

212116

District Court of Frankfurt am Main

Pronounced on: 02/09/2018

File reference: 2-03 O 494/14

Wagner, Court Clerk
Certifying clerk of the court



RECEIVED

FEB. 13, 2018

WILDE BEUGER SOLMECKE
ATTORNEYS-AT-LAW

[initials]

[initials]

In the Name of the People Judgment

In the matter of

S. Fischer Verlag GmbH, represented by its directors, Michael Justus, Dr. Jörg Bong, Dr. Uwe Rosenfeld, Monika Schoeller, née von Holtzbrinck, Hedderichstraße 114, 60596 Frankfurt am Main,

Plaintiff

Authorized proxy: Waldorf Frommer, attorneys-at-law

Beethovenstr. 12, 80336 Munich,

File reference: 03640/2013

vs.

1. Project Gutenberg Literary Archive Foundation, represented by its Managing Director and Chief Executive Officer, Dr. Gregory Newby, 809 North 1500 West, Salt Lake City, UT 84116, United States of America,

2. Dr. Gregory Newby, c/o Project Gutenberg Literary Archive,
809 North 1500 West, Salt Lake City, UT 84116, United States of America,

Defendants

Authorized proxies of 1, 2: Wilde Beuger Solmecke, attorneys-at-law
Kaiser-Wilhelm-Ring 27-29, 50672 Cologne,
File reference: 212/16

the District Court of Frankfurt am Main – 3rd Civil Division –

through Dr. Kurth, Presiding Judge at the District Court,
Dr. Mantz, Judge at the District Court, and
Judge Heiser

based on the hearing of 01/30/2018, has thus adjudged:

- I. The defendants are ordered, on penalty of an administrative fine of up to EUR 250,000.00 or, alternatively, imprisonment of up to 6 months, for each case of non-compliance, said imprisonment to be imposed on the second defendant, to cease and desist from making the following works publicly available or letting them be made publicly available, namely:
 1. the German literary works titled “Der Untertan,” “Die Ehrgeizige,” “Professor Unrat oder Das Ende eines Tyrannen,” “Der Vater,” “Flöten und Dolche,” and “Flaubert und die Herkunft des modernen Romans,” by the author Heinrich Mann;
 2. the German literary works titled “Buddenbrooks,” “Der Tod in Venedig,” “Der kleine Herr Friedemann,” “Tristan,” “Gladius Dei,” “Schwere Stunde,” “Königliche Hoheit,” and “Tonio Kröger,” by the author Thomas Mann; and
 3. the German literary works titled “Die Ermordung einer Butterblume und andere Erzählungen,” “Die drei Sprünge des Wang-lun,” “Die Lobensteiner reisen nach Böhmen,” and “Wallenstein,” by the author Alfred Döblin

via the website www.gutenberg.org (including its sub-pages) without the plaintiff's consent, if and to the extent to which it is possible for internet users to access them (screen display and/or download) from Germany.

- II. The defendants are ordered to provide information about the extent of the infringements, by specifying
 1. the times when the works listed under section I. were first accessible via the website www.gutenberg.org (including its sub-pages), and
 2. the number of times the works listed under section I. were accessed (screen display and download) from Germany via the website www.gutenberg.org (including its sub-pages).
- III. The court finds that the defendants, as the joint and several debtors, are obligated to pay damages to the plaintiff for making the works listed under section I. publicly accessible to users in Germany via the website www.gutenberg.org (including its sub-pages), based on the information provided according to section II.
- IV. The defendants shall pay half of the costs of the proceedings, respectively.
- V. The judgment shall be provisionally enforceable on provision of security, as follows: with respect to the dictum of I.1 to I.3, in the amount of €25,000.00 each; with respect to the dictum of II., in the amount of €5,000.00; and with respect to costs as per section IV., in an amount equal to 110% of the appropriate amount to be enforced.

Facts of the case

The parties are engaged in a legal dispute over copyright claims arising from the distribution of books (ebooks).

The plaintiff is a publishing house which publishes the works of Thomas Mann, Heinrich Mann, and Alfred Döblin, among others.

The first defendant is a “not-for-profit-corporation” under U.S. law with two employees. It operates the website www.gutenberg.org, which can also be accessed from Germany, and has rented servers from the University of North Carolina at Chapel Hill for this purpose. The first defendant pursues no commercial purposes and is recognized as a “public charity” organization. It is funded (at least in part) by donations.

The second defendant is the Managing Director and CEO (Chief Executive Officer) of the first defendant and provides his work in this function as a voluntary service. He is listed as the “Registrant Contact” and “Tech Contact” for the domain www.gutenberg.org with the relevant registration services.

