Kluwer Copyright Blog

YouTube is a hosting provider, but one with extensive duties of care, say two German Courts

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Decision Oberlandesgericht (Court of Appeal) Hamburg of July 1, 2015, file no. 5 U 87/12 and Landgericht (District Court) Munich I of 30 June 2015, file no. 33 O. 9639/14

YouTube is the most popular video-sharing website in the world. As it is not entirely free of videos that infringe third party copyrights, it is also subject to litigation around the world. But under what regime can YouTube be held liable: Direct copyright infringement (as a perpetrator)? Or mere indirect copyright infringement, which imposes further requirements for establishing liability? Two German courts – Oberlandesgericht (Court of Appeal) Hamburg and Landge-richt (District Court) Munich I – have ruled almost simultaneously on these interesting questions under German law.

In summary, neither court found that YouTube had direct liability as a perpetrator nor liability as a contributory infringer. But according to the Court of Appeal Hamburg, YouTube was liable under the German concept of "Stoererhaftung", which is an indirect liability concept. Stoererhaftung only allows injunction claims, and in this case requires that after notification of a clear infringement, YouTube has not only a duty to takedown and secure staydown, but also to prevent other infringements concerning the same work which are just as clear. Under Stoererhaftung, YouTube faces a more extensive duty of care due to its business model, which is quite far removed from that of a genuine hosting provider.

1. **Oberlandesgericht (Court of Appeal) Hamburg of July 1, 2015**

The case before the Oberlandesgericht (Court of Appeal) Hamburg concerned various infringements of copyright in music rights committed through YouTube by its uploaders. The German musical collecting society GEMA had sued YouTube as the owner of exclusive rights.

a) No direct liability of YouTube as a perpetrator

The Court of Appeal Hamburg did not find YouTube to be liable for such infringements as a perpetrator for the following reasons:

- The relevant act of publicly making the work available had been committed by the YouTube uploader, not by YouTube itself.
- YouTube did not make the user's content its "own content". According to the case law of the German Federal Supreme Court in "marions-kochbuch.de", the act of making content its own content could create direct liability as a perpetrator. In the eyes of the Hamburg court, the following factors in particular were crucial for this finding: the entire upload process was automated, and no quality control by YouTube took place. Further, the editorial structuring and proposals to users for other videos were not sufficient to make it YouTube's own content.
- Also, direct liability as a perpetrator could not be inferred from an "active role" played by YouTube in the sense of the CJEU judgment in "L'Oreal/eBay" (C-324/09). Here, the Court of Appeal Hamburg thought that the CJEU case law was on liability privileges, i.e. exemptions from liability, but not on the question of the concepts of direct or contributory infringement. The determination of infringement (including determination of direct infringement) would remain a national issue to decide.
- Further, obtaining commercial gain from the content would not be sufficient to make YouTube a perpetrator.

Interestingly, the Court of Appeal Hamburg later stated that the liability privilege for hosting providers (Art. 14 e-commerce directive and its German implementation Art. 10 TMG) could no longer be applied to YouTube, as YouTube "presents third party content like own content" by arranging, structuring and filtering its extensive offering. YouTube followed a business model whereby it was "appropriating third party content". However, according to the court, this appropriation would not be sufficient to make YouTube a directly infringing perpetrator.

b) Liability of YouTube as a contributory infringer

According to the court, YouTube would also not be liable as a contributory infringer.

In particular, after having been notified of an infringement, a breach of the duty of care to prevent other infringements of the same kind would not be sufficient to create liability as a contributory infringer. The court requires factual knowledge of the specific infringement, so this clearly relates only to the particular infringement notified. If this infringement has been taken down, no contributory infringement seems to be possible.

c) Liability of YouTube under "Stoererhaftung"

Stoererhaftung is a specific German concept of indirect liability which only allows injunction claims, not damages claims. So under Stoererhaftung, there is no opportunity to try to collect the revenue YouTube made from advertising etc., during the period that the content was offered illegally.

Stoererhaftung requires that YouTube has breached its duty of care after having been notified of an infringement. This duty of care (arising with notification) does not only include a mere takedown of the infringement notified, but also a stay down and the prevention of other infringements of the same kind which are also obvious. This concept applies to YouTube according to the Hamburg court.

