

WILDE BEUGER SOLMECKE RECHTSANWÄLTE

WILDE BEUGER SOLMECKE Kaiser-Wilhelm-Ring 27 -29, 50672 Köln

Mr
Philip Matesanz
youtube-mp3.org

Rafaela Wilde
Michael Beuger
Christian Solmecke LL.M.
Nicola Simon
Fachanwältin f. Arbeitsrecht
Otto Freiherr Grote
Kilian Kost
Frank Fischer
Jennifer Jessie
Matthias Besenthal LL.M.
Dr. Eva-Maria Brus
Agnieszka Slusarczyk

sent by E-mail: pm@youtube-mp3.org

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Our reference:	3850/12	jl	Solicitor:	Christian Solmecke
Secretary:	Jessica Laymann		Telephone:	0221 951563-45

youtube-mp3.org Advice / Legal Opinion

Dear Mr Matesanz,

I write to you concerning the above mentioned case.

For your information please find below our legal opinion on the legality of the service offered by www.youtube-mp3.org.

Yours sincerely,



Christian Solmecke, LL.M.
Solicitor

Postfach 19 04 23
50501 Köln

Gerichtsfach K 1581

Tel. 0221 951563-0
Fax 0221 67789727
www.wbs-law.de
info@wbs-law.de

Opinion on the legality of the service: www.youtube-mp3.org

This short opinion analyses the legality of the service offered by www.youtube-mp3.org. The analysis considers the legal position in light of an E-mail received by youtube-mp3.org on 08.06.2012, in which YouTube assert that the service provided by www.youtube-mp3.org infringes on YouTube's Terms of Service and consequently demand a cessation of that service.

I. Overview of the service

Through the www.youtube-mp3.org service (hereafter: youtube-mp3.org) users are able to convert audio content available on the platform www.youtube.com (hereafter: YouTube) into MP3-format. To do so, there is no requirement for that user to be registered.

After inserting the relevant YouTube link on youtube-mp3.org the audio content from videos is automatically converted into MP3 format. The entire conversion process takes place within the youtube-mp3.org architecture. The YouTube-API is not accessed. After the conversion, which takes around three to five minutes, is complete the user is provided with a link through which they can download the YouTube-Video as an MP3.

This service is provided to the user for free.

II. Legality of the service

I. Infringement of YouTube's Terms of Service

Paragraph 6.1.K of the YouTube Terms of Service (available at: <http://www.youtube.com/t/terms> (Location Germany)) provides that YouTube content may only be accessed via streaming. The conversion

of the content to a saveable format (such as MP3) is therefore not permitted.

Under paragraph 6.1.K. the user agrees not to access content for any other reason other than for “personal, non-commercial use solely 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.”

However, this clause, as well as YouTube's entire Terms of Service, do not apply to and have no legal effect on youtube-mp3.org. This is because a relationship, through which the application of the Terms of Service can come about, is lacking. Youtube-mp3.org has not conducted itself in any manner, so as for that conduct to amount to the acceptance of an expressed intention aimed at the creation of a contractual relationship with YouTube. Furthermore, youtube-mp3.org has received no declaration from YouTube purporting to the creation of a contract.

Additionally, the Terms of Service would have no effect as General Terms and Conditions within the meaning of paragraph 305 subparagraph 1 sentence 1 German Civil Code if any contract between YouTube and youtube-mp3.org were to come into existence. Where contracts between companies are concerned, an express or implied agreement must take place in order for General Terms and Conditions to be included in the contract (Jauernig, paragraph 305 BGB Rn. 18). No such agreement has taken place here.

Youtube-mp3.org has never acknowledged the Terms of Service, nor has it declared itself in agreement with them.

An infringement of the rules contained in YouTube's Terms of Service has therefore not taken place and as such, no legal consequences follow.

2. Infringement of YouTube's API Terms of Service

Youtube-mp3.org does not utilise the YouTube API. The entire conversion takes place within youtube-mp3.org's architecture.

As a result, YouTube's API Terms of Service do not apply here, as no contract has been created which allow for would the Terms of Service to come into effect (as in II.1 above).

