Kluwer Copyright Blog

GEMA/YouTube: only secondary liability for infringing uploads

John Weitzmann (iRights.info) · Thursday, June 7th, 2012

German Court of First instance rules that YouTube is only liable for secondary liability for user's infringing uploads, but must prevent future infringements of identified works by screening of and implementing a word filter for new uploads.

In this test run case the German composers and lyricists collecting society GEMA claimed that 12 songs of its repertoire were made accessible via YouTube without permission and that YouTube LLC was primarily liable for copyright infringement. YouTube's reaction to this had been to cancel any further negotiations with GEMA about payments for GEMA repertoire content being uploaded to YouTube. Also, YouTube had pre-emptively blocked numerous videos that potentially contained GEMA repertoire and had replaced the respective videos with a blocking messages informing site visitors that the videos could not be shown due to GEMA not having granted the relevant rights. This had stirred a lot of angry reactions against GEMA, also because YouTube had previously reached agreements with many other European collecting societies.

Even though the Court held that the accessibility of the content in question via YouTube violated copyright of creators represented by the GEMA, if found that YouTube faces only secondary liability after being properly notified of individual infringements. YouTube had argued no own duties to screen its content and that rights holders were themselves required to use YouTube's Content-ID system in order to prevent future uploads of their works. The Court found no primary liability because YouTube LLC neither uploaded the works in question itself nor appropriated the uploaded material in any way. A mere structuring of the content in categories, which on YouTube happens mostly automatically by way of algorithms and suggestion routines, does not amount to appropriation by editorial curation of content, said the Court. Also, YouTubes offering its services for anonymous use does not legally mean appropriation, because Art. 13 sec. 6 of the German Telemedia Act requires platform providers to offer anonymous or pseudonymous access if dominant reasons don't command otherwise.

A success on GEMA's side is that YouTube is liable at all for user uploads while YouTube successfully established itself to (only) be regarded a host provider, not a content provider. The Court did not follow YouTube's argument that the ECJ's ruling in SABAM vs. Netlog relieved YouTube from all duties to screen or control content, because the Court found GEMA's claim less far-reaching than that of SABAM in the named case. Also, said the Court, a relevant contribution for finding a secondary liability is not ruled out generally, as in cases of mere network providers,

like the BitTorrent carriers, because from an objective point of view infringing use of the defendant's platform is nothing improbable but rather likely. And the gratis use of the platform does not remove relevant control duties, for YouTube LLC nevertheless runs its platform in order to earn from advertising. But these duties do not include a requirement to screen the whole existing material on the site, uploaded before an infringement was brought to attention.

But YouTube itself must screen new uploads for infringements of the specific works already named, according to reference files provided by the rights holders. It is unreasonable to ask the rights holders to do this themselves via the Content-ID system, said the Court. In addition to that, the Court asks for a word filter to be implemented for new uploads. It is to catch uploads. the title of which contains both the full title and name of the performer of one of previously disputed works. To prevent unjustified overblocking, which could impede free speech and other basic rights, the word filter must automatically direct users to YouTube's dispute resolution mechanism.

It remains to be seen whether the decision will be appealed by one of the parties. For YouTube this would probably make more sense than for GEMA, because the Court's explanation is rather thin when it comes to why the present case is fundamentally different from SABAM vs. Netlog where the provider was held to have no general screening duties at all. If the number of works claimed under the present GEMA ruling grows over time, this will inevitably at a certain point come close to a general screening duty for close to all of YouTube's content. Parallel to any potential appeals it is widely believed that GEMA and YouTube will now return to the table and negotiate on how much YouTube is to pay, either lump sum or per view, for GEMA repertoire content being uploaded.

A full summary of this case by Till Kreutzer & John Weitzmann has been added to the Kluwer IP Cases Database (www.KluwerIPCases.com).

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