[DE] Federal Supreme Court refers ‘Uploaded’ to ECJ

IRIS 2018-10:1/9

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On 20 September 2018, a week after issuing its YouTube decision (IRIS 2018-9/10), the Bundesgerichtshof (Federal Supreme Court – BGH) decided to refer a similar set of questions to the European Court of Justice (ECJ) concerning the liability of a shared web hosting service for copyright infringements (Case no. I ZR 53/17 – Uploaded).

The case follows a dispute between book and music publishers and the shared hosting service Uploaded, which offers free storage space for anyone to upload files that can, in principle, be downloaded free of charge by other users. Registered users can pay for higher download speeds and a larger download quota. The defendant automatically creates and gives to the user an electronic download link to each uploaded file, but does not provide access to an index or search function for uploaded content. The download links are often found with a description of their content on other websites, although these are operated by third parties. The defendant pays uploaders a form of bonus based on a certain number of downloads (up to EUR 40 for 1 000 downloads). Although prohibited under its terms and conditions, much of the platform’s content infringes copyright, a matter that has repeatedly been brought to the defendant’s attention. On 2 March 2017, following a complaint by several music and book publishers claiming exclusive usage rights to works made available on the platform, the OLG München (Munich court of appeal, Case no. 29 U 1797/16) ordered the operator, as a so-called ‘interferer’, to desist (Article 97(1) of the Copyright Act - UrhG), but did not award damages or require user data to be disclosed. It based its decision on the fact that the defendant was neither fully nor partially responsible for the copyright infringements, since it had only provided technical means and had therefore not made the works available to the public itself (Article 19a UrhG).

Now, however, the BGH has decided to suspend the proceedings and refer questions to the ECJ on the interpretation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, and Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

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The following questions were submitted:

- “Does the operator of a shared web hosting service, on which users make available to the public data containing copyright-protected content without the rightsholder’s permission, carry out ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29/EC if

- the uploading process is automatic, requiring no prior approval or control by the operator,

- the operator points out in its terms of use that copyright-infringing content may not be uploaded,

- it generates revenue by operating the service,

- the service is used for lawful purposes, although the operator is aware that a substantial quantity of copyright-infringing content (more than 9 500 works) is available,

- the operator does not provide an index or search function, although the unrestricted download links that it creates are listed on the Internet by third parties, together with information on the files’ content and a search function,

- it creates an incentive to upload copyright-protected content that users would otherwise have to pay for by awarding a bonus based on the number of downloads, and

- it decreases the likelihood of users being held to account for copyright infringements by enabling them to upload files anonymously?

- Is the answer to the above question different if between 90 and 96% of the content made available via the shared hosting service infringes copyright

- Does the activity of the operator of such a shared hosting service 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 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?

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- If the answer to the previous questions is no: should the operator of a shared hosting service in the circumstances described in the first question be considered an ‘infringer’ within the meaning 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 commit actual copyright infringements?”

These questions are very similar to those contained in the decision to refer the question of YouTube’s liability for copyright-infringing content (decision of 13 September 2018 – Case no. I ZR 140/15, IRIS 2018-9/10). However, the two platforms are very different in terms of their structure and business model. It remains to be seen whether and how the ECJ will distinguish between the different types of service and the different ways in which the providers contribute to copyright infringements.

Pressemitteilung Nr. 156/18 des BGH vom 20. September 2018

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2018&Sort=3&nr=87736&pos=0&anz=156

BGH press release no. 156/18 of 20 September 2018

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