[DE] Federal Supreme Court: broadcaster not obliged to search YouTube for illegal content

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Jörg Ukrow
Institute of European Media Law (EMR), Saarbrücken/Brussels

In a decision of 12 July 2018 (Case no. I ZB 86/17), which was published on 28 September 2018, the Bundesgerichtshof (Federal Supreme Court - BGH) ruled that a broadcaster had fulfilled its obligations by removing a TV programme from its online media library and taking steps to ensure that it could not be retrieved from the cache of common search engines, and in particular from Google.

The case concerned a television programme broadcast in April 2017 by public service broadcaster Norddeutscher Rundfunk (NDR) which had been the subject of a preliminary injunction on account of infringements of the right to free speech. NDR had removed the programme from its online media library and asked common search engines, in particular Google, to delete it. However, the programme had been uploaded to the YouTube video platform by a third party without NDR's involvement and was therefore still available to the public. As a result, the person concerned by the programme filed legal proceedings against NDR, claiming that it had breached the injunction.

However, the BGH rejected the application. It was true that NDR, under the injunction, had been obliged to delete the programme from its online media library and ask search engines to do the same. The BGH explained that it was in the economic interest of companies that used the Internet as part of their commercial activity that search engines help users find the content that they had made available on the Internet. In NDR's case, the fact that search engines referred users to television programmes in its online media library was, in any case, likely to raise and maintain the public profile of the media library and of previously broadcast programmes. NDR therefore stood to benefit financially if programmes available in its media library could be accessed via Internet search engines. NDR must also have been aware that the programme deleted from its media library would remain accessible via the search engine cache until it was updated and that it would continue to be viewed illegally as a result.

However, NDR was not obliged to search other websites to see if the programme was available, as might be the case if, for example, a third party from whose activity the broadcaster did not benefit financially had independently published it on an Internet video portal. It was only obliged to take action with regard to third parties if it benefited financially from their activities. This system of liability was

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based on the notion that an obligor helped by a third party to expand its activities must assume responsibility for the resulting increased risk of rights infringements.

NDR did not benefit financially from the publication of the programme by the YouTube user. It was true that its publication on an Internet video portal meant that more viewers might become aware of it. However, this expansion of its potential audience did not, on its own, give NDR a relevant economic benefit. On the contrary, it could actually be detrimental to NDR's online media library, which might seem less attractive than the competing service. It was also important to note, when evaluating the overall situation, that the publication of the programme by a third party without NDR's consent infringed the copyright of the broadcaster, which had the exclusive right to decide how its works should be used and to benefit from them financially.

Beschluss des BGH vom 12. Juli 2018 (Az. I ZB 86/17)

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288&Seite=1&nr=88030&pos=44&anz=527

Decision of the Federal Supreme Court (BGH) of 12 July 2018 (Case no. I ZB 86/17)

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