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Munich District Court holds pan-European copyright licensing model of joint venture CELAS invalid

Summary of the case

In a declaratory judgment action filed by the company MyVideo (represented by K&L Gates Berlin) against CELAS, a joint venture of the German collecting society GEMA and the UK collecting society MCPS-PRS, the District Court of Munich (*Landgericht München*) decided on June 25, 2009, that CELAS has no right to prohibit reproductions of the Anglo-American repertoire of EMI Music Publishing Ltd. online in Germany.

MyVideo provides an ad-financed website in German (myvideo.de) that, just like Youtube, enables the streaming of user-provided video content over the internet. CELAS, which was set up by GEMA and MCPS-PRS to manage on a pan-European basis the so-called mechanical reproduction rights for online-uses of the Anglo-American repertoire of EMI Music Publishing Ltd., had claimed that MyVideo needed a CELAS license with respect to EMI songs uploaded on its server as part of videos.

The District Court of Munich held that, in general, making available copyrightable works online required imperatively both making available rights and mechanical reproduction rights as a making available online was technically not feasible without a reproduction. In such a case of union of rights, however, German copyright law did not allow a splitting of making available rights and mechanical reproduction rights for online uses. The court held that, as a consequence, EMI could not have validly transferred only mechanical reproduction rights for online-uses to CELAS while making available rights were still managed by GEMA.

The decision confirms that in Germany, GEMA still functions as a one-stop-shop for the world-wide repertoire which offers all making available and reproduction rights necessary for online-uses. Users do not have to negotiate separate deals with business models such as CELAS or PEDL (Warner) for mechanical reproduction rights. Instead, they can obtain comprehensive licenses from GEMA in a fast and efficient manner - also for the benefit of all copyright holders.

The impact of the decision may be bigger than it seems at first glance because it would stop all the publisher models of withdrawing the mechanical online rights from the collecting societies. Interestingly, the grounds of the German court are in line with the Commission's decision from July 6, 1972 (72/268/EWG, ABl. 1972 L 166/22 GEMA II). The Commission found that **"all economically dividable forms of exploitation of copyright under consideration of the differences of the national laws could be transferred separately"**.

Details of the case

MyVideo Broadband S.R.L. vs. CELAS GmbH, District Court of Munich (Landgericht München), No. 7 O 4139/08 (June 25, 2009)

MyVideo provides an ad-financed website (www.myvideo.de) that, just like Youtube, enables the streaming of user-provided video content over the internet. Users have to register in order to upload videos on its server. During the registration procedure, each user has to accept the General Terms and Conditions of MyVideo, which explicitly state that "a user bears exclusively and without restriction all responsibility for all information he/she provides".

CELAS is a joint venture of the German collecting society GEMA and the UK collecting society MCPS-PRS. CELAS claims to manage the so-called mechanical reproduction rights for the Anglo-American repertoire of EMI Music Publishing Ltd. In 2006, the German supervising authority *Deutsches Patent- und Markenamt (DPMA - the Patent and Trademark Office)* had rejected an application of CELAS for admission as a collecting society according to the German law for copyright management (*Urheberrechtswahrnehmungsgesetz (UrhWG)*). CELAS had stated that it only managed the mechanical reproduction rights for online-uses of Anglo-American artists that were under contract with EMI Music Publishing Ltd. On these grounds, the DPMA had held that CELAS did not act as fiduciary of several rights holders and, hence, did not need an admission as a collecting society according to UrhWG. Subsequently, the German Federal Antitrust Agency (*Bundeskartellamt*) had advised that CELAS did not also need an admission according to antitrust regulations.

In February 2008, CELAS made an offer to MyVideo to settle ongoing negotiations and agree on a license fee of several Mio € for 2007 and again for 2008. The parties did not agree on these fees. On November 11, 2008, MyVideo closed a deal with GEMA regarding www.myvideo.de for the period April 1st, 2006, up to March 31st, 2009, which fixed a six digit lump sum for use of the GEMA world repertoire by way of upload on its server, making available and visualization (reproduction) on the electronic devices of end-users. The rights claimed by CELAS were explicitly excluded.