The first defendant’s website offers over 50,000 books in ebook format, including the German editions of the 18 works in dispute, listed on p. 11 of the case file, by Heinrich Mann, Thomas Mann, and Alfred Döblin. The works made available are, at least for the most part, in the public domain under U.S. law, as their copyright protection has expired according to U.S. law. This applies particularly to any books published before 1923.

The books are made available under a “Project Gutenberg License” (p. 395 of the case file), which is pointed out in a note preceding each book. The note states, among other things:

“This eBook is for the use of anyone anywhere at no cost with almost no restrictions whatsoever. You may copy it, give it away or re-use it under the terms of the Project Gutenberg License included with this eBook or online at www.gutenberg.org.”

At least parts of the first defendant’s website are available as a German version, which can be accessed via a link with the description “in other languages.” The first defendant includes a

disclaimer – in English – on its website (Exhibit B12, p. 351 of the case file). In this disclaimer, the first defendant instructs users from outside the U.S. to check whether the work they wish to download is protected by copyright laws in their country or not before downloading it.

The activities of the first defendant are essentially based on volunteer work. These volunteers organize their work, in part, through the "Distributed Proofreaders Foundation." The volunteers select books and send a copyright clearance request form to investigate the copyright status of the work to the first defendant; this form, however, only deals with U.S. laws. The first defendant relies on a team of volunteers to investigate these requests. The second defendant, as well as one other person, belong to that team.

The ebooks made available by the first defendant are then created in various formats, checked, and uploaded to the first defendant's site by volunteers. There is an additional "Posting Team," also composed of volunteers, who verify if the uploaded document complies with certain quality requirements. The second defendant is also a member of the "Posting Team."

The volunteers also include users from Germany. The webmaster listed on the first defendant's website resides in Germany.

There have been several reports on the defendants' project in the German media.

A German "Projekt Gutenberg-DE" also exists, which makes public-domain books available at www.projekt.gutenberg.de, although this project is not operated by the defendants.

On August 22, 2013, the plaintiff pointed out copyright infringements in a message sent to the email address listed at www.gutenberg.org for copyright-related inquiries, copyright2010@pglaf.org (Exhibit K19, p. 118 of the case file). There was no response to this. The plaintiff then repeated its statement in a message sent to the second defendant's email address on September 4, 2013 (Exhibit K20, p. 120 of the case file). The second defendant replied in an email sent the same day, announcing he would respond soon (Exhibit K16, p. 103 of the case file). In an email sent on September 18, 2013, the plaintiff reminded [the second defendant] to respond, but only received an automated response.

In a letter from the plaintiff's lawyers dated June 18, 2014, the plaintiff sent the first and second defendants a cease and desist notice, demanding removal of the material, a declaration to

cease and desist, and information on the number of times the works in question had been accessed (Exhibit K23, p. 126 of the case file). The defendants sought legal advice. The second defendant then declined to comply with the demands in his email dated August 23, 2014 (Exhibit K24, p. 138 of the case file).

The plaintiff claims to hold exclusive, comprehensive, territorially unlimited rights of use in the entire literary works of the authors Thomas Mann, Heinrich Mann, and Alfred Döblin.

The rights in the works of Thomas Mann were allegedly granted by the publishing contract dated April 17, 1956, amended on May 26/June 2, 1977 (Exhibit K45, p. 648 of the case file), as well as the “Amendment on E-Book Rights” dated August 20/August 26, 2013, and confirmed by the “Supplement to the Amendment on E-Book Rights” dated December 1/December 3, 2014 (p. 666-668 of the case file). Allegedly, Prof. Dr. Frido Mann was authorized to grant these rights by the community of heirs of Thomas Mann.

The rights in the works of Heinrich Mann were allegedly granted by the publishing contract dated December 8, 1993 (p. 669 of the case file), amended by the “Amendment on E-Book Rights” dated October 15, 2010 (p. 674 of the case file), and confirmed by the “Supplement to the Amendment on E-Book Rights” dated December 1, 2014 (p. 676 of the case file). Allegedly, Jindrich Mann was authorized to grant these rights by the community of heirs of Heinrich Mann.

The rights in the works of Alfred Döblin were allegedly granted by the General Contract dated February 12/February 14, 2008 (p. 677 of the case file). As for the rest, reference shall be made to p. 479 of the case file with respect to the granting of rights in all of the works.

[The plaintiff claims that] the defendants analyze the IP addresses of their users.

The plaintiff is of the opinion that the content offered by the defendants also targets German users, claiming that it would easily be feasible for the defendants the use methods like geotargeting, geoblocking, or setting up a registration process, in order to block users in Germany from accessing their content. [The plaintiff claims that] the defendants should themselves be considered users of the works, not merely intermediaries. [The plaintiff claims that] the defendants have appropriated the content on their website, and that they are liable at the very least from the time when they were made aware of the infringements. In any case, they

should be able to request log files from their server operator in order to provide the requested information.

