

## LEGAL OPINION

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Prepared for

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by

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I. Facts of the Case	3
II. Questions	3
III. Opinion	4
1. Copyright Concerns	4
a) Evasion of Effective Safeguards as provided by § 95a UrhG	4
b) Infringement of YouTube's Ancillary Copyrights as database producer (§ 87b para. 1 sentence 1 UrhG)	5
c) Copyright Holder's Song Rights are not Infringed	6
2. Concerns re. Competition Law – YouTube is not deliberately obstructed (§ 4 Nr. 10 UWG)	8
IV. Summary	9

## I. Facts of the Case

1. PMD Technologie UG provides an internet mp3 conversion service under the URL [www.youtube-mp3.org](http://www.youtube-mp3.org) (hereinafter **youtube-mp3.org**) for YouTube. In order to extract a video soundtrack and to store it as an audio file, the user has to enter the URL of the YouTube video on the website: [www.youtube-mp3.org](http://www.youtube-mp3.org). When the "Video in mp3 umwandeln" button is clicked, the user downloads the video onto a temporary-storage server provided by PMD Technologie UG. The video track is thereby separated from the audio track and stored as an audio file. A link is then sent to the user whereby he is able to download the mp3 file onto his hard drive. The mp3 file is then automatically deleted from the server.
2. YouTube is a platform financed by advertising. It is available to users free of charge, with no requirement to register or to agree to YouTube's "terms of use" to be found at [www.youtube.com/de/terms](http://www.youtube.com/de/terms).

Downloading of content is forbidden under the "terms and Conditions (6.1.K):

*"You agree not to access Content or any reason other than your personal, non-commercial use solely as intended through and permitted by the normal functionality of the Service, and solely for Streaming. "Streaming" means a contemporaneous digital transmission of the material by YouTube via the Internet to a user operated Internet enabled device in such a manner that the data is intended for real-time viewing and not intended to be downloaded (either permanently or temporarily), copied, stored, or redistributed by the user."*

3. In an email dated 8.6.2012, YouTube LLC demanded of PMD Technologie UG to cease the youtube-mp3.org service. They argued that YouTube itself would not provide a download function and that Downloading of videos would expressly be forbidden in the terms of use. Youtube-mp3.org would also infringe the API terms of service even though the service does not use the YouTube API.

## II. Questions

1. Can YouTube forbid PMD Technologie UG in Germany from providing the mp3 conversion service on the basis of the German Copyright Act (hereinafter "**UrhG**")?
  - a) From a technical point of view YouTube uses – apparently deliberately – a streaming method without a download function in order to real-time viewing only. A permanent storage by the user is clearly not intended. Does this constitute an evasion of effective safeguards as provided by § 5a UrhG?
  - b) Does the download of videos from YouTube and storage as audio tracks infringe YouTube's Ancillary Copyrights as database producer as set out under § 87b Abs. 1 UrhG?
  - c) Does the download of videos from YouTube in accordance with YouTube's "terms of use" infringe the copyright holder's song rights? Is the storage as privileged private copy – despite the "prohibition of downloading" – exempted from the requirement to be expressly permitted by the copyright holder according to § 53 Abs. 1 UrhG?

2. Can YouTube prevent PMD Technologie UG from providing the mp3-conversion service on the basis of the German Act against Unfair Competition (hereinafter “UWG”) because
  - a) youtube-mp3.org enables the user to create music files from YouTube videos in opposition the the “terms of use”?
  - b) an internet service for permanent storage of videos from a video-on-demand-site that is financed by advertising, may reduce the number of visitors to the site and thereby reduce the advertising value of the platform?

### **III. Opinion**

#### **1. Copyright Concerns**

##### **a) Evasion of Effective Safeguards as provided by § 95a UrhG**

- (1) § 95a para. 3, sentence 1 of UrhG forbids the provision of services whose primary purpose is to “evade effective safeguards” that are put in place in order to prevent access or use (e.g. downloading) of protected content. The copyright holder who uses such safeguards (and, where applicable, the operator of these safeguards), in this case is entitled to injunctive relief against the service provider under § 97 para. 1 UrhG.<sup>1</sup>
- (2) Initially the permanent recording of a stream constitutes a contradiction of it's technical character. This is because the data is packaged such that it is only stored temporarily for the purposes of playing back the content.<sup>2</sup>
- (3) However storing of (unencrypted) video and audio streams is a phenomenon that has been well-known for many years. Various so-called “streamrippers” are available on the internet and can be used by anyone with average skills. The intended use of broadcasted terrestrial signals, e.g. television or radio, also is the reception and play back of the “broadcasted” TV and radio programmes. Permanent recording of TV and radio programmes by means of cassette-, video- or dvd-recorders – even after conversion to DVB-T (Digital Video Broadcasting – Terrestria) does not constitute an evasion of effective safeguards as long as encryption or access control system are not hereby circumvented.<sup>3</sup> Nothing else can apply to streamed content.
- (4) The mere fact that content is solely available as a stream and permanent storage by means of a simultaneous download function is not supplied, does itself not constitute an effective safeguard as defined by § 95a para. 2 UrhG.<sup>4</sup> Thus neither the provision nor use of download or conversion services constitutes

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<sup>1</sup> Wandtke/Ohst in: Wandtke/Bullinger, UrhR, 3. Ed. 2009, § 95a UrhG, Rn. 88, 92 m. w. N.

