

# Kluwer Copyright Blog

## Germany: What do YouTube and GEMA have in common?

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*“The latest development is that GEMA has filed another lawsuit against YouTube, demanding from YouTube to take down the on-screen notice ‘Unfortunately, this video is not available in Germany because it may contain music for which GEMA has not granted the respective music rights.’”*

YouTube and GEMA (the German Society for musical performing and mechanical reproduction rights) do have something in common: they are both committed to entertainment, since they could not exist without it. This connection embroils YouTube and GEMA in a multitude of ways. They do not appear to be amused about it though; and so they fight in many different ways. Even the technology-savvy observer will inevitably lose track or temper. Besides an almost 4-year-long quarrel over the amount of royalties to be paid – the prime cause of mutual indignation – there are various minor skirmishes which are being fought through different channels including, but not limited to litigation, arbitration, mediation and last but not least the media.

### Negotiation

In 2007 GEMA and Google’s video platform YouTube agreed on a license contract, which allowed YouTube to stream videos that contained music being part of the GEMA repertoire for a flat fee. The license agreement had been concluded for an initial 2-years period. However, when that period lapsed, by the end of March 2009, the parties couldn’t agree on a subsequent understanding and the initial license agreement ran out. The parties have been negotiating ever since. Periods of seemingly fruitful discussions have alternated with occasional tantrums usually followed by a somewhat convincingly delivered statement that negotiations have ultimately failed this time; the main culprit for this usually being the other side and the opposing views as to how the legal term “equitable remuneration” should be converted into an equitable amount of money.

At the beginning of the negotiations GEMA offered a rate of €0.12 per view, which YouTube turned down, describing it as “without comparison in the history of online music”. Over the years of ongoing negotiations this amount has subsequently been reduced to €0.00375 (0.375 cents) per view. YouTube on the other hand, still refuses to pay this amount and instead offers to pay a

certain percentage of the ad revenue that is being earned with videos incorporating GEMA repertoire. YouTube claims to have concluded similar agreements with collection societies in more than 40 different countries. Both parties remain unwilling to move and consequently in January 2013 negotiations have once again reached deadlock.

### **Litigation/Arbitration**

As noted above, the never-ending negotiation is not the only means by which the dispute is fuelled. From time to time certain aspects of it have been “outsourced” and made subject to litigation. In 2010, for instance, GEMA filed a test case before the District Court of Hamburg claiming that 12 songs from its repertoire (for the purpose of that case merely a symbolic number) were made publicly available without permission and thus YouTube was liable for copyright infringement. YouTube denied any obligation to monitor the content that was being uploaded to its platform. The court held that YouTube could not be held primarily liable, since the provider had neither uploaded the infringing material, nor had adopted it in any way. The court found, however, that YouTube may be held secondarily liable (Störerhaftung). After being notified of individual copyright violations it should have removed the infringing content from its platform and, in order to prevent future infringements regarding that content, implement a Content-ID system and if necessary a word filter. The ruling has been appealed. A decision from the Appellate Court (Hanseatisches Oberlandesgericht) is still pending.

In addition, the GEMA filed a complaint to the Arbitration Board of the German Patent and Trade Mark Office pursuant to Section 14 of the Act on the Administration of Copyright and Neighboring Rights (Urheberrechtswahrnehmungsgesetz). As a neutral authority the Arbitration Board is due to review whether the amount of 0,375 cents called for by GEMA is an equitable remuneration. A final decision is also pending.

The latest development is that GEMA has filed another lawsuit against YouTube before the District Court of Munich demanding from YouTube to take down the on-screen notice (“Unfortunately, this video is not available in Germany because it may contain music for which GEMA has not granted the respective music rights”) with which YouTube attempts to explain why certain contents have to be blocked. GEMA considers this notice misleading as it may convey a false picture on the ongoing license dispute between the parties. Consequently GEMA applied for a cease-and-desist order to prevent YouTube from insinuating that GEMA alone is responsible for the ongoing dispute. Additionally GEMA filed a claim for damages.

### **The Media**

The Media plays its own part in this conflict and the parties’ roles seem clearly defined: YouTube, the victim, firmly believes that right holders and artists cannot benefit from their works in Germany. Conversely, in more than 40 other countries, where an agreement with collecting societies exists, revenue streams generated via YouTube prove to be an important source of income especially for younger and less known artists. Furthermore, according to a current [survey](#) in Germany 615 out of 1000 of the most popular YouTube clips are blocked, which makes Germany by far the country with the largest number of blocked videos. GEMA on the other hand is portrayed as a greedy and self-complacent collection society that (half-heartedly) insists to represent the copyright owners’ interests, but in fact is unable to comprehend 21st century business models and how revenue is created digitally. Most likely the truth is hidden somewhere in between.

Meanwhile, numerous websites have plug-ins available with which YouTube's blocking can be circumvented, "GEMA Sperre umgehen" (German for bypassing GEMA blocker) is a popular search term on Google and numerous video tutorials explaining how to bypass the blocking notice are freely available on YouTube. Whether some of those tutorials are blocked in Germany as well could not be established. Even the question whether using such means is illegal cannot be answered, as legal literature on the topic is scarce, not to mention court decisions. Finally and en passant the conflict also makes apparent what happens when 21st century legal battles are fought with 20th century legal armoury. And so this legal standoff is – thoroughly unintended – entertaining in its very own way. GEMA and YouTube, YouTube and GEMA they really have something in common.

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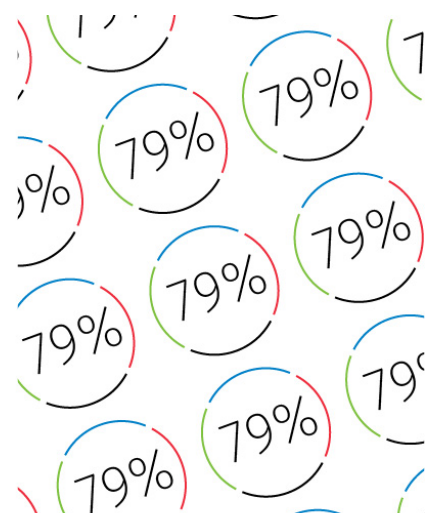
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