The plaintiff requests

- I. that the defendants be ordered, on penalty of an administrative fine of up to EUR 250,000.00 or, alternatively, imprisonment of up to 6 months, for each case of non-compliance, said imprisonment to be imposed on the second defendant,

to cease and desist from making the following works publicly available or letting them be made publicly available,

1. the German literary works titled "Der Untertan," "Die Ehrgeizige," "Professor Unrat oder Das Ende eines Tyrannen," "Der Vater," "Flöten und Dolche," and "Flaubert und die Herkunft des modernen Romans," by the author Heinrich Mann;
2. the German literary works titled "Buddenbrooks," "Der Tod in Venedig," "Der kleine Herr Friedemann," "Tristan," "Gladius Dei," "Schwere Stunde," "Königliche Hoheit," and "Tonio Kröger," by the author Thomas Mann; and
3. the German literary works titled "Die Ermordung einer Butterblume und andere Erzählungen," "Die drei Sprünge des Wang-lun," "Die Lobensteiner reisen nach Böhmen," and "Wallenstein," by the author Alfred Döblin

via the website www.gutenberg.org (including its sub-pages) without the plaintiff's consent, if and to the extent to which it is possible for internet users to access them (screen display and/or download) from Germany;

- II. that the defendants be ordered to provide information about the extent of the infringements, by specifying
 1. the times when the works listed under section I. were first accessible via the website www.gutenberg.org (including its sub-pages), and

2. the number of times the works listed under section I. were accessed (screen display and download) from Germany via the website www.gutenberg.org (including its sub-pages).
- III. a ruling that the defendants, as the joint and several debtors, are obligated to pay damages to the plaintiff for making the works listed under section I. publicly accessible to users in Germany via the website www.gutenberg.org (including its sub-pages), based on the information provided according to section II.

The defendants contest the international jurisdiction of the District Court of Frankfurt am Main.

The defendant requests that

the action be dismissed.

The defendants claim that the first defendant has no knowledge of the nationality of its users and that the users' IP addresses are not analyzed.

The defendants state that they currently have no information on the number of times the works in dispute were accessed from Germany. Providing the requested information would allegedly require a disproportionately great expense of time and effort. [The defendant claims] to have no access to the log files that could provide the requested information.

The defendants are of the opinion that their service is not intended to target users from Germany. This is allegedly substantiated by the use of an .org domain and the disclaimer, which indicates that users from other countries must not download books that are still protected by copyright laws in their respective countries. The first defendant operates exclusively in the U.S. and under U.S. law. The (partial) German translation of its website is supposedly intended for German-speaking Americans. It should also be taken into account that the defendants operate a unique non-profit project.

[The defendants claim that] the plaintiff's request under I. is too broadly defined, as it would require the defendants to delete the works in dispute, and as the "geoblocking" measures demanded by the plaintiff are easily circumvented.

The actions of the volunteers can allegedly not be attributed to the defendants.

[The defendants claim that] it is easily feasible for users to verify if the work in question is copyrighted in the user's country based on the disclaimer.

An intensive impairment of the plaintiff's rights is not recognizable.

Allegedly, the second defendant was not responsible for the release of these works in dispute, as he was only involved in part of the publication process. His liability would have to be limited to willful intent and gross negligence since he exclusively works on a voluntary basis.

The defendants claim they are not liable for damages as their actions were neither willful nor grossly negligent. They could rely on the fact that the first defendant's website would be exclusively subject to U.S. law.

The court has heard evidence based on the evidence order of November 2, 2017 (p. 728 of the case file) by hearing the witnesses Prof. Dr. Frido Mann and Jindrich Mann. As to the results of the hearing of evidence, reference is made to the minutes of the proceedings of January 1, 2018 (p. 769 et seq. of the case file).

With respect to further details, additional reference is made to the pleadings exchanged by the parties, including enclosed documents, as well as the remainder of the case file.

Reasons for the decision

The action is admissible and well founded.

1. The action is admissible. In particular, the District Court of Frankfurt am Main has international and local jurisdiction pursuant to § 32 ZPO (German Rules of Civil Procedure). According to § 32 ZPO, the court of the district where an unlawful act was committed has jurisdiction for suits brought against such acts. Unlawful acts within the meaning of § 32 ZPO also include copyright infringements. Along with local jurisdiction, this provision also governs the international jurisdiction of German courts. An unlawful act within the meaning of § 32 ZPO is deemed to have been committed both at the place where the offense was

committed and at the place where the offense had its effect, so jurisdiction optionally applies to the place where the infringement was committed or where the legally protected interest was affected. A conclusive claim of facts substantiating an unlawful act committed within the judicial district is enough to establish jurisdiction. § 32 ZPO also covers claims for injunctive relief.

