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LEGAL ASPECTS OF INTERNET HYPERLINKING UNDER AUSTRIAN LAW

*AN EURO-AMERICAN LAWYERS GROUP BRIEFING ARTICLE PREPARED BY
EALG MEMBER DALLMANN & JURANEK, VIENNA, AUSTRIA*

Hyperlinks enable to what is known as “internet-surfing”, namely the switching from one website to another without inserting another URL (i.e. “uniform resource locator”, the “internet address”) as well as the implementation of websites in others (“inline-linking” or “framing”). Intrinsicly, hyperlinks are programming commands which provide for direct connection to other websites and which can be set with or without the knowledge of the operator of the referenced site.

Each setter of hyperlinks, however, runs the risk of infringing applicable laws in at least two different ways: On the one hand either the setting of the hyperlink itself or the referenced website may contravene competition laws or infringe copyrights, trademarks etc. On the other hand the targeted website may contain illegal content, the setter of the hyperlink (unwittingly) refers to. The following gives a short overview on the leading cases and the restrictions of liability under Austrian law for link-setters:

1. Anti-Competitive Acts

Section 1 of the Austrian Competition Protection Act (UWG) contains a general clause, prohibiting the carrying out of acts in business dealings which contravene good morals. If such infringement of sect 1 occurs, the aggrieved party may not only file for injunctive relief against the direct offender but also against his complices, suborners and assistants. With regard to Hyper-links the question comes up, whether a link-setter can be held liable if not his own but the referenced website contravenes competition law rules?

In the leading case “jobmonitor” the Austrian Supreme Court decided that the provider of a hyperlink who refers to another website thereby provides access to the referenced website and helps to increase its accessibility. If the referenced website contravenes competition law rules, the provider of the hyperlink may be considered an “assistant” to the direct offender within the meaning of the UWG and can be held liable.

The “metedata”-case was based on slightly altered facts as the link-setter provided for a so called “deep link”, which did not lead to the starting page of the website (the “homepage”) but to a “deeper” part of the referenced website and thereby implemented weather maps in its own website (“framing”). The plaintiff brought forward that the link-setter would pass the content off as his own original content and mislead the customers by exploiting the creation of his competitor. Moreover, the deep link would cause financial damage as users of the deep link would circumvent the ads primarily contained on the homepage of the referenced website. The Supreme Court, however, denied the motion for injunctive relief and reasoned that the deep link



did not give the impression that the weather map was the link-setter's own content: The linked frames, indeed, contained a copyright symbol and the sign of "metedata", thus, the deep link neither constitutes an act against good morals nor did it exploit the reputation of the referenced site: On the contrary, it was considered to be promoting the website by means of displaying the copyright symbol of metedata; the circumvention of the ads was considered an unintentional side effect which would not constitute an anti-competitive obstruction.

2. Unlawful Content

The question whether hyperlinks themselves constitute or help to promote unfair trade practices must be strictly distinguished from hyperlinks to websites which contain illicit content (e.g. pornography, terrorist activities etc):

The responsibility of hyperlink-setters for the content of the referenced website, thus, is restricted by the Austrian E-Commerce Act: Pursuant to section 17 para 1 service providers providing access to third-party information by means of hyperlinks are not responsible for such information unless they (i) do not have actual knowledge of illegal activity or information and they are not aware of facts or circumstances from which the illegal activity or information is apparent; or (ii) upon obtaining such knowledge or awareness, they act expeditiously to remove the link.

Exceeding the provisions of the EC-Directive on electronic commerce 2000/31/EC (the "Directive") the Austrian legislator thereby implemented an exclusion of liability for link-setters corresponding to the restrictions of the Directive pertaining liability of host providers.

The Austrian restriction of liability for hyperlinks, however, gains in particular importance with regard to the "country of origin principle" set forth by the Directive: Thus, service providers established in one member state shall in all other member states be determined in accordance to the laws of their state of origin. Under all other jurisdictions of EC-member states, therefore, service providers established in Austria can be held liable for hyperlinks to illicit websites only within the narrow confines of section 17 of the E-Commerce Act even if the laws of other EC-member states do not provide for corresponding provisions on the restriction of liability.

*For further details, please contact Armin Dallmann, Partner,
Dallmann & Juranek, Vienna, Austria; a.dallmann@dallmann.cc; <http://www.dallmann.cc>
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