[DE] BGH refers questions to ECJ concerning YouTube's liability for copyright breaches

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In a decision of 13 September 2018 (Case no. I ZR 140/15 - YouTube), the Bundesgerichtshof (Federal Supreme Court - BGH) referred a number of questions to the European Court of Justice (ECJ) for a preliminary decision concerning the liability of the YouTube Internet video platform operator for copyright breaches linked to content uploaded by third parties.

The case follows a claim brought by a music producer after a YouTube user had uploaded several videos containing musical works by the singer Sarah Brightman. The producer claimed that he had produced one of the albums featured in the videos and owned exclusive rights to exploit it. In November 2008, the producer demanded that the video platform operator, YouTube LLC, and its parent company, Google Inc., sign a declaration with a penalty clause, promising not to copy or make available to the public audio recordings or musical works from his catalogue. In response, YouTube LLC removed some of the videos, but similar videos became available again just a few days later. The producer then took legal action against Google Inc. and YouTube LLC, requesting an injunction, disclosure of information and damages.

The lower-instance courts LG Hamburg (Hamburg district court, ruling of 3 September 2010, Case 308 O 27/09) and OLG Hamburg (Hamburg appeal court, ruling of 1 July 2015, Case 5 U 175/10) largely upheld the request. However, the BGH decided to suspend the appeal proceedings brought by both parties in order to submit to the ECJ the following questions concerning the interpretation of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, Directive 2000/31/EC on electronic commerce and Directive 2004/48/EC on the enforcement of intellectual property rights:

- Does the operator of an Internet video platform on which users make available to the public videos containing copyright-protected content without the rightsholder's permission carry out 'communication to the public' in the sense of Article 3(1) of Directive 2001/29/EC if:

it generates advertising revenue from the platform, and the uploading process is automatic, requiring no prior approval or control by the operator; the operator, in accordance with the terms of use, obtains a global, non-exclusive, free licence to use the videos for the period during which they are made available; the operator, in

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the terms of use and as part of the uploading process, states that copyright-infringing content may not be uploaded; the operator provides a system through which rightsholders can block infringing videos; the operator displays search results in the form of ranking lists and content-related categories on the platform, and shows registered users a selection of videos recommended on the basis of videos they have previously watched;

- if it has no actual knowledge of the availability of copyright-infringing content or, upon obtaining such knowledge, immediately removes it or blocks access to it? Does the activity of the operator of such an Internet video platform fall under the scope of Article 14(1) of Directive 2000/31/EC and does the actual knowledge of illegal activity or information and awareness of facts or circumstances from which the illegal activity or information is apparent, as mentioned in this provision, have to concern actual illegal activities or information?

- Is it compatible with Article 8(3) of Directive 2001/29/EC if a rightsholder is unable to obtain an injunction against a service provider whose service is used to store information provided by a user, and has been used to infringe copyright or related rights, unless a clear infringement has been notified and a second such infringement has subsequently been committed?

- If the answer to the previous questions is no: should the operator of an Internet video platform in the circumstances described in the first question be considered an infringer in the sense of Articles 11 (1st sentence) and 13 of Directive 2004/48/EC, and can such an infringer’s obligation to pay damages under Article 13(1) of Directive 2004/48/EC be made conditional on the infringer (i) having acted deliberately in terms of his own infringing activity and that of the third party, and (ii) having known or been reasonably expected to know that users were using the platform to infringe intellectual property rights?

Pressemitteilung Nr. 150/2018 des BGH vom 13. September 2018

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2018&Sort=3&nr=87409&pos=2&anz=152

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