According to § 32 ZPO, if a copyright or related property right is allegedly infringed by making the protected property publicly accessible via a website, the place where the unlawful act was committed is Germany if the asserted rights are protected in Germany and if the website is (also) publicly accessible in Germany. However, intended availability of the web presence in Germany (among other countries) is not a requirement (Federal Court of Justice, GRUR 2016, 1048, marginal number 18 - An Evening with Marlene Dietrich; cf. Regional Court of Hamburg, Judgment dated 06/19/2015 - 308 0 161/13, BeckRS 2015, 18942; Regional Court of Hamburg, Judgment dated 06/17/2016 - 308 0 161/13, BeckRS 2016, 12262).

These requirements are met in this case, as the works in dispute which are protected in Germany are indisputably also available in Germany. Also, the plaintiff has convincingly argued that the availability has led to downloads in Germany.

Apart from that, the first defendant's website is also intended to target German users. This is supported by the fact that the website is partially in German, that the site offers German-language works, and that the first defendant explicitly strives to make the works available globally ("anyone anywhere"). This is not contradicted by the disclaimer in the first defendant's website stating that users must verify if they are entitled to download the works in their respective countries. Rather, this disclaimer indicates that the defendants are aware that their website is also visited by users from other countries than the United States.

With respect to the plaintiff's request under III., a legitimate interest in a declaratory judgment required according to § 256 sec. 1 ZPO also exists.

2. The plaintiff is entitled to make the desired cease and desist request of the defendants based on § 97 sec. 1 UrhG (Copyright Law).
 - a. The plaintiff has a legitimate right of action.

The plaintiff has presented a substantiated argument that it has been granted rights in the works in dispute. In this respect, the plaintiff has submitted the various contract documents and indicated the parties and the time of the conclusion of the contract. Upon the court's order pursuant to § 142 ZPO, the plaintiff submitted the relevant contracts without redactions (Exhibit K45, p. 648 et seq. of the case file). In addition, the court has taken evidence by hearing witnesses.

Based on the mutual representations of the parties and the hearing of evidence, the court is convinced that the plaintiff has a legitimate right of action with respect to the works in dispute.

aa.

With regard to the works of Thomas Mann, this is supported, firstly, by the submitted publishing contract dated April 17, 1956, amended on May 26/June 2, 1977 (p. 648 of the case file), as well as the "Amendment on E-Book Rights" (p. 666 of the case file) dated August 20/August 26, 2013, and the confirmation dated December 1/December 3, 2014 (p. 668 of the case file). The contracts stipulate a comprehensive grant of "publishing rights," with other rights, including ebook rights, being granted "additionally." The supplement dated December 1/December 3, 2014 (p. 668 of the case file) explicitly confirms that the ebook rights are also granted exclusively. Therefore, based on the interpretation of the contracts, the plaintiff was granted full exclusive rights (for interpretation of the term "publishing right," see Schricker, "Verlagsrecht," 3rd edition 2001, § 8, marginal number 1).

With respect to the defendants' claim in their pleading dated May 19, 2017 (p. 690 of the case file), stating that the power of representation regarding the estate of Thomas Mann is not sufficiently clearly defined, the plaintiff, in its pleading dated June 16, 2017 (p. 702 of the case file), has explained and provided evidence that Prof. Dr. Frido Mann had been authorized by the members of the community of heirs. In its pleading dated December 19, 2017, the plaintiff additionally submitted written powers of attorney by the members of the community of heirs (Exhibit K46, p. 740 et seq. of the case file). Furthermore, the court has heard Prof. Dr. Frido Mann on the issue of his authorization. The submitted powers of attorney and the hearing of Prof. Dr. Frido Mann have sufficiently convinced the court of the

fact that Prof. Dr. Frido Mann was, at least in the year 2014, sufficiently authorized by the community of heirs to represent the estate.

In this respect, the defendants have challenged the power of attorney of Dominica Borgese (p. 743 of the case file), claiming it had been granted only “together with herself.” The court does not follow this argument. Based on its unambiguous wording, the power of attorney must be interpreted to mean that firstly, “Dr. Frido Mann” is granted power of attorney and that Ms. Borgese, together with Dr. Stefan Mann, is only subsequently authorized as a “successor.” Therefore, at the time of authorization and at the time of the hearing, Prof. Dr. Frido Mann was the sole authorized representative.

