[DE] Cologne Appeal Court Rules on Evaluation of "Relevant Exploitation Phase" for Works in Determining Commercial Scale

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In a recently published decision of 27 December 2010, the Oberlandesgericht Köln (Cologne regional court of appeal - OLG) considered the concept of "commercial scale" of file-sharing in relation to the right to information enshrined in Article 101 of the Urheberrechtsgesetz (Copyright Act - UrhG) (see IRIS 2011-1/17).

Taking previous case-law into account, the OLG Köln repeated that, on the one hand, a commercial scale was present if the work being offered was particularly valuable, before looking more closely at a second scenario, whereby a sufficiently large file was made available to the public during its relevant exploitation phase. In this phase, copyright holders were particularly affected by the publication of their works by third parties.

In the opinion of the OLG Köln, the relevant exploitation phase for musical and cinematographic works lasted six months from first release. For films, this period should be calculated not only from the date of their release in cinemas, but also from when DVD sales began, since this represented a totally different type of use from cinema distribution.

In the court's view, special circumstances, such as the long-lasting, particularly high level of commercial success of a work, could lead to a longer relevant exploitation phase. For music albums, for example, this was conceivable if the album was in the Top 50 of the music industry's sales charts when the copyright was infringed. The same situation applied if one track from the album concerned was particularly well placed in the charts at the time. For audio books, the size of the work or the success of the printed version could also be significant.

One reason to oppose the lengthening of the relevant exploitation phase would be if the work was available at sale price, unless this was merely as part of a special offer available for a limited period of time.

Beschluss des OLG Köln vom 27. Dezember 2010 (Az. 6 W 155/10)

http://medien-internet-und-recht.de/pdf/VT-MIR-2011-Dok-001.pdf

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Decision of the Cologne regional court of appeal, 27 December 2010 (case no. 6 W 155/10)

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