As injunction claims by CELAS were imminent, MyVideo filed a declaratory judgment action in the District Court of Munich (*Landgericht München*) against CELAS, seeking a declaration that CELAS had no injunction claim against MyVideo concerning reproduction of copyrighted works for online-uses. In response, CELAS filed a cross-action against MyVideo for injunctive relief regarding the making available on MyVideo's website of 14 individual songs.

During the court proceedings, MyVideo, inter alia, disputed CELAS' status of plaintiff with respect to injunction claims against the website www.myvideo.de. MyVideo claimed, first, that all mechanical reproduction rights were still with GEMA and, second, that CELAS was a collecting society that did not hold the admission as required by UrhWG. Even if the mechanical reproduction rights of the Anglo-American artists resided entirely with EMI Music Publishing Europe Ltd., a fiduciary management for the benefit of "several right holders" – a key characteristic of collecting societies according to UrhWG – would exist. Further, the separate management of mechanical reproduction rights for online-uses would be tantamount to unlawful splitting of a unitary right.

CELAS moved to dismiss the declaratory judgment action and filed action for injunctive relief. CELAS argued that EMI Music Publishing Ltd., after obtaining all rights from its authors and composers, had transferred the mechanical reproduction rights for online-uses within the European Economic Area on an exclusive basis to EMI Music Publishing Europe Ltd., which then had licensed these rights to CELAS for the purpose of pan-European licensing and rights management (CELAS did not present the respective agreement, though). Moreover, CELAS claimed that it was not a collecting society according to the statement of the DPMA, characterized this statement as binding, and argued that this statement correctly reflected the fact that CELAS only acted for the benefit of EMI Music Publishing Europe Ltd. CELAS further claimed that according to the notion of common law, copyright publishers in common law countries obtained not only derivative rights from the authors and composers but their full copyrights.

According to CELAS, MyVideo twice infringed its mechanical reproduction rights (Sec. 16 German Copyright Act (*Urheberrechtsgesetz (UrhG)*) by the service www.myvideo.de in regard to 14 songs specified in its motion: firstly, by the upload of video material including these songs on MyVideo's server and, secondly, by the visualization of such video material on electronic devices of end-users when the videos are transmitted by streaming.

With its decision of June 25, 2009, the District Court of Munich granted declaratory judgment to MyVideo and denied CELAS' cross-motion for injunctive relief. The court stated:

- "The mechanical reproduction rights for online-uses have not been validly transferred to Defendant. A splitting of online rights into the right to make available (Sec. 19a UrhG) and the mechanical reproduction right (Sec. 16 UrhG), as claimed by Defendant, is not possible. Because of the technical conditions a making available is not feasible without a reproduction. That is why Defendant is not entitled to claim injunctive relief against Plaintiff."
- "German copyright applies to the present case because its focus is on the question of infringements of copyrights in Germany."
- "The splitting of rights for online-uses, as claimed by Defendant, in respect to Anglo-American artists contracting with EMI into mechanical reproduction rights (Sec. 16 UrhG) and rights of making available (Sec. 19 a UrhG) is inadmissible because 'mechanical reproduction rights for online-uses without the right of making available' does not exist as individual kind of use. This is why EMI Music Publishing Europe Ltd. could not transfer to Defendant the rights which Defendant now claims. This is why Defendant cannot claim injunctive relief against Plaintiff."

The District Court stated that a specific kind of use could be licensed according to Sec. 31 (1) UrhG only if the kind of use qualified as sufficiently clearly separable, economically and technically autonomous and unitary use according to prevailing public understanding. Citing German jurisprudence, the District Court held that reproduction(s) were inherent to the making available of copyrighted works online and, thus, could not be separated from the right to make available. If the splitting was admissible and rights would reside with different right holders, users would face substantial legal uncertainty and the risk of double claims regarding a uniform technical process. The fact that in other countries mechanical reproduction rights and performing rights are managed by different entities is, according to the court, of no meaning for the case *MyVideo v. CELAS*.

As CELAS was already denied the necessary status of plaintiff, the District Court held that all other disputed issues such as sufficient proof of chain of rights, aspects of antitrust law or qualification of CELAS as a collecting society did not need to be decided. However, the court stated in obiter dictum that there was good argument for CELAS being a collecting society and thus, as the admission required by Sec. 1 (3) UrhWG was (and is) missing, being blocked from claiming any rights.

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