

German Court: online video recorders infringe broadcasters' rights

This case, which is reviewed below went before the German Federal Court in 2009. Whilst the Court gave their opinion on two issues in connection with the legal admissibility of online video recorders, it referred the case back to the previous Court, the Higher Regional Court of Dresden. The Dresden Court recently published its judgment which strengthened the rights of TV broadcasters against operators of online video recorders. The court's decision was based on a number of interesting technical details.

Circumstances of the case

The defendant offered services as an online video recorder via the Internet. The online video recorder operated as follows: the online user could choose telecasts from a wide range of digital TV programs. The selected telecasts then were automatically recorded, without the need for any further interventions or arrangements by the service provider. Subsequent to the recording, the taped telecast was transmitted to the respective user's private online account. Thus, the user was able to watch the telecast from any web-enabled terminal device, such as their personal computer.

The claimant was a TV station who claimed that the online video recorder infringed the ancillary copyright for broadcasters under section 87 of the German Copyright Act ("GCA"). The claimant argued in particular that the recording service breached the rule of undue reproduction (section 16 GCA) and should be classified as an unpermitted act of making a telecast available to the public (section 19a GCA). Finally, the plaintiff argued that the online recorder infringed the TV station's exclusive rights to broadcast particular programs (section 20 GCA).

The Court ruled that the online video recorder had infringed the exclusivity rights of the broadcaster – certainly in regard to the particular operational design underlying the case.

The Court's judgement

The Dresden Higher Regional Court began its judgment by assessing the question of whether the recording via the online recorder was an undue

reproduction under the terms of the GCA. The Court confirmed that the online recorder had reproducing qualities. However, the judges came to the decision that these reproductions were permitted under the category of a so called private copy ("Privatkopie") which is legal under section 53 GCA. In their view it was not the provider of the recording service who must be thought of as the reproducer, but rather the private end-user. The court based their concluding judgments on the specific operational design of the online recorder. According to the court, the reproducing process happened automatically after the customer had initiated the recording. Following this logic, according to the court, the online video recorder was, only an auxiliary device which supported the production of a private copy by the end-user.

Secondly, the Court did not agree with the claimant's argument in which they suggested there had been an infringement of the right to make the broadcasts available to the public. This argument floundered on issues relating to the technical set-up of the internet-recorder in question. The court ruled that the recorded telecasts were not made available to sufficient numbers of the public via the recording service, on the basis that the copies were only transmitted to a single end-user's private online account.

However, the judges did agree with the plaintiff on the issue of whether there had been an infringement of the broadcaster's exclusive rights to broadcast the recorded telecasts. The claimant was able to prove that TV signals were transmitted to at least ten different end-users at the same time. According the Court's judgment, this forwarding of a television signal via the online recorder to a multiplicity of members at the same time must be viewed as the exploitation and breach of the TV station's broadcasting right.

Conclusion

The verdict from the Dresden Higher Regional Court certainly strengthens the rights of broadcasters in Germany. It places an obligation on the online video recorders to set up a prior licensing arrangement with the broadcasting companies. This at least applies for

“reproductions qualify as ‘private copy’”

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service providers which operate on the same or similar technical setups as in the present case. At the same time, the judgment places the online video recorder operators in a catch-22 situation. On the one hand, they need a licence from the broadcasters to allow them to legally operate. At the same time, it remains uncertain whether the online recorders have to be seen as a cable retransmission service in terms of section 20b GCA for this obligation to apply. Only to the extent that the online video recorders fall into the scope of this section 20b GCA, would the broadcasters be constrained to grant a (compulsory) licence on market-based terms and conditions (“Zwangslizenz”).

Against this background, it is hardly surprising that the first provider of online recording services has recently filed a claim against a major broadcasting company requesting a compulsory licence. However, the ultimate legal solution for these emerging media service companies will only be concluded in the course of the much-anticipated modernisation of the German Copyright Act.



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