Furthermore, regarding the power of attorney of Claudia Beck-Mann (p. 745 of the case file), the defendants have claimed that Prof. Dr. Frido Mann is only authorized as a “spokesperson” and, moreover, that the power of attorney is limited to negotiations with the Thomas Mann Archive. Again, the court does not follow the defendants’ perspective. The power of attorney states that Prof. Dr. Frido Mann is to be regarded as an “authorized representative.” He is to be authorized to exercise the “function of a spokesperson of the community of heirs.” In principle, one could assume that the role of “spokesperson” does not include the granting of exploitation rights. However, the term is sufficiently explained in the subsequent paragraph of the power of attorney, which states that this includes estate-related activities – such as, in this case, the granting of exploitation rights in the estate of Thomas Mann – including, “in particular,” negotiations and agreements with the Thomas Mann Archive. Interpreting this in accordance with §§ 133, 157 BGB (to be applied to the interpretation of powers of attorney, MünchKommBGB-Busche, 7th edition 2015, § 133, marginal number 34, with additional references), the spokesperson of the community of heirs is therefore authorized to conduct negotiations and – solely – enter into agreements on behalf of the entire community of heirs, and in view of the wording of “in particular,” the power of attorney, contrary to the defendants’ opinion, is not limited to the Thomas Mann Archive.

The court has heard the witness Prof. Dr. Frido Mann. He testified that he signed the contracts in dispute. When confronted with the different signatures in the two amendments of 2013 and 2014, he declared that they are both his signature. He explained that he sometimes signs his full first name and sometimes does not. He further stated that he acts as the

spokesperson of the community of heirs and that he is also authorized to grant exploitation rights in the works in dispute in this capacity. He stated that he had initially been verbally authorized by part of the community of heirs in 2002 and that he was not in contact with the other members at that time. Later, when he realized that it was time to set the power of attorney down in writing, he obtained the written powers of attorney submitted here and inspected at the hearing from all members of the community of heirs. He stated he was also fully authorized to grant rights. The publisher approached him regarding the amendment on the granting of ebook rights. He stated he had always had a bond of trust with the plaintiff, so he read and then signed the agreements. When asked whether he had been aware of the distinction between the granting of basic and exclusive exploitation rights, he replied that he was not aware of this. He stated he had not given any thought to the idea of any third parties exploiting the rights.

In the court's opinion, this establishes that Prof. Dr. Frido Mann held sufficient authority, at least at the time of signing the "Supplement to the Amendment on E-Book Rights." The witness statement was plausible. In particular, it was without any contradictions, either of an inherent nature or with respect to the documents submitted in writing. The witness himself was credible as well. He reacted with openness when presented with contradictory statements and conceded gaps in his knowledge unprompted. When presented with the fact that the power of attorney of Claudia Beck-Mann was phrased differently from the other powers of attorney, he explained and dispelled this without limitations. Furthermore, he answered questions outside the scope of evidence and on the Mann family without reservations.

Insofar as the defendants claim that in 2013 Prof. Dr. Frido Mann was not yet sufficiently authorized, this is refuted by the permission granted as part of the "Supplement to the Amendment on E-Book Rights" dated December 1/December 3, 2014 pursuant to §§ 177, 184 BGB (cf. Federal Court of Justice, NJW 1981, 1213; Palandt/Ellenberger, BGB, 76th edition 2017, § 177, marginal number 6, with additional references; MünchKommBGB/Schubert, 7th edition 2015, § 177, marginal number 27). At least at the time referred to, Prof. Dr. Frido Mann was authorized to represent the community of heirs, and he made explicit reference to the previously made stipulations under item 2) of the Supplement.

Insofar as the defendants have referred to § 4 paragraph 1 of the contract dated May 26, 1977 (p. 651 of the case file), which states that “ancillary rights” are to remain “with Mrs. Mann,” in the opinion of the court, this changes nothing about the fact that the plaintiff has, at least for the rest, been granted exclusive exploitation rights and that the plaintiff thus has a legitimate right of action.

bb.

The court is also convinced of the granting of rights in the works of Heinrich Mann. This is supported, firstly, by the submitted publishing contract dated December 8, 1993 (Exhibit K45, p. 669 of the case file), amended by the “Amendment on E-Book Rights” dated October 15, 2010 (p. 674 of the case file), in which the legal successors of Heinrich Mann grant the plaintiff “exclusive rights of reproduction and distribution (publishing rights),” with other rights, including ebook rights, being granted “additionally.” The supplement dated December 1, 2014 (p. 676 of the case file) explicitly confirms that the ebook rights are also granted exclusively.

In this regard, the defendants have raised the objection that the signatories’ power of representation is not proven.

The court has heard the witness Jindrich Mann on the issue of his authorization to grant exploitation rights. The witness declared that he signed all three contracts, stating that he had been authorized to do so by his brother Ludwig, who had granted him a general power of attorney before he signed the first contract. When the publisher asked him to sign the additional agreements, he had assumed that the full granting of rights had already been covered by the first contract. He nevertheless signed the additional contracts. He claimed he did not remember exactly why the corporate counsel required the second supplement dated December 1, 2014.

The statement made by the witness Jindrich Mann was also plausible and, in particular, without contradictions. The witness himself was credible as well. He, too, answered questions openly and straightforwardly.

cc.

The court is convinced that the same applies to the works of Alfred Döblin, for which the plaintiff has submitted the “General Agreement” dated February 12/February 14, 2008 (p. 676 of the case file).

