

Kluwer Copyright Blog

Tens of thousands of cease and desist letters for watching a stream

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It doesn't happen every day that copyright law and its daily application receive such an overwhelming media coverage. Germany's biggest news portals, the public service broadcasters and major newspapers all reported about a case that appears to be a routine job for a copyright lawyer. In the last two weeks a wave of cease and desist letters sloshed over the country. This happens from time to time and is also not very noteworthy.

What made this case different was not the amount of letters that had been sent out (suspected to be in the high five figures area) and neither was it the fact that it involved, once again, many people that did not even own a computer.

What caused all the attention, was that it was the first time that the supposed copyright infringement consisted of watching a film on a video portal on the internet. The website in question, Redtube, is a pornographic version of sites like Youtube. Users upload material that other users can watch via streaming but that they cannot download.

The cease-and-desist letters were not sent to the persons that uploaded the videos or to the portal itself, but to the viewers. It is still uncertain where the right holder or their lawyers respectively got the viewer's ip-adresses, since the classic technique of logging the addresses would require access to the server. But that is just a side note here.

Watching a stream: copyright infringement?

What is more interesting is the legal significance of streaming content. First the technicalities. Just like Youtube, Redtube offers videos in an on-demand-streaming process. On-demand-streaming,

in contradiction to live-streaming, means that the video is not broadcasted as a constant data stream that is sent to every visiting user in real-time, but in the sense that chunks of the video are sent to the user on his demand and are cached in either the RAM or on the physical hard drive.

In the case of the aforementioned live-streaming, there's clearly no act of copying involved. In the case of on-demand streaming, the caching process is clearly an act of copying. But the resulting copy is a volatile copy. It is deleted when the user closes the video (although there are ways to read out ('dumping') the datastream with specific software).

How to deal with a volatile copy?

The question arises how to regard this volatile copy. The answer to this question lies in § 44a [German Copyright Act](#) (). It freely translates to: "Temporary acts of reproduction which are transient or incidental and integral part to a technological process and which only purpose is to [...] enabling the lawful use of a work and which have no separate economic value on their own are allowed." The European Copyright Directive (2001/29/EC) states in its recital 33 that use in this sense is lawful "where it is authorised by the rightholder or not restricted by law".

One might argue that watching a pirated movie is restricted by the law since the volatile copy in the cache is not permitted by § 53 I German Copyright Act which allows individual copies of a work for private use, if the template is not obviously an unlawful reproduction or unlawfully made publicly available. The question whether a template is obviously unlawfully made publicly available has to be decided on a per case basis. In my opinion, the user of a video platform like youtube – unlike the user of a peer-to-peer network – can assume that the videos there are made publicly available lawfully, since those platforms normally have procedures to prevent pirated material to be uploaded and provide right holders with a process to execute their rights.

The opinion above has already been neglected by the ECJ in its Judgement of 4th October 2011 in the case *Murphy* Case C-429/08 (Joined Cases C-403/08, C-429/08), where the court decided that the "[m]ere reception as such of those broadcasts – that is to say, the picking up of the broadcasts and their visual display – in private circles does not reveal an act restricted by European Union legislation or by that of the United Kingdom, as indeed follows from the wording of Question 5 in Case C-403/08, and that act is therefore lawful" (rec. 171).

This judgement directly applies to the case at hand. The situation of a satellite broadcast is similar to on-demand-streaming. A decoded satellite data stream needs to be decoded by the receiver. In order to decode there is an ephemeral copy of the data stream held in the decoder (see ECJ in the case above rec. 170).

What's next?

The legitimacy of the cease-and-desist letters and the decision of the courts to order ISPs to divulge the identities of the viewers will certainly be questioned, in and out of the courtroom, and this case will undoubtedly remain a topic of discussion in the months to come. The fact that German lawyers will also look at the cease-and-desist letters as a first test for the new § 97a IV German Copyright Act, which grants the recipient of a cease-and-desist letter a claim for damages if the letter was unjustified or invalid, contributes even more to the importance of this case.

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