<sup>2</sup> Vianello, Retrieval and Recording of Video and Audio Streams for private Use, CR 728, 732.

<sup>3</sup> BGH (FCJ), Decision dated 22.4.2009, I ZR 175//07,ZUM 2009, 765 – Online Video Recorders; LG München (Munich Regional Court), Decision dated 22.11.2010, 21 O 19689/10 – Digital Receivers with Online Encryption Facilities.

<sup>4</sup> Endorsed by Vianello, a. a. O., CR 2010, 728, 734.



an infringement by evasion, as long as no further safeguards that the platform operator has implemented in order to effectively prevent storage are circumvented.

- **As long as YouTube has not implemented any additional safeguards e.g. encryption techniques in order to effectively prevent permanent storage of streamed content, there are no grounds to object to the services provided by or the use of youtube-mp3.org on the basis of the provisions of § 95a para. 3, sentence 1 UrhG.**

**b) Infringement of YouTube's Ancillary Copyrights as database producer (§ 87b para. 1 sentence 1 UrhG)**

- (1) Systematic or methodical collections e.g. of copyrighted works (such as videos) that are accessed by electronic means and whose obtaining, verification or presentation requires significant investment are defined as databases and protected by § 87a para. 1 sentence 1 UrhG.
- (2) It is already doubtful whether YouTube, as operator of an internet platform on which users can upload and broadcast videos, may acquire ancillary copyrights to a "database" at all. Assuming that YouTube could claim ancillary copyrights to the platform as "database", PMD Technologie UG as provider of the conversion service could only be considered as participant or interferer to the infringement by the user. PMD Technologie UG provides the service only as a tool to enable users to convert internet content from YouTube.<sup>5</sup>
- (3) Only in the event that the users infringe YouTube's ancillary copyrights by using youtube-mp3.org to download music, PMD Technologie UG could be considered liable as service provider for these infringements.
- (4) The exclusive rights enjoyed by the producer of a database apply next to the misuse of the entire database also to the "repeated and systematic duplication of insignificant parts of the database", § 87b para. 1 sentence 2 UrhG. This is, however, conditional on it being contrary to the normal use of the database and the legitimate interests of the database producer being unreasonably compromised thereby.
- (5) Parts of a database can only be considered significant in terms of type or scale if it is qualitatively or quantitatively significant, Art 7 para. 1 Database Guidelines.<sup>6</sup> The extent of the outlay in obtaining, verifying and presenting this part of the database respectively the relationship of the volume of data concerned as against the volume of the entire database is the operative factor<sup>7</sup>.

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<sup>5</sup> BGH (FCJ), Decision dated 22.4.2009, I ZR 175//07, ZUM 2009, 765 – Online Video Recorders, Rn. 17; BGH (FCJ), Decision dated 22.6.2011 – I ZR 155/10, WRP 2011, 1469 – automobil-onlineboerse, Rn. 19.

<sup>6</sup> Directive 96/9/EG of the European Parliament and Council dated 11 March 1996 regarding the legal protection of Databases.

<sup>7</sup> EuGH (ECJ) dated 5.3.2009, C-545/07, GRUR 2010, 1004 – Apis/Lakorda Rz. 59; EuGH (ECJ) dated 9.11.2004, C-203/02, GRUR 2005, 244, 59 – BHP Horse Race Betting, Rn. 70; BGH (FCJ), Decision dated 22.6.2011 – I ZR 155/10, WRP 2011, 1469 – automobil-onlineboerse, Rn. 42.

- (6) Users are able to store videos as music files only one at a time using youtube-mp3.org by entering the URL of the video manually. Seen against the total number of videos available on YouTube, the number of copies that users of the conversion service are able to make is minimal. With regard to the number of individual videos uploaded by third parties and copied by users of the conversion service, YouTube certainly makes no relevant investment. Altogether “significant parts” of YouTube’s entire collection of videos are not being copied.

