Kluwer Copyright Blog

Puls 4 v YouTube in Austria does not anticipate Article 17

Rainer Schultes (Geistwert) · Tuesday, April 2nd, 2019

On Valentine's Day, the Higher Regional Court of Vienna (docket no 4 R 119/18 a) issued a judgment on a complaint by the Austrian broadcasting company Puls 4 against YouTube, predating the much-discussed Article 17 (formerly known as Article 13) of the Copyright Directive. The petition requested aimed to prevent YouTube from making available videos containing films or motion pictures, or parts thereof, produced by the plaintiff which were uploaded by unauthorized persons. The Plaintiff particularly stressed the so-called "monetization" of uploaded videos by YouTube, while YouTube defended with the safe harbour privilege.

The court of first instance had allowed the petition for injunctive relief and the petition for publication of the judgment (see Kluwer Copyright Blog).

The courts established that YouTube does not generally perform an ex ante check for copyright infringements, even on an automated basis. Advertising is provided for videos if the user uploading them consents (the so-called "monetization"): The user posting a video decides whether advertising should appear in connection with it. To this end, the user/rights holder posting the video enters into an agreement with Google Ireland Ltd (which was sued, too, but said proceedings were stayed). Based on this agreement, Google Ireland Ltd supplies the YouTube user with the advertising the user requests, either itself or via third-party undertakings. All this is done by automated processes. Every YouTube user uploading videos can decide to monetize its videos through advertising. A user who selects a video for monetization receives a request to confirm that he is the proprietor of

all elements of the video and/or holds sufficient commercial exploitation rights for all (audio and video) elements to monetize the video. The user is also instructed that YouTube may require proof of commercial exploitation rights (this is usually the case if the algorithmic tests show that a video cannot be monetized, for instance as a result of contrary "blocking claims") and may block the monetization of the videos or indeed the entire account for repeated abuse of the system. If the user now confirms, by clicking "OK", that he holds all necessary (exploitation) rights to monetize the video, the user can set individually which ad formats he wishes to activate for his video. An automated standard check is performed before ads are actually switched on. Both users and YouTube itself profit from the monetization option.

The courts found that YouTube acts exclusively at the request of the (presumed lawful) rights holder and is remunerated for its host provider services, but it has an automated review process which leads, after receipt of a take-down notice, to a blocking of the videos concerned.

Operating an account with YouTube is a prerequisite for uploading movies. Personal data must be provided for this purpose, but the accuracy of such data is not verified. Upload filters (electronic content recognition) are not used on uploaded videos. However, YouTube offers the option of having a video electronically checked for matches to their own content. Right holders can request blocking or participation in the earnings from the advertisements in connection with the video.

The court of first instance found that the safe harbour privilege pursuant to § 16 ECG lapses if a supplier abandons its position as neutral mediator and takes an active role that could give it knowledge of, or control over, certain data, e.g. by way of interconnecting, sorting, filtering and linking, in particular by creating content directories, thus making the uploading of videos – infringing or not – easy and interesting for users. YouTube would thus be regarded as an instigator or at the very least an abettor of copyright infringements and could not rely on the host provider privilege. The fact that YouTube removed the incriminating videos once the copyright was proved, could not therefore exonerate it from liability.

The Appeal Court did not share this view. A platform operator is not (as of yet) obliged to monitor the information it transmits or stores or to investigate circumstances which point to unlawful activity. Earning remuneration or the fact that YouTube provides an attractive environment to advertising customers without involving the supplier of a video are not objectionable. According to the Court of Appeal, which referred to ECJ C-160/15 – GS Media/Sanoma, YouTube did not go beyond the typical behaviour of a privileged host operator. If it had to forgo structuring and search options in order to avoid a damaging "appropriation" of video content, its video platform would lose all user-friendliness.

In the present case, there was no evidence to suggest that the user who illegitimately uploaded the infringing videos had already violated the plaintiff's copyrights, nor that YouTube knew about it. Consequently, the Vienna Higher Regional State Court decided that – in the case at stake – YouTube could benefit from the safe harbour privilege as a host provider. The position might change, of course, once Article 17 of the Copyright Directive comes into force.

It is to be assumed that the decision of the Higher Regional State Court is not yet definitive, as it explicitly allowed an appeal to the Supreme Court.

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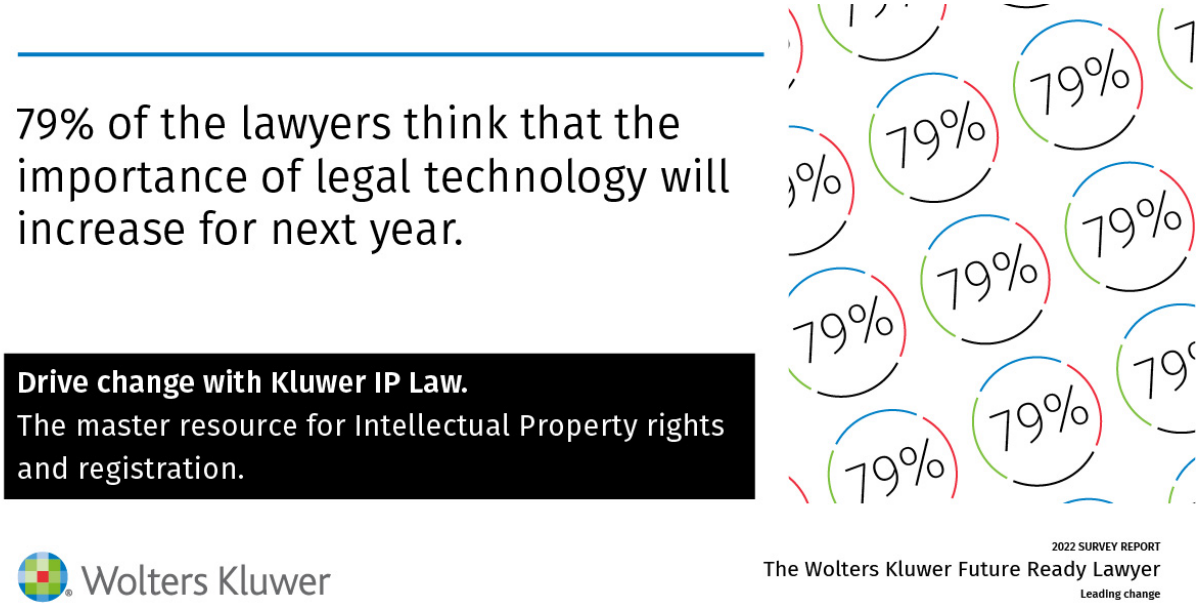

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