

PRESS RELEASE*for immediate publication***German Legislation: Is there a right to retrieve information from public sources at all?****Art. 87b of German Copyright Law kills searching engines –
New bill causes even more confusion**

Germany, 13 August 2002. The German Government has released a new draft law for regulating copyright in the information society, according to EU directive 2001/29/EG. Among other things, the government clarifies the rights of reporting daily news in online media – but unfortunately, the controversially discussed article 87b of German copyright law (Urhebergesetz, “UrhG”) has not been changed, which is the German interpretation of the EU database directive.

The news searching engine NewsClub.de has been accused of copyright infringement by a big German news publishing company. Argumentation: NewsClub would violate article 87b of German copyright law by setting website links to their news articles, which they call a “database”.

Currently, there are several parallel lawsuits in Europe against searching engines, such as Newsbooster.com, Paperboy.de and Net-Clipping.de.

NewsClub offers the web community a searching engine for news. Currently, it covers more than 100 different news sources. The user can search by news category and headline, being relegated by a web site link to the publisher's web page containing the desired article. The user receives the page directly from the publisher's server, including all contents, advertising banners, etc. There is no in-frame linking, and each news headline includes the publisher's name.

In addition, the news web site gains accesses by the inflow of users that come from NewsClub. Apparently, the complaining publisher did not understand that this gives him a material benefit. They have filed a suit against NewsClub by using the exceptional rule in copyright for “databases”.

Article 87a UrhG defines “databases” as follows:

“A database within the meaning of this Act is a collection of works, data or other independent elements arranged in a systematic or methodical way the elements of which are individually accessible either by electronic or by other means, and the obtaining, verification or presentation of which requires a qualitatively or quantitatively substantial investment.”

In article 87b UrhG the rights of the Maker of the Database are defined:

“The maker of the database has the exclusive right to reproduce, to distribute and to communicate to the public the whole data base or a qualitatively or quantitatively substantial part thereof. The repeated or systematical reproduction, distribution or communication to the public of qualitatively and quantitatively insubstantial parts of the database shall be deemed as equivalent to the reproduction, distribution or communication of a qualitatively or quantitatively substantial part of the database provided that these acts run counter to a normal exploitation of the database or unreasonably prejudice the legitimate interests of the maker of the database.”

So, the question is: Does pure linking (brokering) of internet websites violate copyright law? If that would be true, searching engines like Google, NewsClub, Altavista etc. could shut down their servers.

The German government wants to introduce two new articles into German copyright law to make situation clearer, article 44a UrhG and 50 UrhG:

By article 44a, “temporary copying acts” such as searching engines do are going to be allowed:

“Temporary copying acts which are non-permanent or accompanying and represent an integral and essential part of a technical process and whose solely purpose is

- 1. to provide a transmission in a net between third parties by an intermediary, or*
- 2. to provide lawful use*

of a work or other subjects of protection, and which do not have commercial relevance by itself, are permitted”

(non-official translation)

The proposal for the revised form of article 50 UrhG also seems to be advantageous for searching engines:

“For reporting current-events by radio or by other similar technical media, in news papers, magazines and other printings or by other data media which essentially accommodate daily interests - as well as in the movies - the reproduction, distribution or communication to the public of works that are perceivable in the course of these events is permitted in a scope, which is appropriate for the purpose.”

(non-official translation)

But it is yet unclear if legislation comes to the position that these both articles are valid for databases as well – because article 87b has not been modified!

If you follow the reasoning of Munich Upper Court (OLG München), who currently have to deal with the NewsClub case, that article 87b would regulate searching engine activity regarding databases in a terminatory way, one could assume that the legislator used different terms for one kind of redistribution, namely “copying”.

Then, you have a forked term of copying, as searching engines, that quote and link information from databases, already perform “copying” when the quoted text is stored in memory. According to article 44a, such a temporary, technically needed storage should not be illegal.

Obviously, it deserved serious quirks to criminalize searching engines and to kick them out of business.

The main subject-matter in the lawsuit against NewsClub is primarily one thing:
Is there are right to retrieve information from public sources? May a searching engine enable the Internet user to find the location of desired information?

It is a matter of fact that the complainer' s website is publicly accessible. They have not taken any precautions - neither legally nor technically – to limit access by the public and searching engines.

Whoever posts a document on the Internet, without undertaking provisions such as password-secured access, or a clear “don' t link me” statement (robots.txt, Meta-Tags etc.), declares that he wants to be found by searching engines. Any other construction seems to be controversial and inconsistent. Not only the consitutionally but also the logically conformable interpretation leads us to the conclusion that article 87b is not really meant as a general linking ban.

It is reasonable for the creator to clarify by himself that he does not wish any linking to his documents. It is inappropriate to expect that searching engine maintainers have to ask all publishers if there is a linking permission. You would just bankrupt the searching engines if the burden of proof was on their side. It is even more astonishing that the news publishing company is complaining, because NewsClub has removed the concerning web site from its crawler already in 2000, right after the dissuasion document arrived.

The damage is incalculable for all Internet users, because the Internet is not operable without searching engines.

The publishers' actual intention is clear:

They want to direct their readers like cattle along all the advertising banners, from the starting page down to the page containing the news article, hoping that the user clicks on one of them. That way, the publishing company wants to refinance their website.

Metaphorically spoken, they want to forbid users to read their newspaper starting at the last page! He is also interdicted to skip pages – the newspaper should not be read too conveniently.

Searching engines as NewsClub.de simply the access to information and increase the newspapers' attractiveness. In any case, NewsClub helps increasing the page access rates – advertisers benefit from that, as they can reach a bigger audience.

In other words, if newspapers exclude searching engines, they lose readers and advertising income – and the advertisers are fleeced of potential customers.

You can find more detailed information about the subject at <http://www.newsclub.de/prozess>, including documents, sentences, pleadings and links for further information. There is also a discussion forum, in English and German.

If you have any questions, please do not hesitate contacting us:

NewsClub
Christian Kohlschütter
Marienstr. 59
D-95028 Hof
Germany

phone +49 9281 8169106
fax +49 9281 8169104
email: ck@newsclub.de

<http://www.newsclub.de>

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