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# IP/IT & MEDIA

NEWSLETTER – SEPTEMBER 2010

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## SOCIAL MEDIA TOOLS AND DATA PROTECTION

**DR. THOMAS FISCHL**

The city of Hamburg recently removed the Facebook “Like” button from its official city website, [www.hamburg.de](http://www.hamburg.de), because of data protection issues, only a short time after the button was launched. Like many other features on Web 2.0, the social plug-in of Facebook also collects data from the visitors on the website into which the plug-in is embedded. However, with only a few exceptions, it is absolutely unclear which data is actually collected by the various services and which is not.

So, which peculiarities in data protection regulations does a website operator have to adhere to in connection with such tools? The operators of [Hamburg.de](http://Hamburg.de) reacted in a sensitive way and removed the Facebook tool from their site again.

By clicking on this button, users registered with Facebook can automatically leave messages on their Facebook profile saying that they like the website linked. In many cases, such tools collect more data via elaborate cookie and tracing tools than many users suspect. The regulations of tool providers often do not clearly state which data is collected and to whom this data is passed on. The Like button does not only make it possible for Facebook to collect data on the preferences of its users on their website, but, by tracing the surfing habits of its users, their preferences in the whole Internet. There are many indications that Facebook even collects data of such users who are not members of Facebook. Because with every visit to a website with the Facebook button, data as well as the IP address is passed on to Facebook along with the URL of the visited site. If a user visits another site with the Like button, they will be “recognized.”

By means of the Facebook buttons, data is transferred to the servers situated in the United States; the same applies to other social media features, like, for instance, Google Analytics. The collection of this data alone raises significant issues with respect to data protection regulations, even more so, of course, when data is transferred to the United States.

First, website operators need to adhere to the requirements of § 13 para. 1 Tele Media Act (TMG). The Act regulates that service providers need to inform the user before using the relevant service about the manner, extent and purpose of the collection, and the use of personal data, as well as about the transfer and processing of data in countries outside the EEC.

Thus, when using the Facebook Like button, along with other social media tools, website operators need to amend their data protection declaration on their websites accordingly. Users do not only have to be informed that data is collected by means of the tool, but they also need to be informed about the extent and manner of the data collection, as well as the data transfer. The data protection declaration also needs to be understandable, otherwise fines pursuant to § 16 TMG could be imposed.



However, it remains to be conclusively decided whether social plug-ins can be used in a way compliant with data protection regulations only by an appropriate wording of the data protection declaration—because basically the processing of personal data is only permissible when the user consented to this, or if it is permissible by statutory law. An explicit consent is not given in most cases and neither is a permission by statutory law. This shows that German and European data protection regulations are not appropriately equipped for dealing with new tools in Web 2.0.

Finally, there are many indications that the use of the Facebook Like button on a website is currently adverse to data protection. Whoever embeds such features into their websites has to be aware of this risk. The data protection authorities have not yet made a statement on these facts and circumstances. We will keep you updated.

## OPINION OF THE ARTICLE 29 WORKING PARTY ON ONLINE BEHAVIORAL ADVERTISING: COOKIES FOR ALL?

**KATHARINA A. WEIMER, LL.M.**

On June 22, 2010, the Article 29 Working Party issued an opinion on the topic “Behavioral Advertising” (Opinion 2/2010). The Article 29 Working Party was founded on the basis of Article 29 of the Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data (“Data Protection Directive”), and constitutes an association comprising all national data protection authorities in Europe. On a regular basis it issues opinions and passes resolutions of a non-binding character on current data protection issues. Its latest opinion addresses the questions posed in the context of the widely used Behavioral Advertising, a type of advertising that targets the Internet-user with tailored advertisement on the basis of his or her Internet

activities. In this context, what is to be regarded as problematic is not only the provision of advertising as such, but rather the collection of information on the user's activities, and the resulting profiles of the individual users by employing various technologies, first and foremost the use of cookies.

Last year, Article 5 ss. 3 of the Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector ("ePrivacy Directive"), was amended to require the Internet-user's consent for the installation and use of cookies.

