

Intellectual Property - Switzerland

Website posting hash links held to be accessory to copyright infringement

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On February 7 2011 the Federal Supreme Court found that providing hash links to copyright-infringing content gives rise to criminal liability under Swiss law.⁽¹⁾ The individual behind the website was found guilty of acting as an accessory to the crime of copyright infringement.

The accused operated a website (as holder and responsible webmaster) providing hash links for users of file-sharing peer-to-peer networks. Setting up hash links involves work to identify good quality content. Unlike an ordinary link, a hash link gives a unique identifier to the linked file, which will remain linked even if the file name is changed. So a hash link from a trusted source ensures a certain quality for the members of a peer-to-peer network.

When a user clicks on a hash link, his or her computer immediately starts downloading the linked content, provided that the user has already downloaded the necessary peer-to-peer software, which is freely available on the Internet. The downloading of copyright-protected content (other than software) is not illegal under Swiss law, as long as the user makes only private use of that content. However, peer-to-peer networks operate in such a way that content is usually also automatically uploaded from users' computers. This simultaneous upload allows for the efficient operation of the network. Although the upload function may be disabled by individual users, in practice this rarely happens, and peer-to-peer networks are dependent on uploads in order to function. The uploading of copyright-protected content without permission is illegal under Swiss law, as it is considered to constitute the 'making available' or 'distribution' of a work under Article 10(2) of the Copyright Act, and these are exclusive rights reserved to the copyright holder.

The hash links on the website of the accused linked mainly to files containing computer games and (cinema) films made available online without the relevant copyright holders' consent. These had been selected by the accused, who was aware that users of his website would be committing copyright infringement by accessing the linked files.

In his defence, the accused claimed it had not been proven that a crime had occurred in Switzerland and therefore he could not be charged with being an accessory to a crime. He argued that not one single illegal download or upload by a Swiss user had been proven, and that the lower court had based its findings on a series of unproven assumptions. In particular, he took the position that a Swiss IP address did not necessarily belong to a Swiss user, and that clicking on a link did not necessarily lead to an illegal download or upload, as users often collected several links before deciding which file to download.

The lower court had established that the accused's website had around 280,000 registered users, of which 540 had a '.ch' email address. It found that the number of persons not located in Switzerland who have a '.ch' address was much smaller than the number of persons in Switzerland who do not have a '.ch' address. Therefore, it could be assumed that many more than 500 of the registered users on the website were located in Switzerland. Also, in a sample of the IP addresses that connected to the website over a 25-minute period one afternoon in February 2004, around 60 could be identified as being from Swiss IP addresses. The access log file for the website showed that the vast majority of visitors were looking for hash links and downloading the files found therein. It could be assumed that most of those users had not disabled the upload function.

The Supreme Court is bound by the facts established by a lower court unless these facts are obviously incorrect or have been established in breach of constitutional rights. The court found that this was not the case with the lower court's findings. The accused had picked individual assumptions out of the lower court's findings and tried to discredit

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them. However, all of the numerous indications that Swiss users had downloaded illegal files via the accused's hash links were to be considered together rather than individually. Taken together, they did constitute complete evidence of a crime in Switzerland and removed all reasonable doubts to the contrary.

The accused further protested his innocence with the following arguments:

- He could not be classified as having acted as an accessory to any crime, principally because the website users could access the linked files only if they downloaded a separate piece of software. The lower court had found that the intentional and main focus of the accused's website was to collect hash links to copyright-protected works made available online without the copyright holders' consent, and to make these available to users. Swiss law does not require that the main crime be dependent on the accessory's contribution, but only that the accessory support or facilitate the commission of a crime.
- He had not acted commercially. Here the lower court had found that the accused spent a significant portion of his time on the operation of the website, and that he earned a (variable) income from it that was more than enough to cover his costs. The accused's position was that the lower court had not considered all of his expenses in connection with the website. However, here again the Supreme Court could not re-examine the factual finding of the lower court.
- He legitimately believed that his activities were legal and therefore could not be found guilty of a crime, because an earlier criminal complaint against him had been withdrawn due to the lack of a commercial element to the website. The Supreme Court rejected this argument completely, as the accused must have realised at the time of the criminal complaint that his activities could be criminally relevant. The fact that the complaint was withdrawn did not allow him to conclude that the activities were legal.

Quite apart from the crime of assisting in copyright infringement, the accused was found guilty of possession of illegal pornographic images, found on his computer during the investigation of the main charges.

This decision follows an earlier decision of the Grisons Cantonal Court in the *swissmule.com* case (reported in *sic!* 2008, 205). In that case the court also found that a person who posted hash links was guilty of being an accessory to the crime of copyright infringement.

The penalties imposed in this case – a conditional penalty of 90 days at a rate of Sfr30 per day, a fine of Sfr2,000 and the requirement to pay appeal costs of Sfr4,000 – may seem lenient. However, it will be interesting to see whether the ruling will be limited to operators of individual sites dedicated to undermining copyright, or whether it will be stretched to cover search engines such as Google, user-generated content platforms such as YouTube, eBay and internet hosting services, or even access providers. It is to be hoped that the courts take a reasonable line, in order to distinguish between parties that intend to facilitate copyright infringement and those offering a legitimate internet service that may happen to include an offering of links to copyright-infringing content.

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Endnotes

(1) Decision 6B_757/2010.

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