Kluwer Copyright Blog

German Federal Court of Justice: Copyright Case Law of 2021 – Part II

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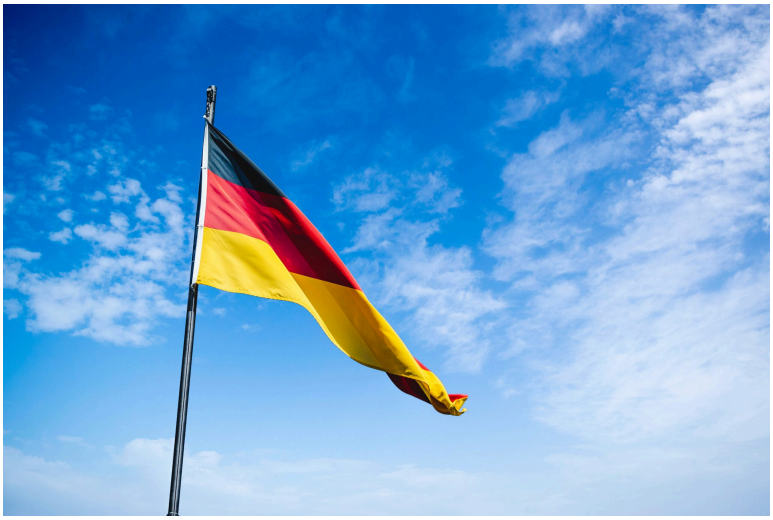
2021 saw a very active German Bundesgerichtshof ("BGH" – Federal Supreme Court) in the area of copyright law. This article covers the most relevant copyright law decisions of the BGH from that year. Part I addressed decisions in the areas of scope of protection, exploitation rights, exceptions and limitations, and copyright contract law. Part II will cover claims under copyright law and collecting societies.



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V. Claims under copyright law

1. Capacity to be subject to legal action

In *YouTube v Cyando*, the referring BGH asked the CJEU whether the German implementation of Article 8(3) of the InfoSoc Directive through the principle of *Störerhaftung* (breach of duty of care) was compatible with the Directive. The *Störerhaftung* is the basis, in particular, for claims to compel access providers or other intermediaries to bring an end to copyright infringements. Störerhaftung merely provides for injunction claims – and not for damage claims. The requirements for *Störerhaftung* are, however, almost solely founded upon the case law of the BGH going back over many years. These requirements are often very strict. One of the main points of discussion was that one prerequisite of such a claim arising, not provided for in the Directive, is usually a prior notification of the rights infringement to the party concerned. This mechanism was confirmed by the CJEU in principle. As such, the BGH can continue to rely on the legal concept of *Störerhaftung*.

In *Störerhaftung des Registrars*, the BGH ruled for the first time on the responsibility of a domain registrar to bring an end to a copyright infringement. Registrars are domain providers that register domains with registries on behalf of customers and forward to the registries the details of the respective domain owner as necessary for the connection of the domain, i.e., the IP-address of the actual host server the domain shall connect to. In the BGH case, the registrar against whom the action had been brought had registered and connected a structurally copyright-infringing website. The rightholder whose rights had been infringed was seeking a cessation of the infringement through the disconnection of the domain. This would only have been possible via the principle of *Störerhaftung*. The BGH concluded that the necessary criterion of an adequately causal contribution to the copyright infringement was present despite the fact that the website containing the copyright infringement could also have been accessed by simply entering the IP address (without the need for the domain connected by the registrar). The reasoning given was that hardly any users would actually access the website by directly entering the IP address.

The existence of *Störerhaftung* is also dependent on the violation of reasonable (due diligence) obligations. In this context, the scope of the obligation is determined by the service provided or activities performed by the party against whom action has been taken as a *Störer* (i.e., party in breach of a duty of care). In relation to registrars, the BGH decided to apply the principles for duties of care that it had, several years prior, applied to access providers. This is good for domain name registrars because it enables them to benefit from a number of prerequisites for claims that provide protection to potential targets of legal action. The application of the principles relevant to access providers means that, in addition to the subsidiarity requirement (the scope of which is unclear), there is also a requirement that the registrar can only be subject to legal action if the vast majority of the content of the website in question is rights infringing. Moreover, the (above-mentioned) prior notification of the rights infringement is necessary. That notification has to include all relevant circumstances giving rise to due diligence obligations. The equivalence created by the BGH seems somewhat questionable, however, since even the court acknowledges that domain registrars – unlike access providers – have a contractual relationship with the infringer. As such, it would seem fair to the interests of the parties involved to have the contractual relationship with the infringer count against the registrar and to impose on the registrar the risk of misconduct by its contractual partner.