Article 5 ss. 3 of the amended Directive provides that the storage of information or the access of information already stored on the user's computer is only permitted upon the consent given by the participant or user concerned. At the same time, the provisions of the Data Protection Directive will apply where the information collected by the use of cookies constitutes, as in most cases, personal data. Accordingly, for a valid consent, the person concerned must give his voluntary consent after having been informed extensively and clearly on the purposes and extent of the use of the data.

The amendments to the ePrivacy Directive must be implemented by the Member States until May 25, 2011. According to the Opinion of the Article 29 Working Party, the implementation of the amended ePrivacy Directive into national law will require a full overhaul of existing technologies and procedures, in particular of the commonly used Internet browsers, and of opt-out mechanisms, in order to achieve the level of user-consent that is required in the opinion of the Article 29 Working Party.

In the opinion of the Article 29 Working Party, the current practice of those using Behavioral Advertising – i.e. the setting of cookies after access to a website belonging to an ad-network (except where the user's browser is set to blocking cookies), in connection with information contained in the general terms and conditions and/or privacy policy of the website on cookies used for Behavioral Advertising – does not fulfill the requirements imposed by the amended ePrivacy Directive in connection with the Data Protection Directive. Browser settings accepting cookies as default setting cannot be regarded as constituting sufficient and valid consent within the meaning of the Data Protection Directive. Such consent must be voluntary, specific, and informed, and it must constitute a clear and positive indication of the user's wish, i.e., an opt-in solution as opposed to opt-out. Moreover, consent must be obtained prior to any use of personal data and it must be revocable. Browser settings are not able to provide this under normal circumstances, except where they are set to reject cookies from the outset and where the user has deliberately changed those settings after having been informed in advance and provided with all information that is necessary for this choice. In respect of the use of cookies, this rarely reflects reality.

The Article 29 Working Party seems to be aware of the importance of the use of cookies for the advertising world. Therefore, a one-time consent to the use of cookies is contemplated that could simultaneously constitute sufficient consent to the subsequent collection of information, provided that this consent fulfills the aforementioned conditions. At the same time,



however, the Article 29 Working Party regards it necessary to implement additional safeguards: the industry should install a time-limit applying to such general consent; more transparency is required regarding the risks to privacy that are posed by Behavioral Advertising; and it must be ensured that users can easily revoke their consent at any time.

The Article 29 Working Party has called upon the industry to participate in the discussion and to further the implementation by using constructive suggestions, in particular to further develop technology in order to be able to fulfill the pre-conditions imposed by the amended ePrivacy Directive and the Data Protection Directive. It hopes for the development of a solution that protects privacy of Internet-users on the one hand, but that also tends to the interests of the advertising industry and the interrelated economic situation on the other. In particular, browser developers are called upon to strengthen "privacy by design" as a concept, and refrain from "imposing" data protection afterwards for the purposes of compliance.

The Opinion of the Article 29 Working Party does not constitute a binding requirement, and it remains to be seen how the Commission and, in particular, national legislators, will approach the implementation of the amended ePrivacy Directive. Companies active in the advertising world should use the advance notice prior to implementation of the amended provisions to adapt their technologies to the altered circumstances now.

## GERMAN FEDERAL COURT OF JUSTICE DENIES TRADEMARK PROTECTION FOR WORDY STATEMENTS NOT RECOGNIZABLE AS ADVERTISING SLOGANS

**DR. ALEXANDER R. KLETT, LL.M.**

In a recent decision of July 1, 2010 (file number I ZB 35/09) the German Federal Court of Justice confirmed a decision by the Federal Patent Court refusing registration for a wordy statement which in English would read as follows:

**“The Vision:** unique dedication for chocolate truffles.

**The sense:** everybody knows what needs to be done when and what does not need to be done.

**The use:** everybody does the right thing at the right time.”

The applicant had filed this designation for registration as a German trademark for various kinds of foods in class 30 as well as for different services in classes 35 and 42. The Federal Court of Justice rejected the application for lack of distinctiveness and affirmed the decisions by the German Patent Court and the German Patent and Trademark Office. With this decision the Federal Court of Justice gives further guidance with respect to the protectability of trademarks concerning verbal statements not directly linked to a company or specific goods or services or their qualities.