➤ **Whether or not the conversion service is hereby operating contrary to YouTube’s “normal use of the database” or is unreasonably damaging YouTube’s legitimate interests does not need to be resolved here. Possible ancillary copyrights of YouTube to the platform are not infringed by users downloading videos/music by means of youtube-mp3.org. At the most, only insignificant parts of the YouTube “database” are copied. Any claims by YouTube that its rights as producer of the database as defined in § 87b para. 1 UrhG are therefore invalid.**

**c) Copyright Holder’s Song Rights are not Infringed**

- (1) YouTube does not appear, where recognisable, to have any exclusive exploitation rights on the videos that are broadcasted via the platform assigned to them. Neither does it appear to be the case that the owners of the videos empower YouTube to enforce their rights against third parties.

It is therefore very doubtful whether YouTube, as operator of the platform has the right to sue for copyright infringements based on the download of audio files or the conversion service.

- (2) Any permanent reproduction of the streamed media on a digital device – irrespective of the used file format or storage medium – constitutes a reproduction according to § 16 UrhG and generally requires the permission of the affected copyright holder.<sup>8</sup>
- (3) In deviation to this, natural persons may make copies for their private use without the permission of the copyright holder. This is conditional on the copies not being used, either directly or indirectly for commercial purposes and that no clearly illegally produced versions are used or made publicly available, § 53 para. 1 sentence 1 UrhG.
- (4) During the implementation of the provisions of the Directive 2001/29/EG 9, the German legislator specifically chose not to except digital copies from this privilege of copies for private use § 53 para. 1 UrhG.<sup>10</sup> The privilege of copies for private use that is firmly incorporated in § 53 para. 1 UrhG cannot be excluded by an unilateral declaration in YouTube’s “terms of use”. The text of the

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<sup>8</sup> Heerma in: Wandtke/Bullinger, a. a. O., § 16 Rn. 13 f.

<sup>9</sup> Directive 2001/29/EG of the European Parliament and Council dated 22.5.2001 on the harmonisation of certain aspects of copyright law and related rights in the information society (cf. Art. 5 para. 2 lit. b).

<sup>10</sup> cf. page 18 f., Explanatory Memorandum, BT-DS 16/1828.



explanatory memorandum to the draft of the 2nd Act on copyright in the information society of 15.6.2006<sup>11</sup> states:

*„As far as works ... are made publicly available by means of contractual agreement, such that they are available to members of the public at the time or place of their choosing, copies thus made, under these contractual agreements do not constitute personal copies as provided for by § 53 para. 1, rather they are acts of exploitation that have been licensed by the copyright holder.“*

Legal personal copying privileges as in § 53 para. 1 UrhG apply fully outside of such contractual limitations on use.

- (5) The usage of the YouTube platform does not, however, occur on the basis of such a contractual agreement between YouTube and the user. There is no requirement to register in order to make use of the YouTube video platform. Simply accessing the YouTube platform cannot in any way be defined as a legally binding intention of visitors to the portal to enter into a contract as defined under § 145 BGB (German Civil Code).<sup>12</sup> It also seems doubtful that simply accessing or using the platform could constitute legal acceptance of a Use/Licence Contract as defined by § 147 BGB (GCC). Although the average internet user should be aware that commercial service providers usually set out conditions of use that regulate the rights and duties of their users, it is common in electronic business transactions, that protected content can only be accessed following registration and acceptance of the terms and conditions. From the user's point of view, the simple use of an internet service does not constitute contractually relevant use, with any legally binding relationship with the operator.
- (6) Even in the event of an effective contract being concluded between operator and user simply on the basis of using the platform, the conditions of use here, would not effectively have been incorporated into the contract cf. § 305 para. 2 Civil Code (BGB). General terms and conditions, which includes YouTube's terms of use can only be incorporated into a contract if the other party to the contract accepts them. This acceptance must not necessarily be explicitly given, acceptance may be implicitly given also. It is, however, standard practise on the internet to require the user to tick a box in order to explicitly declare acceptance of the terms and conditions or conditions of use and this would speak against implicit acceptance of YouTube's terms of use in this instance –YouTube does not adhere to this standard practise.
- (7) The privilege to make copies for private use does not become invalid simply by the user accessing an illegal version of a work. It does not apply in case “clearly illegal” copies are concerned, § 53 para. 1 sentence 1 UrhG. How to define a “clearly illegal” copy is highly controversial in legal literature. The music accessed or downloaded through using youtube-mp3.org must have written the infringement more or less on its forehead. This is most certainly seldom the case, if ever.

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<sup>11</sup> BT-DS 16/1828.

<sup>12</sup> cf. Spindler, Contract Law for Internet Providers, 2. Ed. 2005, Part IV Rz. 31f.

- (8) Finally, the privilege to make copies for private use is not affected by the user storing data by means of an internet-based conversion service operated by a third party and a temporary copy on PMD Technologie UG's server. A reproduction only produces who actually masters the final physical fixing. It is therefore of no significance if the user hereby makes use of technical means even if these are provided by a third party, as in this case PMD Technologie UG.<sup>13</sup>.

