[DE] Federal Supreme Court Clarifies Monitoring Obligations of Rapidshare File-Hosting Service

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In a decision of 15 August 2013, the Bundesgerichtshof (Federal Supreme Court - BGH) further clarified the extent of the duty of care of a file-hosting service provider and, in addition to the liability privileges enshrined in Articles 7(2) and 10 of the Telemediengesetz (Telemedia Act - TMG) and Articles 14(1) and 15(1) of the E-Commerce Directive (2000/31/EC), demanded that hosting service providers be subject to a partly-proactive monitoring obligation.

The ruling follows an action brought by the Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (Society for musical performing and mechanical reproduction rights - GEMA) against the Rapidshare file-hosting service. Although the GEMA had issued a caution about a large number of music titles stored by Rapidshare, the provider had not completely removed them.

In its ruling, the BGH firstly confirmed its previous case law: in accordance with Article 7(2) TMG, the service provider did not have a general obligation to monitor data that it merely stored. However, depending on the circumstances of the individual case, a monitoring obligation might apply.

Service providers who stored information provided by users had a duty of care to take reasonable measures to identify certain types of illegal activities.

In this case, Rapidshare’s business model had not been designed from the outset to facilitate infringements of the law, since the service could also be used for lawful purposes. It could not therefore be expected to monitor everything without specific cause.

However, for a number of reasons, the service provider was obliged to monitor stored data once it had been cautioned about an infringement of the law, since Rapidshare, through its own activities, was increasing the risk of its service being used illegally. For example, the claim that certain files had been downloaded 100,000 times, which Rapidshare used to advertise its hosting service, was only possible if the content concerned was highly attractive and illegal. The fact that the service could be used anonymously made it even more appealing for illegal use. The additional awarding of points to users, depending on the number of downloads, could also be seen as further evidence that mass infringements were

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being promoted.

It was therefore necessary to consider the extent to which the file-hosting provider was required to monitor content when asked to do so. In previous case law, the BGH had noted that, in principle, the service provider should be expected to monitor a reasonable number of relevant collections of links to certain designated content. In the instant case the BGH also explained that, with a large number of over 4,800 musical works, the hosting provider should be expected to regularly monitor collections of links. In this respect, a hosting provider could be required to use a word filter, at least.

Rapidshare was also obliged to find out about other illegal links via general search engines. The reference to general preventive measures that had been taken (17-person “abuse team”, MD5 filter, deletion interfaces for rightsholders) could not, on its own, exonerate the defendant.

Urteil des BGH vom 15. August 2013 (Az. I ZR 79/12)

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=050ba4d368b7ac13f5db41b65db7e7f4&nr=65240&pos=0&anz=1

BGH ruling of 15 August 2013 (case no. I ZR 79/12)

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