Client Alert

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Landmark Decision of German Federal Court of Justice on Blocking of Copyright-infringing Websites

By Christoph Wagner and Johannes Hieronymi

On 26 November 2015, the German Federal Court of Justice ruled that Internet access providers (IAP) can be liable for copyright infringements on third parties' websites and can thus be ordered to block access to such websites. This shall only be the case, however, if the copyright holders have exhausted all reasonable steps to enforce their rights against the website operator and the host provider.

BACKGROUND

Whether an IAP should be obliged to prevent its users from accessing websites that contain illegal content or unauthorized download links to copyright-protected works is a highly controversial matter in Germany and Europe. Although the EU Directive 2001/29/EC since 2001 provides in its Article 8 (3) that "Member States shall ensure that right holders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right", the German legislator did not see any need for implementing Article 8 (3), as in its view, the German Copyright Act already provided for sufficient measures. Two main arguments were brought against such obligation of IAPs: (1) The blocking of a website would also lead to the blocking of any legal content on such website (so called "overblocking"), which could be considered censorship that is in principle prohibited by the German constitution; and (2) the blocking of a website could in any case not prevent Internet users from accessing such websites, since there are several technical ways to work around the blocking. The topic of website blocking was also subject to a highly controversial political discussion regarding a legislative initiative for the blocking of child porn websites that failed in the end.

European case law addressed the topic of website blocking: The Court of Justice of the European Union (CJEU) ruled in its decisions Scarlet Extended / SABAM (2011) and SABAM / Netlog (2012) that EU law precludes website blocking based on a statutory provision that was found to be too unspecific and unbalanced. In its decision UPC Telekabel Wien / Constantin Film, Wega Filmproduktionsgesellschaft (2014), the CJEU found that an IAP may be ordered to block its customers' access to a copyright-infringing website (in that case "kino.to"), provided that the injunction ensures a fair balance between the fundamental rights concerned.

DECISION OF THE GERMAN FEDERAL COURT OF JUSTICE ON 26 NOVEMBER 2015

In a landmark decision, the German Federal Court of Justice (Bundesgerichtshof – BGH) has now addressed the liability of IAPs with regard to copyright infringements on third parties' websites. According to the court's press release (the reasoning has not yet been published), IAPs can be liable for copyright infringements on third parties'

websites and can thus be ordered to block access to such websites. However, that is, as the court pointed out, only the case if the copyright holders have made (all) reasonable but unsuccessful efforts to enforce their claims against intermediaries more directly involved in the copyright infringement, such as the website operator and the host provider – or if such claims lack any chances of success. Even though the German Copyright Act does not explicitly state such blocking obligation, according to the court, German copyright law must be interpreted in the light of Article 8 (3) 2001/29/EC, and must therefore provide for a possibility to impose blocking orders against IAPs.

Co-liability of Internet Access Providers

In the court's view, the act of procuring access to websites containing copyright-infringing content represents an adequately causal contribution of the IAP to the infringement of rights of the website operators. Considerations of the affected fundamental rights must include (i) the affected EU and national fundamental rights of property protection of the copyright holders, (ii) the operational freedom of the IAP, and (iii) the freedom of information and informational autonomy of the Internet users. In weighing these rights, the BGH also addressed both of the above-mentioned arguments, but rejected them: (1) according to the court, the use of blocking measures is reasonable not only when only infringing content is provided on the website, but even when according to the overall ratio, the lawful content compared to the unlawful content is negligible; and (2) the theoretical possibilities of bypassing blocking measures that exist due to the technical structure of the Internet are not an obstacle to blocking measures being reasonable if the blocking prevents, or at least impedes, the access to infringing content.

Blocking of Websites as Ultima Ratio

The obligation of an IAP to block the access to such websites may, however, only be applicable under the aspect of proportionality if the respective copyright holders initially made reasonable but unsuccessful efforts to take action against those persons who – like the website operator – committed the right's infringement themselves, or (like the host provider) contributed to the infringement by rendering services. Only if the enforcement of claims against these persons fails or lacks any prospects of success, thus creating a gap in the legal protection, is the enforcement of claims against the IAP as a co-liable person reasonable. Website operators and host providers are considerably more closely related to the infringement than those persons who only generally procure access to the Internet. When determining those persons against whom claims must primarily be enforced, the right holders must to a reasonable extent carry out investigations, for example by commissioning a detective agency or a company that carries out investigations in connection with unlawful Internet offers or by engaging governmental investigating authorities. The two cases decided by the BGH failed to meet this prerequisite. In the first case, the addresses of the website operator and the host provider stated in the domain-registration proved to be wrong, so an interim injunction could not be served. In the second case, the website operator's identity could not be determined from its web presence. The court pointed out, as stated in the press release, that the right holders should have undertaken further reasonable measures and should have carried out additional investigations.

CONSEQUENCES FOR COPYRIGHT HOLDERS

The BGH decision strengthens the legal situation of copyright holders in Germany in principle. To effectively enforce their copyrights in Germany, the right holders may bring claims not only against the operator and the host provider of the website that contains the infringing content, but also against the IAP who provides Internet access to its customers.

However, as the blocking of a website by the IAP can only be *ultima ratio*, the right holder still has to primarily enforce its rights against the website operator and the host provider. Only if all reasonable efforts to take action against those persons have been exhausted, can a claim be brought against IAPs. The requirements in this respect are significant. Depending on the case, right holders must even commission a private detective agency. Unlike, for example, the U.S. legal system, German civil procedure does not know the principle of discovery, meaning that, before a German court, each party is responsible for proving the facts stated in its favor. Therefore, proper documentation of the efforts taken by the right holder to enforce its copyright claims against the website operator and the host provider is indispensable in order to bring a successful case against an IAP.

Considering these strict requirements, it remains to be seen to what extent copyright holders will have the chance to successfully bring claims against IAPs in practice. Further details are to be expected upon publication of the reasoning of the BGH decision.

Contact:

Christoph Wagner
+49 (0)30 72622 1322
cwagner@mofo.com

Johannes Hieronymi
+49 (0)30 72622 1322
jhieronymi@mofo.com

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