While it is undisputed in German as well as in European Community trademark law that advertising slogans can be protected as trademarks the Federal Court of Justice found, in this case, that even in a case in which the statement or statements in question are not descriptive in any way for the goods or services in question and even if the term applied for is not a common word of the German or a commonly understood foreign language which will be perceived by consumers only as such and not as an element to distinguish goods or services of one company from those of another, there can nevertheless still be cases in which a lack of distinctiveness can be found. This is the case, according to the Federal Court of Justice, in particular with respect to lengthy sequences of words which will usually not be perceived by consumers as an indication of origin of the goods or services in question. If the term in question is not concise, original and succinct, as in this case, the necessary minimum amount of distinctiveness may not be found. Furthermore, according to the court, consumers are not used to recognizing multiple successive statements as an indication of origin, i.e. a trademark.

Unlike other recent decisions this decision does not concern the question whether an advertising slogan is too short and too generic a statement in order to be protectable as a trademark. Rather, it concerns the other end of the spectrum in which an alleged advertising statement is too wordy to be perceived as an indication of origin. Trademark applicants need to take this into account and are well advised to make sure when filing applications

for slogan marks that the slogan in question is concise and perceived as a slogan, and thus as an indication of origin, by relevant consumers.

## EUROPEAN COURT OF JUSTICE DECIDES ON ‘ADWORD’-ADVERTISING BY USING THIRD-PARTY MARKS

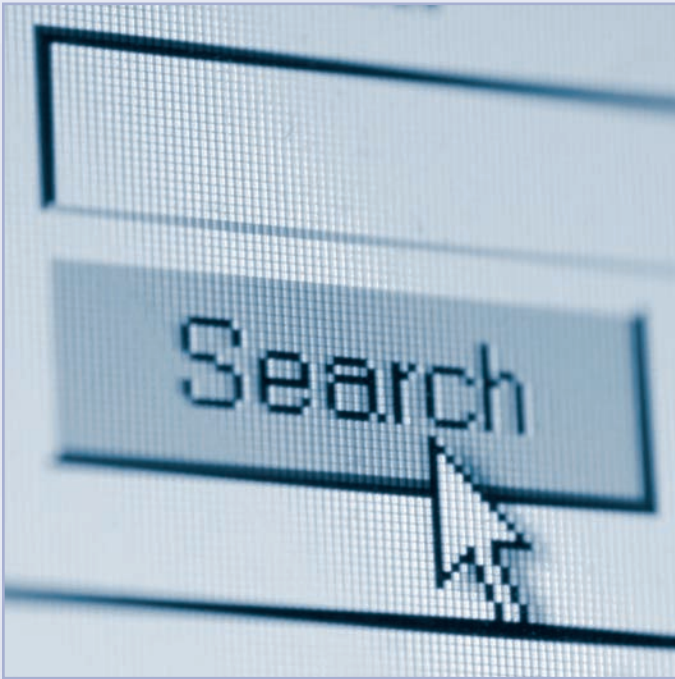
**DAJA APETZ, LL.M.**

The European Court of Justice (ECJ) has now decided on four of five references for preliminary rulings regarding Google Adwords. After having rendered the decisions Google (judgment of March 23, 2010, C-236/08 to C-238/08), *Bergspechte* (judgment of March 25, 2010, C-278/08) and *Bananabay* (order of March 26, 2010, C-91/09), the court again ruled on July 8, 2010 on the question of under which conditions the use of protected marks within the framework of Google “AdWord”-advertising is admissible (*Portakabin*, C-558/08).

The ECJ understands the illegal use of third parties’ trademarks as “AdWord” search keywords as being a use of the trademark in the course of trade for relevant goods and services by the advertising entity. This also applies if the sign chosen as a keyword itself is not mentioned in the “AdWord”-advertisement. A use of the trademark in the course of trade for relevant goods and services is not sufficient, according to the court, however, for a trademark infringement. Rather, the function of the trademark has to be affected. The trademark’s main function is the indication of origin, but other functions such as the guarantee of the goods’ or services’ quality or the trademark’s function of communication, investment and advertising, could be affected as well; according to the court, the infringement of one of the functions is sufficient.