➤ **The downloading of streamed Videos from YouTube for private uses does not currently require the permission of the copyright holder. The storing of audio files is privileged by the right to make copies for private use in § 53 para. 1 UrhG (Federal Copyright Law). This applies as long as YouTube does not require its users to expressly agree to its terms and conditions or legally forbids downloading or implements technical safeguards to make permanent copying impossible. Just because storing of audio files is contrary to YouTube's unilaterally-declared terms of use, does not cancel the right to make copies for private use. Using youtube-mp3.org and the services thereby provided therefore does not infringe the rights of the copyright holder.**

## **2. Concerns re. Competition Law – YouTube is not deliberately obstructed (§ 4 Nr. 10 UWG)**

According to § 4 no. 10 UWG, unfair competition occurs when competitors are deliberately obstructed. According to § 8 UWG (FUCA) para. 1, sentence. 3 no. 1 i. c. w. §§ 3, 4 no. 10 UWG the contravener can be sued for cessation and desistance of the concrete obstructive activity.

Whoever knowingly and deliberately attempts to cause breach of contract by a competitor is also deemed to commit an act of unfair competition according to § 4 no. 10 UWG (FUCA).<sup>14</sup>

- (1) The User does not breach any contract in downloading content from YouTube in contravention of YouTube's terms of use. There is no effective contract of use between the User and Youtube. There is certainly no effective incorporation of a downloading ban in any contractual arrangement that might be deemed to have occurred. (cf. III. 1 c) (5),(6)).<sup>15</sup> Just because YouTube states unilaterally in its "terms of use" that downloading is not desired, this is not sufficient to cause an obstruction in terms of competition law.

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<sup>13</sup> BGH (FCJ), Decision dated 22.4.2009, I ZR 175//07, ZUM 2009, 765 – Online Video Recorders, Rz. 16.

<sup>14</sup> Köhler in: Köhler/Bornkamm, UWG, 30. Aufl. 2012, § 4 Rn. 1.107

<sup>15</sup> Also similarly rejected: BGH (FCJ), a. a. O. – Automobil-Onlinebörse, Rn. 71.



- (2) The Federal Court of Justice (FCJ) found that no deliberate obstruction in terms of competition law was committed against a platform operator with regard to a software offer that was based on his platform and which impaired the commercial exploitation of this platform:

*"If the (platform operator) makes his internet site fully accessible, he cannot then - as the court of appeal has accurately stated - expect that users will also access his internet site in order to access his data unless he has put technical safeguards in place and these have been circumvented."<sup>16</sup>*

- **As long as YouTube does not put any technical safeguards in place to effectively prevent downloading of streamed content or make access to the platform dependent on acceptance of the terms and conditions, which include the ban on downloading, YouTube cannot forbid youtube-mp3.org on the grounds of unfair competition.**

#### IV. Summary

In view of the foregoing, there are strong arguments in favour of YouTube not being able, successfully to object to either the use or the provision of the mp3 conversion service, mp3.org on the grounds of an infringement of its copyright or of unfair competition:

- As long as YouTube does not implement any additional safeguards such as encryption technology, in order to prevent permanent storage of streamed content, circumvention of technical safeguards does not occur in accordance with the provisions of § 95a para. 1 UrhG.
- Downloading of streamed content from YouTube by natural persons for their private use does not currently require the consent of the copyright holder. The right to make copies for private use is protected under § 53 para. 1 UrhG. This applies for as long as YouTube does not conclude effective contracts of use with its users that refer to the download ban or does not implement technical safeguards that prevent permanent storing of content. The right to make copies for private use is not affected by the fact that in its terms of use, YouTube declares unilaterally that it does not wish copies to be made.
- Possible ancillary copyrights of YouTube to the platform as "database" are not infringed by users using youtube-mp3.org in order to download files. At the most, insignificant parts of the YouTube database are reproduced. There is therefore no infringement of YouTube's rights as producer of the database as provided for under § 87b para. 1 UrhG (Federal Copyright law).
- As long as YouTube does not implement any technical means of effectively preventing the downloading of streamed content or makes use of the platform conditional on prior acceptance of the terms and conditions, YouTube cannot prevent the use of youtube-mp3.org with reference to the "download ban", on the grounds of deliberate obstruction of a competitor as provided for in § 4 no. 10 UWG.

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<sup>16</sup> BGH (FCJ), a. a. O. – Automobil-Onlinebörse, Rn. 69.

Please note, that we are licensed to practice law in Germany and we do not purport to be experts on, or to express any opinion herein concerning, any laws other than the laws of Germany as in effect on the date hereof. The aforementioned legal opinion exclusively refers to the German legal situation.



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