[DE] Cologne Appeal Court rules that domain registrars share liability for copyright infringements

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In a ruling of 31 August 2018 (Case no. 6 U 4/18), the Oberlandesgericht Köln (Cologne Regional Court of Appeal - OLG Köln) decided that domain registrars are liable for copyright infringements on filesharing platforms if they fail to shut down a domain reported by a copyright holder.

The case concerned copyright breaches committed on the filesharing platform "The Pirate Bay". The Court of Justice of the European Union had previously examined this platform in 2017 (Case no. 610/15, see IRIS 2017-7:1/4), when it had decided that the making available and management of an online filesharing platform should be considered as an act of communication to the public for the purposes of the EU Copyright Directive (2001/29/EC). Unlike the CJEU procedure, which had examined Dutch court decisions concerning the liability of Dutch Internet access providers Ziggo and XS4ALL, the OLG Köln's decision was directed against the domain registrar with which the second-level domain 'thepiratebay' and various top-level domain endings are registered. The role of domain registrars is to register domains with the relevant registries. The holders of the exclusive rights to exploit the film 'Victoria', which had been made available for download by other users on the online filesharing platform without the rightsholders' permission in November 2011, had applied for an injunction against the domain registrar, requiring it to shut down the domain concerned and to refrain from reallocating it until the film 'Victoria' had been removed from the platform. The application was primarily based on the notion that an action against the domain registrar was the only suitable way of effectively preventing the copyright infringements, since the registrant (domain owner) and the hosting provider could not be reached and this situation was unlikely to change. The domain registrar, on the other hand, had argued that it was not required to check or monitor content stored in the domain; besides, it was unable to carry out such checks because domain registration was - indisputably - an automatic process that took place without any human intervention. However, the first-instance court upheld the complaint and its decision was confirmed on appeal by the OLG Köln.

The OLG Köln held that the download registrar could not be liable as either a perpetrator or an accessory because it had not itself made the film available to download and had not knowingly or willingly contributed to the copyright infringement. In particular, liability as an accessory could not be based simply on the fact that the complainant had informed the domain registrar about the possible infringement. However, an injunction could be granted on the grounds of

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the registrar's liability as a so-called 'interferer' because, by keeping the domain open, it had made a sufficient causal contribution to the copyright infringements and was in a similar position to an access provider. It was true that domain registrars could not be generally required to check the content of registered websites because they had no influence on their content and could not verify its legality in advance because the registration process was automatic. However, a duty to inspect and act could arise if a domain registrar was made aware of a clear, easily identifiable infringement. In particular, the OLG pointed out that it was unnecessary to make a claim against other third parties such as the domain owner or hosting provider before taking action against the domain registrar. The domain registrar had more extensive inspection obligations than the registry, which allocated domain names, because unlike the latter, it operated as a business, aimed to make a profit and had a contractual relationship with the domain owner.

Urteil des OLG Köln vom 31. August 2018 (Az.: 6 U 4/18)

https://www.justiz.nrw.de/nrwe/olgs/koeln/j2018/6_U_4_18_Urteil_20180831.html

Judgment of the Cologne Regional Court of Appeal, 31 August 2018 (Case no. 6 U 4/18)

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