

Update – Liability of One-Click Hosting Providers for Users’ Copyright Infringements under German Law



One-click hosting services have a catchy English nickname in Germany: They are often referred to as “sharehosters”; a friendly expression akin to the “filesharing” euphemism that, in legal terms, mostly boils down to plain old copyright infringement. Most such services can be used with some degree of anonymity, and copyright owners have therefore often tried to go after the hosting services themselves to stop the illegal distribution of copies of protected works. The extent of liability and the copyright compliance requirements for one-click hosting sites have however been the subject of extensive legal discussion and shifting case law for at least five years in Germany.

If customers infringe copyrights by sharing their files, one-click hosting providers also face some legal exposure under German law.

In 2012, Germany’s highest civil court, the Federal Court of Justice (BGH) handed down a first ruling about the liability of one-click hosting services, which provides some practical guidelines to determine duties of care for one-click hosting providers. A second decision followed in summer 2013. However, liability highly depends on the individual case so that there is still no fixed checklist for the compliance of one-click hosting services.

1. Perpetrator, Participant, Interferer?

Normally, liability for a copyright infringement requires distributing or at least willingly and knowingly participating in the unlicensed distribution of protected works. It is an almost common consensus that one-click hosting services themselves do not distribute files as perpetrator or participant. In fact, these services are only considered as intermediaries for their users’ reproduction and distribution of files.

However, hosting providers can be held liable for their users’ uploads in Germany on the basis of a legal theory called “Störerhaftung” (interferer’s liability). According to long-established German case law, an interferer is someone who – without being a perpetrator or participant – wilfully contributes to a violation of rights in a sufficiently causal manner. The interferer does not automatically owe damages for the initial copyright infringement itself, but must cease and desist, and pay damages for legal fees associated with such cease and desist requests or injunctions, and must pay damages for any breach or violation of a cease and desist undertaking or injunction. However, the courts have made it clear that this liability cannot be unreasonably extended to third parties who are neither perpetrators nor participants. Thus, the liability on the basis of “Störerhaftung” requires a breach of a reasonable duty of care (referred to as a “Prüfpflicht”,

literally a “duty to audit”), the precise extents of which depend on the individual case. One of the guiding principles set forth by the BGH in consistent case law, however, is that the duties of care must be reasonable and cannot be so extensive that they would destroy an otherwise legitimate business model.

The extent of these audit duties is the key aspect of the discussion about the liability of hosting providers and probably the main issues for legal disputes in this field in Germany. There have been several contradictory court decisions on the extent of audit duties for one-click hosting sites in the past five years, most of them involving the Swiss one-click hosting company Rapidshare. As the following list shows, the scope of these court rulings was quite broad:

Higher Regional Court of Cologne, 2007¹

Rapidshare is not required to use file name filters to detect specific copyright protected works, as those filters are not able to differentiate between legal and illegal copies, and it is therefore not reasonable to mandate their use.

Higher Regional Court of Hamburg, 2009²

The business model of Rapidshare is not legitimate as it aims at enabling illegal use of copyrighted works. Therefore, all necessary measures to detect and delete copyright protected works are to be considered reasonable.

Higher Regional Court of Düsseldorf, 2010³

Rapidshare fulfils its audit duties by deleting files that are reported to be illegal copies of protected works. Further monitoring of stored, uploaded or downloaded files is unreasonable.

Higher Regional Court of Hamburg, 2012⁴

Considering the rise of cloud services and the need for online storage, the business model of Rapidshare cannot be considered illegitimate anymore. However, the fact that Rapidshare allows completely anonymous up- and downloads still leads to a high risk that the service is abused for purposes of piracy. Therefore, Rapidshare has a significant duty of care, but not necessarily to the same very broad extent the court had ruled in its decision in 2009.

¹ OLG Köln, Urt. v. 21. Sep. 2007 - 6 U 86/07. MMR 2007, 786

² OLG Hamburg, Urt. v. 2. Jul. 2008 - 5 U 73/07, MMR 2008, 823

³ OLG Düsseldorf, Urt. v. 27. Apr. 2010 - I-20 U 166/09, MMR 2010, 483

⁴ OLG Hamburg, Urt. v. 14. Mar. 2012 - 5 U 87/09 MMR 2012, 393

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2. Decisions of the Federal Court of Justice⁵

In its rulings in 2012 and 2013, the German Federal Court of Justice (BGH) stated that a one-click hosting provider is required to take all technically and economically reasonable measures to prevent future uploads of files that have been reported to be illegally distributed via its service. The court held that the following audit duties are reasonable in the specific case:

- Notice and take down

A one-click hosting service is obliged to delete any files that are reported to be illegal copies of copyrighted works.

- File name filters

If a one-click hosting service is notified of a copyright violation, it is not only required to use file name filters to avoid future uploads of the same or similar files. It is also obliged to use these file name filters to scan files that are already stored on the servers. According to the BGH, the need for an effective protection of copyright outweighs the interest of users to upload and store legal backup copies of protected works.

- Monitoring of link lists

A one-click hosting service is required to actively monitor online third party link lists known for publication of links to infringing files stored on the hosting service’s servers, and delete any infringing content that is advertised on such sites. However, in this context the BGH points out that this obligation can only include a limited number (in the 2012 case the BGH speaks about a "single-digit number") of third-party link lists, as a more comprehensive monitoring obligation would be economically unreasonable.

Although the BGH has given quite precise guidelines for audit duties of one-click hosting providers, it must be emphasized that these guidelines depend on the individual and specific design and business model of the particular service at issue in the case. Audit duties might, for example, go further if the one-click hosting service were to play an “active role” in terms of knowledge of or control over the data (European Court of Justice, Case C-324/09, L’Oréal vs. ebay).

At the same time, it must be taken into account that cloud computing has become a part of our everyday life, as the

Higher Regional Court of Hamburg correctly points out in its 2012 decision. The mere fact that a service allows sharing of files does not automatically lead to extensive audit duties. Yet, even though it was less harsh regarding the legitimacy of the business model in light of these new developments, the court did not consider Rapidshare as a normal cloud storage service. Consequently, the BGH emphasised in its recent decision in 2013 that Rapidshare is encouraging copyright violations and abuse of its service, in particular because it goes a long way to protect the anonymity of its users. As a result, the BGH has also clarified in its 2013 decision that in case of dispute the host provider is required to supply evidence that all audit duties have been fulfilled in the specific case, which means a significant easing of proof for right holders.

In a nutshell, the audit duties laid out by the BGH in its 2012 and 2013 decisions are not an exhaustive checklist for all types of one-click hosting, but a reasonable minimum standard. Any one-click hosting provider that falls short of these measures most likely faces liability under the theory of “Störerhaftung”, and can be targeted by cease and desist letters on behalf of copyright owners.



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⁵ BGH, Urt. v. 12. Jul. 2012 - I ZR 18/11, MMR 2013, 185 – Alone in the Dark; Urt. v. 15. Aug. 2013 - I ZR 80/12 - Rapidshare, <http://tmd.in/u/1413>