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AdBlock Plus — German Media Houses in Court

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Internet users throughout the world are increasingly using adblocking tools to clean their screens of online advertising.

The most popular adblocking tool by far is AdBlock Plus, marketed by the German company Eyeo GmbH. AdBlock Plus is among the most frequently downloaded browser add-ons worldwide, with over 144 million active users reported in 2014.¹

**Adblock Plus most popular adblocking tool,
marketed by German company Eyeo GmbH.**

AdBlock Plus allows internet users to select which advertising content they want to have appear on their screens — if any. The software comes with a pre-selection of blacklisted and whitelisted websites. By default, users of AdBlock Plus only see those adverts that have been whitelisted by Eyeo. Users are free, in theory, to set their own preferences, but most will probably stick with the standard default settings.

Eyeo contends that a volunteer community decides

which content can be whitelisted because it is not “annoying” to users. To qualify for whitelisting, adverts must be static and should ideally only contain text. Attention-seeking images, video, animations and sound are banned. These criteria create a particular challenge for media houses. The video and audio content they provide online is typically accompanied by, and financed through, the sort of adverts that are deemed annoying under the AdBlock Plus criteria.

Scenes of Battle: Munich, Cologne, Hamburg

Several large German media companies have in recent months filed lawsuits against Eyeo before the District Courts of Munich, Cologne and Hamburg.

The plaintiffs contend that Eyeo engages in unfair competition through its white- and blacklisting selection process. In particular, they maintain that Eyeo is striking individual deals with some large advertisers to pay for whitelisting, in some cases collecting million dollar amounts.

Eyeo has also been accused of favoring the content of certain advertising companies in which Eyeo’s owners have a stake, such as the affiliate advertiser Yieldkit. This appears to be out of line with Eyeo’s professed aim of creating a better user experience on the internet.

The plaintiffs say that Eyeo’s practices amount to willful interference with their business, contrary to the German Unfair Competition Act.

Eyeo’s current adblocking practice — with or without whitelisting — does not amount to willful interference with the business of Zeit Online and Handelsblatt, the plaintiff companies.

The District Court of Hamburg.

The District Court of Hamburg was the first court to give a ruling on the adblocking battles. On April 21, 2015, the court ruled in favor of Eyeo (Case no. 416 HKO 159/14). The Hamburg judges held that Eyeo’s current adblocking practice — with or without whitelisting — does not amount to willful interference with the business of Zeit Online and Handelsblatt, the plaintiff companies. The judges stressed that it is not Eyeo, but the users, who have control over the selection of advertising content they want to have blocked. The court therefore saw no room for the argument that Eyeo’s business amounts to an intentional obstruction to the detriment of the website operators.

On 27 May, the District Court of Munich followed suit, dismissing all claims brought by subsidiaries of RTL und ProSiebenSat.1 Digital.

The judges essentially dismissed unfair competition claims for the same reasons as the Hamburg court.

The mere browsing of a website, using an activated adblocker, does not amount to an act relevant to copyright.

District Court of Munich.

Copyright and antitrust claims were also dismissed by the Munich judges. The mere browsing of a website, using an activated adblocker, does not amount to an act relevant to copyright, the judges said.

Further, Eyeo does not — yet — hold a dominant market position, the court said. The court defined the rel-

evant market segment under German antitrust law as composed of all internet users. On this broadly defined market, Eyeo’s AdBlockPlus only holds a share of some 3 percent. In contrast, the claimants had contended that the relevant market only comprises users of adblocking software. Among these users, Eyeo holds a share of more than 30 percent, the claimants said.

The judges only commented briefly on the grounds on which their decision rests. Should the fully reasoned judgment eventually be published — which is not a matter of course in Germany — we may gain further insights. We can also expect the exchange of arguments to continue at the appeal stage.

Furthermore, another stage is set in Cologne, where the District Court yet has to render judgment in the action brought by Axel Springer.

Adblocking Goes Mobile

The adblocking battles continue, and will spread further in months to come.

According to a recent report in the *Financial Times*,² a number of mobile operators are currently developing plans to block advertising on their networks.

One unnamed European wireless carrier told the *Financial Times* that it plans to implement adblocking by the end of 2015. The mobile adblocking technology was developed by the Israeli start-up Shine. Its chief marketing officer Roi Carthy calculates that “tens of millions of mobile subscribers around the world will be opting into adblocking by the end of the year.”

It is as yet unclear whether carriers are planning to offer adblocking on an opt-in basis to their subscribers, or whether adblocking is to be a universally built in feature of mobile services.

Given the strong interconnection between online and mobile business models and advertising, the landscape of online and mobile content will change dramatically with the rise of adblocking.

Notes

1. Adblocking goes mainstream, PageFair and Adobe 2014 report.
2. Mobile operators plan to block online advertising, *Financial Times*, May 14, 2015 (subscription required).