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# ISP liability finally achieved in Germany

Martin Schaefer (Boehmert & Boehmert) · Tuesday, December 22nd, 2015

**The German Federal Court of Justice (BGH) has ruled on two cases concerning internet access providers' obligation to block access to websites providing links to predominantly illegal content. In these two landmark decisions, the BGH has paved the way for website blocking in Germany.**

Where protected content is offered illegally, directly or via link providers, this is often done using top level domains (such as .to), thereby guaranteeing anonymity. The problem is enhanced if the providers of such sites choose host service providers who likewise refuse to disclose information about the identity of those using their services. In the majority of such cases it is obvious at first glance that investigating, let alone legal action, will be fruitless. Even in the famous case of "kino.to", the identity of the actual providers of that illegal service came to light only by chance.

In cases like this, the rightholder's last resort is to request that internet service providers (ISPs) block access to such infringing sites. Furthermore, there are cases where blocking access to an infringing site is far more effective a remedy than going against innumerable individual infringements.

European law acknowledged this as early as 2001, in Art. 8 par. 3 of the Infosoc Directive (2001/29/EC), which reads as follows:

*"Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right."*

Unlike most other countries of the European Union, Germany had chosen not to implement this provision by statute, relying instead on the courts to develop the non-statutory, case law based jurisprudence concerning contributory infringement ("Störerhaftung") into an instrument effectively implementing Art. 8 par. 3 Infosoc Directive.

It has taken the plaintiffs, major companies in the German Music Industry in the first case (I ZR 174/14), and the German Collecting Society of musical authors, GEMA, in the second case (I ZR 3/14) almost ten years, before, on 26 November, the Federal Court of Justice finally issued a judgment that promises to achieve that goal.

The grounds for the judgment have not yet been issued so a first assessment has to be based on the court's press release. According to that source, the weighing of interests which must be undertaken in the scope of the assessment of reasonableness, must take into account the fundamental rights

under European Union law and national law of the protection of property of copyright holders, the freedom of occupation of the telecommunications companies and the freedom of information and the informational self-determination of internet users.

A block, so the court holds, is not considered reasonable only where there is solely infringing content accessible via the website but also where a global assessment of the site reveals that the lawful content is a negligible amount compared with the unlawful content. The circumvention possibilities available due to the technical structure of the internet do not preclude the reasonableness of blocking orders either – provided the blocks prevent or at least impede access to the infringing content.

The court made one caveat, however: Blocking measures can only be considered if the rightholder has made reasonable efforts to take action against those parties who have contributed to the infringement by providing services. Only if action against those parties fails or no prospect of success is evident and thus only if a gap in the legal protection would otherwise exist, can action against the access provider for a breach of duty of care be considered reasonable. When determining against which of the parties involved action should primarily be taken, the rightholder, so the court says, is obligated to make investigations to a reasonable extent – such as by hiring a detective agency, a company which conducts investigations in connection with unlawful offerings on the internet or by involving state investigation authorities.

As the court deemed the plaintiffs' efforts in this respect insufficient in both of the cases, it effectively dismissed the two appeals. Still, the acknowledgement of ISP liability for blocking under the conditions described can be regarded as a big success for rightholders, who after almost a decade and a half of uncertainty can now rely on a safely established basis for website blocking in Germany.

*Dr. Martin Schaefer, BOEHMERT & BOEHMERT, Partner, Berlin, represented the music industry in the case I ZR 174/14*

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