That said, despite the BGH judgment, *Störerhaftung* (which is limited to injunction claims) may not be the only tool that can be used against registrars servicing copyright infringements. It remains to be seen in the light of the judgment *YouTube v Cyando* whether the CJEU concept for liability (including damages) may also be applied to registrars which service copyright infringing websites. As the CJEU judgment was handed down after the BGH registrar case, the BGH could not discuss the issue (see further Study on the Role of the Domain Name System and its Operators in Online Copyright Enforcement, paras. 60 et seq, 64).

2. Claims for information

In *YouTube-Drittauskunft II*, a dispute between YouTube and a film exploiter active in Germany, the BGH was called upon to decide, following the conclusion of related preliminary ruling proceedings before the CJEU, whether the holder of a claim for information against YouTube within the meaning of Section 101(3) No. 1 UrhG also has a claim to information regarding the email addresses of the users, their telephone numbers and their IP addresses. In the scope of

preliminary ruling proceedings (see here), the CJEU decided that the underlying Article 8(2)(a) of Directive 2004/48/EC has to be interpreted as meaning that the term “addresses” does not refer to the email address and telephone number of a user or their IP address. It is of little surprise that the BGH has now found that claims for information concerning “names and addresses” within the meaning of Section 101(3) No. 1 UrhG does not include information regarding the email addresses of the users of the services. It also does not include information regarding the telephone numbers of the users of the defendants’ services, the IP addresses used to upload the rights infringing files or the IP addresses last used by the users of the services to access their user account. As such, YouTube cannot, on the basis of Section 101(3) No. 1 UrhG, be forced to disclose user details actually relevant for taking action against copyright infringements.

VI. Collecting Societies

In the course of 2021, several decisions of the BGH were also handed down concerning the rights of collecting societies.

1. Statutory rights to remuneration

New case law concerned the equipment remuneration that is regulated in Sections 54 et seqq. UrhG. These stipulate a remuneration obligation primarily for the manufacturers of devices and storage media, such as USB sticks, which are typically used in connection with reproductions in the scope of the exceptions (such as the private copy exception). However, importers and retailers can also be affected. It would go beyond the scope of this article to look in any detail at the other BGH decisions concerning this complex special area of copyright law, namely *Außenseiter*, *Gesamtvertragsnachlass*, *Verjährungsverzicht*, *Gesamtvertrag USB-Sticks und Speicherkarten* and *Eigennutzung*. Therefore, at this point a simple reference to those decisions will suffice.

2. Other

In the area of collecting society law, a decision of the German Federal Administrative Court (the highest German court for administrative law issues) should be mentioned which concerned the setting of remuneration tariffs (Section 34(1), Section 38 VGG (German Collecting Societies Act)). These tariffs are used by collecting societies to set the rates they charge for the granting of various exploitation rights. In this decision, the court ruled that the supervisory authority (the German Patent and Trade Mark Office, DPMA) is entitled, by virtue of its powers of legal supervision, to examine whether the tariffs published by a collecting society have been set in accordance with the applicable legal provisions. According to the court, this entitlement also includes examining the fairness of the tariffs.

VII. Summary and Outlook

In 2021, the case law of the BGH included a number of decisions which significantly developed

German copyright law. The BGH based one decision concerning the liability of domain name registrars, before the CJEU decision in *YouTube v Cyando*, on the principle of *Störerhaftung* (breach of duty of care). It remains to be seen whether the CJEU's liability concept will be able to be applied to domain name registrars also. A further point of practical importance seems to us to be the fact that the BGH, in *Lautsprecherfoto*, ruled that a product photograph that only remained accessible to users entering a 70-digit URL into a browser could not be deemed to be a communication to the public. Of further note is the decision in *Das Boot III* concerning bestseller claims for additional remuneration. In 2022, no relevant legislative activity is expected in Germany. However, it will be very interesting to see how the courts deal with the new legislative situation. The future certainly does not look boring in German (and European) copyright law.

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