In all four decisions, the ECJ takes the view that an infringement of the indication of origin could be answered in the affirmative only, if it could not be identified or if it was hard to identify from the “AdWord”-advertisement, whether it emanates from the trademark owner or an affiliated company or a third party. The assessment of this question was left to the national courts. In the *Portakabin* decision rendered recently the ECJ provides guidance for the interpretation for the national court for the first time. The court argues that the use of the trademark in connection with the information that the goods concerned were resold was not sufficient for the assumption of an economic connection between the advertising entity and the trademark owner. Injunctive relief should only be possible if important reasons existed that supported this assumption, such as the reputation of the trademark being affected significantly or the trademark being exchanged against the reseller’s label.

The ECJ denies that the advertising function is impinged, as the order of the normal search-results is not affected by the “AdWord”-advertising, and because the trademark owner is usually mentioned in one of the first positions of the list, and because the free search results and the paid advertising are clearly separated.



The separate question of whether Google itself is liable for trademark infringement alongside a possible liability of the advertiser is answered by the ECJ in the negative because, according to the court, a use of the respective mark in the course of trade cannot be found because of a lack of commercial activity under the mark. This, however, does not mean that Google does not have to take any responsibility. Google is liable if the company becomes aware of the fact that the information or activities of the advertisers were illegal, and then does not arrange for the information being deleted or the access being blocked without delay.

The ECJ decisions clarify the issue for Google and other Internet reference services in so far as the offer of "AdWord"-advertising does not constitute a trademark infringement by the service provider, but that a secondary liability (vicarious liability) remains possible. The question of at what point the advertising entities commit a trademark infringement remains open. In this regard, it will be necessary to wait for individual decisions by the national courts.

## GERMAN FEDERAL COURT OF JUSTICE DECIDES ON ALLEGED COPYRIGHT INFRINGEMENT BY GOOGLE REGARDING THUMBNAILS

**DR. ALEXANDER R. KLETT, LL.M.**

In a decision of April 29, 2010 (file number I ZR 69/08) which was published with full grounds recently, the German Federal Court of Justice decided, for the first time, on the question whether Google is liable for copyright infringement in connection with thumbnails of photographs or works of art provided as search results by the search engine. Google offers

such visual works in condensed form on Google News, but also as a part of search results generated by the Google image search service.

In the case at issue, a painter had sued Google for the display of thumbnail photographs in search results of certain paintings made available by the artist on her website. Interestingly, the German Federal Court of Justice, as the court of first instance and the court of appeals, rejected the claims and found no copyright infringement. The reason was slightly different between the three instances, however. While the court of first instance took the view that by making the paintings available on her website, the artist tacitly consented to the use by Google of the paintings as thumbnails, the court of appeals took the view that a tacit consent could not be found. Instead the court of appeals took the position that the artist tried to sue Google while having consciously optimized the files on her website in order for them to be more easily found by search engines, which constituted a violation of the principle of good faith under the German Civil Code. Consequently, according to the appeals court she had no right to claim injunctive relief from Google. The Federal Court of Justice followed the view taken by the court of first instance and explained that there was in fact tacit consent by the plaintiff artist. The court explained that for such tacit consent it is not necessary to apply the criteria needed to show that a copyright owner has consciously granted a license to the use of his work. Rather, as the court states, a consent to the use can be drawn from the mere conduct by the artist which can objectively be interpreted as showing that she agreed to the use of her works by the defendant's image search engine.

The court went on to clarify that the copyright owner who freely makes literary works or pictures available on the internet without any restrictions needs to expect uses by third parties of such works which are common considering the circumstances. If a copyright owner makes such works available on the internet without protecting them against being found by search engines, such copyright owner tacitly consents to the reproduction and making available of the works in thumbnails by search engines.

This decision follows a recent trend in the case law of the German Federal Court of Justice placing more responsibility on copyright owners and denying them excessive protection without regard to their own actions which may have led to the uses they later hope to enjoin. The decision also takes into account the specifics of use of works on the internet which is a good sign.

## PRELIMINARY INJUNCTIONS IN PATENT MATTERS – CURRENT DEVELOPMENTS

**DR. RICHARD SCHLÖTTER**

Preliminary injunctions are a powerful tool, in particular in patent matters, as they usually force the stakeholder to immediately take his elaborately introduced product from the market. Therefore, there were good reasons for the courts to be reluctant in issuing such injunctions.

