[DE] OLG Prohibits Rapidshare from Making Available Certain Content

IRIS 2012-5:1/12

Tobias Raab
Stopp Pick & Kallenborn, Saarbrücken

In two rulings of 14 March 2012, the *Hanseatisches Oberlandesgericht* (Hanseatic Appeals Court - OLG) prohibited the file-hosting site Rapidshare from making certain copyrighted content available to its users.

The judges therefore upheld the decision of the *Landgericht Hamburg* (Hamburg District Court - LG), which, in lower-instance judgments, had granted the request of the publishers Campus and De Gruyter and agreed with the legal opinion of the GEMA collecting society concerning Rapidshare's liability and obligations. Therefore Rapidshare is prohibited from making available the aforementioned publishers' literary works and music from the GEMA repertoire.

In order to establish disturbance liability, it was necessary in this case to consider the extent to which Rapidshare was liable for misuse of its service and whether it therefore played an "active role" or merely the role of a "neutral go-between". In this regard, the court ruled firstly that Rapidshare had, through its basic business model, tended to influence its users in such a way that they had committed offences and was therefore liable for the provision of storage space and the allocation of links. Without this, subsequent breaches of copyright would have been impossible. In addition, the measures previously taken to combat illegal use were inadequate. It was not sufficient just to take action against breaches of copyright and delete links after being notified by the copyright holders. If an illegal link was reported, it was also necessary to look for and monitor the link's "surroundings", including all related websites and similar links. Rapidshare should also keep an eye on current developments in order to fulfil its obligation to observe the market, and should not limit itself to known lists of links. This was the only way of effectively preventing the repetition of copyright infringements. Since Rapidshare had failed to meet these obligations, the OLG upheld the lower-instance rulings and prohibited the file-hosting site from making the relevant content available.

Nevertheless, the judges deviated from their previous case law in two respects. For example, they altered their view that a breach of copyright occurred at the point of uploading, since in the era of cloud computing such services were increasingly being used to store authorised copies. Since, in the period between the complaints being filed and the OLG's decision, Rapidshare had increasingly been describing itself as a "largely neutral provider" of serious cloud computing

© European Audiovisual Observatory (Council of Europe) 2026

services, the previous accusations that it had tended to influence its customers in such a way that they acted illegally no longer applied. Even so, Rapidshare could still have disturbance liability despite these changes, although no longer on the basis of a tendency to influence users. Rather, such liability could now be based on the fact that Rapidshare enabled customers to use its services anonymously and, in this way, "actively" helped them to infringe copyright. Rapidshare could not justify its actions with reference to Article 13(6) of the *Telemediengesetz* (Telemedia Act - TMG), under which users must be able to use a provider's services anonymously or under a pseudonym. The TMG only allowed this "where this is technically possible and reasonable", which "in view of the dangers posed by the defendant's business model is clearly not the case here". Disturbance liability might therefore still apply in the future.

Pressemitteilung des Hanseatichen Oberlandesgerichts zum Urteil (Az. 5 U 87/09), 15. März 2012

http://justiz.hamburg.de/presseerklaerungen/3334434/pressemeldung-2012-03-15-olg.html

Press release of the Hanseatiches Oberlandesgericht on the ruling (case no. 5 U 87/09), 15 March 2012

© European Audiovisual Observatory (Council of Europe) 2026

© European Audiovisual Observatory (Council of Europe) 2026