In this respect, the defendants have claimed that at the time of conclusion of contract, all rights could not be granted yet, as these rights still belonged to Patmos Verlag (Clause 1 (2) of the contract, p. 677 of the case file). In addition, they claimed that according to Clause 2 (2), the rights granted were not exclusive, a reversion of rights had been agreed on for certain cases, and certain “non-print” rights belonged to Kiepenheuer Verlag.

The court does not follow these objections. It should be conceded to the defendants that the contract mentions that the rights are yet to revert to the estate of Alfred Döblin. However, it is not unusual for future dispositions to be made for rights (cf. § 40 UrhG on future works). Also, the clause explicitly states that the rights will revert to the estate of Alfred Döblin in the near future. Also, the defendants have provided no proof that the rights have not reverted, such as a submission stating that Patmos Verlag might have exploited the works in dispute even after 2008. Finally, also indicating the truth of the claim that the rights reverted to the estate and were then granted to the plaintiff is the fact that the plaintiff has indisputably taken over the exploitation of the rights and, in any case, no submission has been made which states that Patmos Verlag objected to this in any way.

The court is convinced that the rights mentioned in Clause 2 (2) of the contract were also exclusively granted to the plaintiff. While it is true that Clause 2 (1) and Clause 2 (2) use different terms – “grants ... exclusive right” and “exclusive handling ... of subsidiary rights” –, this should nevertheless be considered a grant of exclusive rights in both cases, based on the interpretation of the full contract. This interpretation can also be inferred when taking into account Clause 2 (4) of the contract, which states that the copyright holder will also “grant” additional, unknown rights to the plaintiff on request (“will grant”). Furthermore, Clause 2 (5) of the contract specifies that the plaintiff has also obtained the right to grant (sub-)licenses in the “subsidiary rights,” which also indicates an exclusive grant of rights.

- b. The first defendant has also made the works in dispute publicly accessible within the territory of the Federal Republic of Germany, pursuant to § 19a UrhG.

Neither party disputes the fact that the works in dispute can also be accessed from Germany via the defendants' website. It is the opinion of this court that the defendants' service also targets German users, which is indicated by the inclusion of German-language works, the fact that parts of the website are provided in German, and especially by the disclaimer preceding the ebooks, which states that the works are intended to be "globally" available.

This act of making the works publicly accessible is also unlawful within the meaning of § 97 sec. 1 UrhG. Unlawfulness is indicated by the illicit infringement (Dreier/Schulze-Dreier/Specht, UrhG, 5th edition 2015, § 97, marginal number 14). It is true that, in principle, an infringement can be justified when considering copyright protection in the context of other legally protected interests and an appropriate balancing of interests (cf. Dreier/Schulze-Dreier/Specht, l.c., § 97, marginal number 15, with further references). Furthermore, the defendants' motive is deserving of protection, and the fact that the works in dispute are in the public domain in the United States at least might be worth taking into account. However, in the case at hand, this does not justify the public access provided to the works in dispute in Germany, without regard for the fact that the works are still protected by copyright in Germany. Otherwise, the defendants' opinion would result in the public accessibility of literary works globally being determined by the expiry of copyright in the country where the provider of such access resides.

- c. The first defendant also cannot rely on the fact that the works are suggested, uploaded, and reviewed by volunteers and that the first defendant should therefore only be regarded as the operator of the platform.

The first defendant has, at any rate, appropriated the content on its website. This applies to an operator of a web presence if it is publicly evident that the operator has assumed responsibility for the contents published on its website or has given the attributable impression that the operator identifies with the third-party contents. The question whether a case of appropriation exists should be assessed from the perspective of a sensible average user taking into account all relevant circumstances. One indication of the service provider having appropriated the third-party data is if the service provider selects or checks the contents uploaded by third parties for completeness and accuracy or integrates the third-party data into its own editorial services (Higher Regional Court of Munich, GRUR 2016, 612,

marginal number 26 -Allegro Barbaro). However, in principle, caution is indicated when assuming identification with third-party contents (cf. Federal Court of Justice, GRUR 2015, 1129, marginal number 25 - hotel rating portal).

In this case, from the perspective of an average user, the works in dispute are being offered by the first defendant. According to the undisputed representations of the parties, the first defendant considers it its mission to make copies of literary works globally available (Exhibits K26, K27). In its “Terms of Use,” the first defendant explicitly refers to “our ebooks” (“unsere E-Books”) (Exhibits K1, B12, K34). The first defendant itself has stated that in principle, the individual review steps are in part carried out by the second defendant, its CEO. Moreover, as part of the procedures described by the defendants, statements are added to the start of each work which identify the work in question as “The Project Gutenberg EBook of [... Title ...]” (Exhibit K7). The first defendant also associates the works with a “Project Gutenberg License” (Exhibit K7), in which it also refers to the text of the licensing conditions on its website.