Now, the courts are developing the interim relief in patent cases with surprising speed, but some points remain unclear. It is therefore a welcome development that the Appellate Court of Düsseldorf recently (judgment of April 29, 2010, 1-2 U 126/09, InstGE 12, 114 = Beck RS 2010, 15862) took the opportunity to sharpen the requirements, in particular with regard to the necessary validity of the patent-in-suit.

Preliminary injunctive relief for patent infringement only comes into consideration if the validity of the injunction patent and the patent infringement at issue are crystal clear in favor of the applicant, that an erroneous decision in the subsequent merits-proceeding that would have to be revised cannot reasonably be expected.

However, a dismissal of the petition for an injunction for dubious validity of the injunction patent generally requires that the validity of the patent-in-suit is indeed challenged in related opposition or nullity proceedings, or that a related attack is reliably foreseeable.

If the petition for an injunction is submitted shortly after grant of the patent, i.e., at the beginning of the opposition period, the defendant will in many cases not be in a position to conduct a substantive search regarding opposing prior art. In this case, according to the Appellate Court of Düsseldorf, a dismissal must also be anticipated even if the defendant does not submit concrete prior art, because the status of the patent is unclear and there is the possibility that with respective research, relevant prior art can be found.

As soon as the validity of the patent is challenged in opposition or nullity proceedings, or a related attack is at least foreseeable, the applicant bears the burden of proof that these attacks lack any substance, so that the injunction patent will be upheld with certainty. German translations of foreign citations must be provided by the plaintiff if required.

The Appellate Court of Düsseldorf stresses that validity can generally only be assumed if the patent-in-suit has already survived a first-instance opposition or nullity proceeding. There are only limited exceptions to this rule, i.e.:

- If the defendant has already participated in the examination procedure with its own objections so that factually, the grant of the patent is equivalent to a decision in a contentious proceeding
- If the opposition or nullity proceeding has not been carried out because the patent was accepted as generally valid. The existence of

respective license agreements may be an indication for this.

- If the submitted objections against the validity of the patent are obviously without merits, or
- If, with respect to the market situation or the imminent disadvantages resulting from the infringement, extraordinary circumstances are present that make it unreasonable for the plaintiff to await the outcome of an opposition or nullity action

At this occasion, the court in Düsseldorf refers to its earlier *Olanzapin* decision (InstGE 9, 140), according to which even after revocation of the patent-in-suit in the first instance, a preliminary injunction will be considered if the decision revoking the injunction patent is obviously erroneous. However, this requires specific disadvantages for the applicant that would result from a referral to the outcome of the opposition appeal or nullity appeal proceeding.

The current decision shows that the courts have found a practical way to meet the legitimate interests of the patent owner in case of infringement. At the same time, the bar is raised with regard to the validity that ultimately takes account of the interests of the defendant in an injunction proceeding. It remains to be seen what results this system will bring across the board.

## GERMAN FEDERAL COURT OF JUSTICE DECIDES ON WITHDRAWAL FROM DISTANCE CONTRACTS: DELIVERY COSTS TO BE BORNE BY MAIL-ORDER COMPANIES

**MORITZ N. WAGNER, LL.M.**

By judgment of July 7, 2010, the German Federal Court of Justice decided that in case of a consumer's withdrawal from a distance contract, the costs of delivering the goods have to be borne by the mail-order company. Any provisions to the contrary contained in a merchant's general terms and conditions are invalid. The judgment of the Federal Court of Justice is based on the preliminary ruling of the European Court of Justice of April 15, 2010.

Heinrich Heine GmbH, a German mail-order company, provided in its general terms and conditions that the customer would be charged a flat fee of about €5 for the delivery of the goods. In case of the customer's withdrawal from the distance contract, the delivery costs would not be reimbursed to the customer. The Consumer Protection Agency of North Rhine-Westphalia filed a complaint against the mail-order company to cease using the respective provision in its general terms and conditions. According to the Consumer Protection Agency, the delivery costs could not be charged to the customer if he has withdrawn from the contract. The courts of lower instance decided in favor of the Consumer Protection Agency, whereupon the mail-order company lodged an appeal with the German Federal Court of Justice. The Federal Court of Justice emphasized



that German statutory law does not provide for an express right of the consumer for reimbursement of the delivery costs in case of a withdrawal from the distance contract. This fact would militate in favor of the validity of the provision in dispute. However, the Federal Court of Justice doubted whether such interpretation of German statutory law, i.e., the denial of the consumer's right to reimbursement of the delivery costs in case of a withdrawal from the distance contract, would be in compliance with the European Directive on Distance Contracts of 1997<sup>1</sup>. The Federal Court of Justice therefore referred to the European Court of Justice (ECJ) and asked for a preliminary ruling on the respective interpretation of the European Directive on Distance Contracts.

