Kluwer Copyright Blog

German news on the EU liability concept for indirect infringers of copyright: A push forward by the BGH for communication to the public – and a step back for reproduction

Jan Bernd Nordemann (NORDEMANN) · Monday, January 13th, 2025

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There is news from Germany on the EU liability concept for indirect infringers. The German Federal Supreme Court (Bundesgerichtshof – BGH) has ruled on the liability of online marketplaces for copyright infringement by their users when uploading copyright infringing photographs. This is the BGH judgment of 23 October 2024 – I ZR 112/23 – Manhattan Bridge, published in German here.

The three official most important legal takeaways formulated by the BGH itself read as follows (my translation):

1. The principles of Union law governing the liability of video-sharing and file-hosting platforms for the communication to the public of copyright-protected works (see CJEU judg. of 22 June 2021 C-682/18, C-683/18– Peterson v Google and Others and Elsevier v Cyando; BGH [German Federal Court of Justice] GRUR 2022, 1324 paragraph 17 et seq. – uploaded II published in German here ; BGH GRUR 2022, 1308 paragraph 70 et seq. – YouTube II published in German here) can be applied to the liability of online marketplaces.

2. As a general principle, the operator of an online marketplace – like the operator of a video-sharing and file-hosting platform – is obliged, after being notified of a clear rights infringement, to check the listings posted on its marketplace for similar infringements, within the bounds of what is technically and economically reasonable, and to block or delete any infringing content. However, when applying the case law on video-sharing and file-hosting platforms to online marketplaces, the specific features of online marketplaces must be taken into account. If the offered item itself is not copyright infringing but the listing is merely presented in a copyright-infringing manner, the platform operator's due diligence obligation

extends, as a rule, only to similarly presented listings but not to any and all uses of the copyrighted work.

3. The principles governing the liability of platforms for acts of communication to the public of copyrighted works are not transferable to a reproduction of a copyrighted work on the servers of such a platform. Instead, liability remains governed by the criminal law principles of perpetration and participation.

As one can see from these three official BGH takeaways, this is a decision which goes into the heart of EU liability concepts for copyright infringements. Below, please find a summary of the facts, the content of the judgment and my comments.

Facts

The dispute concerned the liability of an online marketplace (Rakuten) on which a seller had advertised a television using a photograph of the "Manhattan Bridge" in violation of copyright. The seller had uploaded the photograph as the direct perpetrator. The dispute was to determine the liability of the online marketplace as the party that indirectly caused the copyright infringement.

The BGH Judgment

The BGH first looked at Art. 17 DSM Directive 2019/790 and the German implementation, i.e. the German Act on the Copyright Liability of Content Sharing Service Providers [Urheberrechts-Diensteanbietergesetz – UrhDaG; For an official English translation, please see here]. According to the BGH, online marketplaces are not liable as perpetrators for the illegal acts of communication to the public under the UrhDaG. Like Art. 2 No. 6 DSM Directive, Section 3 No. 5 UrhDaG excludes online marketplaces from the definition of "online content-sharing service provider". The liability provisions of the UrhDaG therefore did not apply in this case (see paragraph 42 of the judgment).

However, the BGH found that liability as perpetrator according to the principles established in the CJEU decision in YouTube v Cyando did apply (C-682/18, C-683/18). In the view of the BGH, this liability concept from the CJEU was not limited to video-sharing platforms (like YouTube) but could also apply to online marketplaces. The two requirements for liability – firstly an indispensable role and secondly a breach of a duty of care (see my previous post on the German implementation by the BGH here, and further on hosting providers, Fromm/Nordemann § 97 marg. nos. 160 et seqq.) – were deemed by the BGH to have been met. The BGH found that the staydown obligation did cover similar infringements, i.e. in the case of marketplaces, the obligation to check similarly presented listings; however, it was not necessary to check all uses of the content in dispute (paragraph 56 of the judgment, also second key summary point).

A further point at issue was the online marketplace's liability for the seller's illegal acts of reproduction on the marketplace's servers. According to the BGH, the CJEU liability concept for platforms in relation to indirect infringements of the right of communication to the public does not apply to the right of reproduction. Rather, liability as perpetrator is then still governed by the

national concept of liability. The German national concept is, according to the long-standing case law of the BGH, based on the criminal law principles of perpetration on the one hand and aiding and abetting on the other (paragraph 73 of the judgment). In this respect, the BGH ruled out liability as a perpetrator due to the fact that sole control of the infringement rested with the uploading seller, while also ruling out liability as an aider and abettor due to a lack of sufficient intent (paragraphs 74 et seqq. of the judgment). The BGH then addressed a duty under the German concept of *Stoererhaftung* (limited to injunction claims). The BGH also rejected *Stoererhaftung* because the act of reproduction had already ceased by the time the platform became aware of the copyright-infringing use of the photograph (paragraphs 81 et seqq. of the judgment).

Comment

This case nicely illustrates the current status regarding the liability of platforms in the EU and in Germany.

The BGH rightly refused to apply the specific (perpetrator) liability system under the UrhDaG (German implementation of Art. 17 DSM Directive) because online marketplaces do not fall under that provision according to Section 3 No. 5 UrhDaG (Art. 2 No. 6 DSM Directive).

The BGH was also right in extending the general CJEU liability concept for the right of communication to the public to online marketplaces. This liability concept should even be applied to all indirect perpetrators of infringements of the right of communication to the public, e.g. also to content delivery network (CDN) providers (Oberlandesgericht Köln [Higher Regional Court of Cologne] GRUR-RS 2023, 30866 paragraphs 18, 40 et seqq. – DDL-Music, published in German here). The decisive factor is whether the parties indirectly causing the respective infringements play an indispensable role in those infringements. This primarily depends, as the BGH correctly stated (paragraph 37 of the judgment), on whether there is an increase in the risk of infringement. Hence in the event of a breach of duty, full liability as perpetrator also appears justified. If an indispensable role is denied, the extent of liability changes: Indirect infringers are only obligated to cease and desist pursuant to Article 8(3) of the InfoSoc Directive 2001/29 and implemented into German law via the principle of *Störerhaftung* and (for access providers only) via Section 8 of the German Digital Services Act [DDG].

However, the BGH does not apply the CJEU's general liability concept to infringements of the right of reproduction (similar finding: Opinion of Advocate General Szpunar, 25 Apr 2024, C-159/23, paragraphs 63-69 , 74 – Sony Computer Entertainment Europe), despite there being quite convincing reasons to do so (Zurth at [393]; for the right of distribution under Article 4 InfoSoc Directive: Stieper, Europäische Zeitschrift für Wirtschaftsrecht [European Journal of Economic Law] (EuZW) 2023, 691). The right of reproduction has been fully harmonised under Article 2 of the InfoSoc Directive just as the right of communication to the public has under Article 3 of the InfoSoc Directive. In both cases, importantly, harmonisation can only be deemed fully complete once harmonised liability rules are also in place. A harmonised liability concept for the right of reproduction would also make uniform EU liability rules for AI output possible (see Jan Bernd Nordemann, Generative AI, copyright infringements and liability – My guess for a hot topic in 2024).

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