[DE] Court Decision on Video Portal's Liability

IRIS 2011-1:1/19

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On 29 September 2010, the *Hanseatische Oberlandesgericht* (Hanseatic regional court of appeal - OLG) decided that the Sevenload video portal did not adopt user-generated content as its own and was not, therefore, liable for copyright infringements committed by users, either as a perpetrator, participant or aider and abettor.

The video portal concerned ("the defendant") offers, on its Internet site, both professionally edited content (e.g., films, shows and music), for which it acquires the necessary licences, and content uploaded by registered users - particularly music videos. The content is found under separate headings and, in the section for user-generated content, the defendant has introduced a "notice and take down" system. In the case before the OLG, a music publisher ("the plaintiff") complained that the videos uploaded by users infringed its exclusive rights to reproduce copyright-protected works and make them available to the public (Articles 16 and 19a of the *Urheberrechtsgesetz* - Copyright Act, UrhG) and sought an injunction against the defendant (Article 97(1) UrhG). The court of lower instance partially upheld the request, but both parties appealed.

The defendant's appeal was upheld by the OLG. Referring to the "Chefkoch" case (see IRIS 2010-1/13), which it thought was a different matter altogether, the OLG accepted that the content uploaded by users onto the portal in question was thematically and visually incorporated into the defendant's service and, to an extent, "mixed up" with licensed content. However, in this case, the user-generated content was neither "checked for completeness and correctness" by the defendant in advance, nor marked with the defendant's logo to the same degree as in the "Chefkoch" case. Furthermore, the user-generated section only represented an additional service offered by the defendant, whose "core activity" was to offer licensed content; in addition, users could at any time remove content they had uploaded. Overall, therefore, a "sensible Internet user" would not be given the impression that the user-generated content belonged to the defendant. Secondary liability linked to the defendant's failure to meet its duty of care was also ruled out because, in compliance with guidelines issued by the BGH (Federal Supreme Court), it had deleted the disputed videos immediately after the plaintiff had brought them to its attention.

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Urteil des Hanseatischen OLG vom 29. September 2010 (Az.: 5 U 9/09)

http://www.internet-law.de/wp-content/uploads/2010/11/OLG-Hamburg-5-U-9-09.pdf

Decision of the Hanseatic regional court of appeal, 29 September 2010 (case no. 5 U 9/09)

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