In this respect, the first defendant also cannot rely on the privilege of a Host Provider pursuant to § 10 TMG (Telemedia Act). Firstly, § 10 TMG does not apply to own or appropriated contents, as are concerned in this case. However, even if one did not assume appropriation by the first defendant, the first defendant would, at any rate, be obligated to review and remove the works in dispute after being made aware of the infringement by the plaintiff.

- d. Insofar as the first defendant pleads that it rejected the plaintiff’s claim on the advice of its legal counsel, this is irrelevant. If anything, such – potentially false – advice by a legal counsel would only apply to the first defendant’s culpability, which is without relevance for the claim for injunctive relief. Moreover, the defendants have not specified what their legal counsel’s advice was in the first place. It is therefore still unclear whether this legal advice even included the investigation of German laws and whether the advice to reject the claims was based on legal or factual considerations.

- e. The plaintiff's claim can also be asserted against the second defendant, as the CEO of the first defendant. In this respect, the principles of liability of a managing director apply to the second defendant.

As a general rule, management bodies of companies are personally liable for infringements committed within their company if they can be considered perpetrators or participants. In this respect, the managing director is liable in any case if he/she had knowledge of the infringement and had the option of preventing it. Knowledge is deemed to have been sufficiently established if the managing director knew the business model and, being aware of the risks, failed to prevent this (Fromm/Nordemann, UrhG, 11th edition 2014, § 97, marginal number 180, with further references). These conditions were met in this case. The second defendant knew the services offered by the first defendant. He was, therefore, aware that the first defendant's website also offered works by German authors. Nevertheless, he limited himself to investigating the legal situation under U.S. law.

- f. Contrary to the defendants' opinion, the plaintiff's request under I. is also not without merit on the basis of being too broadly defined. In this regard, the defendants claim that the plaintiff's request does not indicate how the defendants are supposed to prevent the infringements. [The defendants claim] this is only effectively possible by deleting the works.

According to the case law of the Federal Court of Justice, it is not a requirement for a plaintiff's request like this one to explicitly indicate which specific duties of action and inspection should be demanded of the respondent. Rather, it is sufficient if the duties of care and inspection to be complied with follow from the statement of claim and the reasons for the decision (Federal Court of Justice, GRUR 2016, 268, marginal number 14 - Access Provider; cf. also EuGH EuZW 2016, 821 - McFadden). These requirements are met in this case, since it can be gathered from the statement of claim that the plaintiff demands that the defendants use geoblocking to block users in Germany from accessing the works in dispute, at least.

Regarding the defendants' objection that geoblocking is not an effective measure, this is also irrelevant according to the case law of the Federal Court of Justice. It is sufficient in this regard that the unlawful access is made more difficult (Federal Court of Justice, GRUR 2016, 268 -Access Provider).

3. Furthermore, the plaintiffs may also seek a declaratory judgment stating that the defendants are liable to pay damages based on § 97 sec. 1 UrhG.

In this respect, the defendants have also acted culpably, at least by acting grossly negligently, from the time they were made aware of the infringements in dispute at the latest. Case law applies strict requirements to the degree of due diligence (Federal Court of Justice, GRUR 2010, 616, marginal number 40 - marions-kochbuch.de; Dreier/Schulze-Dreier/Specht, I.c., § 97, marginal number 57, with further references). In cases of legal conflict, the infringer cannot presume the perspective that is more favorable for him/her. In this respect, the infringer bears the risk of errors of law (Dreier/Schulze-Dreier/Specht, I.c., § 97, marginal number 57, with further references).

As has been explained in more detail above, the first defendant's service also targets users in Germany. In this respect, the defendants could not limit themselves to reviewing their service solely based on U.S. law and acting accordingly.

Regarding the defendants' argument that the plaintiff has provided no proof of German users actually having downloaded any works, this does not mean that the claim should be dismissed for this reason. As the first defendant's service also targets users in Germany, infringements are to be expected.

With respect to the defendants' plea that § 31a BGB, introduced with the law on the limitation of liability of members of executive boards working on a non-paid, voluntary basis, implies a limitation of the second defendant's liability to willful intent and gross negligence, the court does not follow this argument. Ultimately, the question whether § 31a BGB applies to the persons responsible for the first defendant, which is indisputably a not-for-profit organization, can remain unanswered, since the limitation of liability according to § 31a BGB only applies internally (Palandt/Ellenberger, BGB, 76th edition 2017, § 31a, marginal number 4). Externally, the executive board continues to be liable for ordinary negligence (Unger, NJW 2009, 3269, 3271).

4. Furthermore, the plaintiff is entitled to the information requested from the defendants pursuant to §§ 101 UrhG, 242 BGB.