By judgment of April 15, 2010, the ECJ decided that a provision under national law, which would allow the delivery costs to be charged to the customer in case of his withdrawal from the contract, would be in contravention of the European Directive on Distance Contracts. According to the Directive, the consumer would have the right to withdraw from the distance contract within a period of at least seven working days without penalty and without giving any reason. If the consumer withdrew from the distance contract, the seller would have to reimburse to the consumer any paid delivery costs. The only costs that could be charged to the consumer following his withdrawal from the contract would be the direct costs of returning the goods. The aim of these provisions would be to not prevent the consumer from exercising his right to withdrawal. In case the delivery costs could be charged to the consumer even where he has withdrawn from the contract, the consumer could be prevented from exercising his right. Furthermore, as the costs for returning the goods could be

charged to the consumer in case of his withdrawal from the contract, such interpretation would reflect a balanced distribution of risk between consumer and merchant.

By judgment of July 7, 2010, the German Federal Court of Justice therefore decided that, in accordance with the European Directive on Distance Contracts, German statutory law would need to be interpreted as stipulating a consumer's right to reimbursement of any paid delivery costs where he has withdrawn from the contract. Any provision in general terms and conditions excluding or limiting this right would therefore be invalid.

From the perspective of the merchant, this judgment means a further expansion of an already excessive consumer protection at the expense of the mail-order business. However, it is doubtful whether this extension of consumer protection is really in the interest of the customer. This is because the additional costs for the mail-order companies hereby created will inevitably be reflected in the product prices. Other distance sellers will hardly be affected by the judgment - they already today offer their customers free-of-charge return rights of three months and more.

<sup>1</sup> Directive 97/7/EC of the European Parliament and of the Council of May 20, 1997 on the protection of consumers in respect of distance contracts.

## NEWS FROM THE PRACTICE GROUP

Since 1st April the IP/IT and Media Group has grown significantly. IT expert

**Dr. Philipp Süß** (Partner) and his team consisting of **Dr. Thomas Fischl** (Counsel) and **Moritz Wagner, LL.M.** (Associate) joined the Munich office.

**Dr. Philipp Süß** has broad expertise covering IT and outsourcing, data protection, and IP litigation. He focuses on both transactional and litigious work and recently represented a major European online ticket agency against a leading low-cost airline relating to database rights. He has also acted for several major high-tech companies in particular in the field of software and mobile devices.

**Dr. Thomas Fischl's** particular expertise covers the drafting and negotiating of contracts covering software, IT projects and distribution as well as outsourcing projects. In addition, he specializes in data protection law and intellectual property protection.

**Moritz Wagner** advises international and German companies on IT and outsourcing matters.

In addition, **Daja Apetz, LL.M.** (Associate) joined the Munich office. She has experience in intellectual property law matters, both contentious and non-contentious, and advises regularly on prosecution, portfolio management, licensing, and infringement matters, particularly in the areas of trademarks, designs, copyrights and unfair competition.

## PUBLICATIONS

**Dr. Alexander R. Klett** and **Daja Apetz** give a comprehensive overview on "The Development of Copyright Law since January 2009" ("*Die Entwicklung des Urheberrechts seit Januar 2009*") in the current issue of *Kommunikation & Recht* 7/8/ 2010, p.441.

**Dr. Alexander R. Klett** and **Daja Apetz** authored the article "Once again: AdWord advertising by using third-party marks – an infringement of trademarks?" ("*Nochmals: AdWord-Werbung unter Verwendung fremder Kennzeichen – markenrechtsverletzend?*"), in *Kommunikation & Recht* 5/2010, p.289.

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