But here, the differences between YouTube's business model and a genuine hosting provider come into play. The Court of Appeal Hamburg extended YouTube's duty of care because they provide a platform which makes third party content very attractive for recipients.

The court's findings concerning the filtering duties of YouTube (to prevent further obvious infringements of the same kind), were as follows:

- YouTube needs to be notified of a clear infringement. In this case, YouTube not only has a duty to takedown and secure staydown, but also to prevent other infringements concerning the same work which are just as clear.
- The prevention duties do not relate to the specific recording of the musical work notified as an infringement to YouTube, but to the musical work as such (irrespective of the specific recording). In other words, YouTube has to filter for all different recordings in the form of a video, after having been notified of one infringing recording.
- Surprisingly, the court only sees a duty of care for YouTube to filter for new infringements, i.e. for infringements newly uploaded on YouTube after having been notified. There would be no duty of care for YouTube to filter for infringements already existing on YouTube when notified. This, however, may not be in line with the prevention duty case law of the German Federal Supreme Court.
- In relation to the specific filtering measures and their proportionality, the court advocates the usual weighing of interests between the property rights of the right holder, the entrepreneurial freedom of YouTube and the freedom of users to communicate.
- It is interesting to see that the court considers YouTube to be a "service inclined to infringement" ("Gefahr geneigter Dienst") on the one hand, while the court sees YouTube as providing a business model "in the mainstream of society" ("in der Mitte der Gesellschaft") on the other hand, as brand owners like Mercedes-Benz and Audi present their cars on YouTube channels. The court stressed again that YouTube operates quite differently from the usual business model of a hosting provider and would thus be confronted with more extensive duties of care.
- In relation to the specific filtering measures, YouTube would have the choice of what measures to apply. While a hash-filter (MD5) is seen not to be sufficient as a filtering measure, "Content-ID" is extensively evaluated by the court as sufficient to fulfil the duty of care. It is very interesting that the court says it would be YouTube's job to get the necessary reference files for "Content-ID" and YouTube's duty to operate Content-ID, even without the help of right holders. The right holders would merely have to sufficiently notify YouTube and no more. The court then discussed whether a word filter would also have to be applied by YouTube. YouTube refused to do this and the Court of Appeal thought this was in breach of a duty of care. Content-ID was not sufficient in this case, as it could not recognise other recordings of the same musical work (see above).
- Furthermore, the Court of Appeal also commented on YouTube's "dispute" procedure. This procedure is criticised by the court because in cases where the uploader opposes the takedown, the file is re-uploaded. Interestingly, the decision mentions that in only 2% of cases does the uploader notified oppose a takedown.
- At the end of its evaluation of filtering tools available, the court explained why Content-ID and a word filter would not infringe the prohibition on general monitoring duties according to Art. 15 E-Commerce Directive.

2. **District Court of Munich I of 30 June 2015**

This case also saw GEMA suing YouTube for infringing music videos. But in this case, GEMA did

not sue for an injunction, but only for damages and information to prepare the calculation of the damages claim. Therefore, the German concept of “Stoererhaftung” was not under discussion in this case, because it only allows injunction claims. Rather, the District Court Munich I had to decide solely whether YouTube was directly liable as a perpetrator or at least as a contributory infringer. Under these concepts of German law GEMA could ask for damages.

In conclusion, the District Court Munich I denied claims against YouTube for direct liability as a perpetrator. The YouTube uploaders would be the perpetrators. The District Court Munich I also expressed the opinion that YouTube did not make the users’ content its own content. In this regard, the result of the decision runs parallel with the aforementioned decision of the Court of Appeal Hamburg.

Concerning liability as a contributory infringer, the District Court Munich I was of the opinion that YouTube did not have the necessary intent. Again, the result is very comparable to the Court of Appeal Hamburg decision.

3. **Outlook**

The Court of Appeal Hamburg allowed a further appeal so the case will now go the BGH. So it is very likely that the BGH will rule on the appropriate form of liability for YouTube in cases where copyright is infringed by YouTube videos. But for the moment, courts in Germany have aligned to say that YouTube is not directly liable as a perpetrator or contributory infringer, but may only be liable for injunction claims under the specific German indirect liability concept of “Stoererhaftung”. However, liability as a contributory infringer could be established against YouTube if it were to persistently refuse to takedown and secure stay down of notified infringing videos. But generally speaking, this does not seem to be a problem with YouTube.

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