According to § 101 sec. 1 UrhG, the party infringing a right that is protected by the Copyright Law is obligated to provide information. Accordingly, such information also includes information required to establish a damage appraisal (cf. Higher Regional Court of Hamburg ZUM 2009, 482 - Bauhaus aus Italien II; Dreier/Schulze, I.c., § 101, marginal number 16; BeckOK-UrhG/Reber, I.c., § 97, marginal number 135 et seq.). In this case, that also includes

the information requested by the plaintiff on the extent to which the defendants' services were used with respect to the works in dispute.

This requirement has not been fulfilled. To date, the defendants have provided no information to this effect. They initially pointed out that they do not analyze their users' behavior and that it would be unreasonably difficult to obtain this information. Moreover, they allegedly have no access to this information. However, these representations do not imply a lack of information, especially since there are insufficient arguments as to why the defendants are supposedly unable to provide the information.

[illegible handwritten annotation]
02/27/2018
02/20/2018
[initials]

- 5. The court order as to costs is based on §§ 91, 100 sec. 1 ZPO, as the defendants are the unsuccessful party.
- 6. The decision as to provisional enforceability is based on § 709 ZPO.
- 7. The plaintiff was not to be granted the right to another court hearing in response to the defendants' disallowed amended pleading filed out of time on February 5, 2018. Also, the hearing was not to be reopened pursuant to § 156 ZPO, as the said pleading does not contain any new facts that are relevant to the decision.

Dr. Kurth
Appeal
03/13/2018
03/06/2018
[initials]

Heiser

Dr. Mantz

Certified
Frankfurt am Main, 02/12/2018

[court seal affixed]

BBT
04/13/2018
04/06/2018
[initials]

Wagner, Court Clerk
Certifying Clerk of the Court

Acknowledgement of Receipt

(Service of a document pursuant to § 174 ZPO)

Rechtsanwältinnen und Rechtsanwälte Wilde Your reference:
Beuger Solmecke (attorneys-at-law) 212/16
Kaiser-Wilhelm-Ring 27-29
50672 Cologne

Brief description of the document(s):

Certified copy of the Judgment dated 02/09/18, certified copy of the Decision dated 02/09/2018

File reference: 2-03 O 494/14

In the matter of: S. Fischer Verlag GmbH. vs. Project Gutenberg Literary Archive Foundation. et al.

I have received the above-mentioned document(s) today.

_____, on _____

Signature

I am authorized to accept service (e.g. for lawyers §§ 172, 174 ZPO, § 145a StPO, §§ 30, 52, 53 BRAO)

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069-1367-6050

RESPONSE

Signed Acknowledgement of Receipt to be returned to:

Geschäftsstelle des

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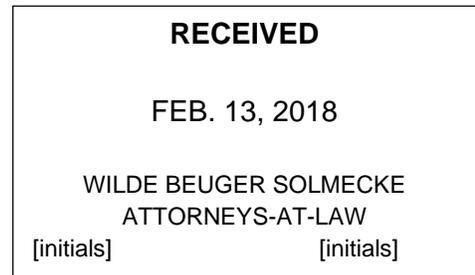
60256 Frankfurt am Main

District Court of Frankfurt am Main
3rd Civil Division

Frankfurt am Main, February 9, 2018

File reference: 2-03 O 494/14

Please quote the above file reference on all
submissions



[handwritten]
Examination of amount in dispute
02/27/2018
02/20/2018
[initials]

Decision

In the matter of

S. Fischer Verlag GmbH vs. Project Gutenberg Literary Archive Foundation et al.,

the total amount in dispute is set at €100,000 (§§ 48 GKG, 3 ZPO)

Instruction on the right to appeal:

An appeal may be brought against this decision. An appeal is only valid if it is received by the District Court at Landgericht Frankfurt am Main, 60313 Frankfurt am Main, Gerichtsstraße 2 within six months after the decision on the case has become legally effective or the lawsuit has otherwise become moot.

If the amount in dispute is set later than one month before the expiration of that period, the appeal may be filed with the court within one month after service or informal notification of the setting of the amount. The appeal is only valid if the amount in dispute exceeds €200.00 or if the court has permitted an appeal of this decision.

Parties whose rights are affected by this decision are entitled to file an appeal. The appeal can be filed in writing or by declaration at the office of the above-mentioned court. It can also be filed by declaration at the office of any District Court; compliance with the time limit shall be determined by the date of receipt by the above-mentioned court. The appeal must be signed by the appellant or his/her authorized proxy. The appeal must include the description of the appealed decision and a declaration

stating that an appeal is being filed against the said decision. If only part of the decision is being appealed, the extent of the appeal must be specified.

Dr. Kurth

Heiser

Dr. Mantz

Certified

Frankfurt am Main, February 12, 2018

[court seal affixed]

[signed]

Wagner, Court Clerk

Certifying Clerk of the Court