3. Legality of the service under copyright legislation

The demand for cessation of the youtube-mp3.org service contained in the E-mail sent from YouTube to youtube-mp3.org on 08.06.2012 is based solely on an infringement of YouTube's Terms of Service and YouTube's API Terms of Service. As these Terms of Service do not apply, it must be assessed whether the youtube-mp3.org service infringes on copyright legislation.

a. Copyright infringement by youtube-mp3.org

An infringement of copyright can only be found if youtube-mp3.org has undertaken an action to which copyright legislation applies. Legislative provisions which could come into consideration here include the right of reproduction (Paragraph 16 Copyright Law) and causing (a work) to be made publicly available (Paragraph 19a Copyright Law).

A reproduction under paragraph 16 Copyright Law includes any physical production of a work which is capable, either directly or indirectly, of

perception by the human senses. (Case law referred to: St. Rspr. BGHZ 17, [267](#), [269](#); BGH, GRUR 1982, [102](#), [103](#); BGH, GRUR 2001, [51](#), [52](#); s. auch amtl. Begr. BT-Drs. IV/270 S. 47). Those who undertake the technical creation of a physical production are the producers of that production. As such, the question is one of a technical matter. It makes no difference if the producer makes use of technical aids, even if they are provided by a third party (BGH ZUM-RD 2009, 508, 511 – Shift.TV). The producer of the reproduction in this case is therefore the user and not youtube-mp3.org. The user simply makes use of the youtube-mp3.org service to reproduce a work. The conversion of YouTube video content occurs upon insertion of the YouTube link by the user automatically and without human intervention. The user alone decides whether and when a reproduction should be created. Youtube-mp3.org provides only a technical aid through which the creation of a reproduction is enabled. Such a reproduction by a user cannot be considered an action taken by youtube-mp3.org itself to reproduce a work (vgl. BGH ZUM-RD 2009, 508, 511 – Shift.TV).

An assessment of whether youtube-mp3.org has made a work publicly available (and therefore infringed upon paragraph 19a Copyright Law) should also be undertaken. Paragraph 19a refers to the right to make a work publicly available, either wirelessly or via cable, in such a way that it allows members of the public to access the work at a time and place of their choosing. Under paragraph 15 sub-paragraph 3 Copyright Law a work is deemed to be made “public” when it is intended for a plurality of persons. This paragraph is not fulfilled in the current case. The converted MP3 file is provided solely to the user who entered the corresponding YouTube link. The file cannot be accessed by other users. As such, a single file which is made available to a single user cannot be said to have been made available to the general public (vgl. BGH ZUM-RD 2009, 508, 512 – Shift.TV). This also excludes the

entire user base of youtube-mp3.org. The right to make works publicly available contained in paragraph 19a Copyright Law refers to keeping a file available for access by members of the public. Offering a conversion service at the end of which an MP3 file can be accessed cannot be regarded as making a work available to the public, as at the time of the offer, the work is not accessible via the service (vgl. BGH aaO). Indeed, the work is only created once the user has completed the action of entering a YouTube link and starting a conversion. As a result youtube-mp3.org undertakes no action which amounts to making a work available to the general public and paragraph 19a Copyright Law is not fulfilled.

Furthermore, YouTube has no recourse under paragraph 97 Copyright Law (and following paragraphs) for infringement of its rights as it has no right of action. Under paragraph 10.1.A of YouTube's Terms of Service (Location Germany) users grant YouTube a non-exclusive licence in regards to content uploaded or posted on YouTube. With a simple right of use, a licensee is prevented from bringing claims based on that right (Wandtke/Bullinger, § 97 UrhG Rn. 11).

b. Liability of the users for infringements of copyright law

No direct copyright-relevant action has been undertaken by youtube-mp3.org. It therefore remains to be assessed whether youtube-mp3.org can be held liable for aiding a user to perpetrate a copyright infringement or whether youtube-mp3.org can be held strictly liable in nuisance. For this to apply, a copyright infringement must be perpetrated by a user. This is not the case. Downloading a converted file is within the right to make copies of works for private use contained in paragraph 53 sub-paragraph 1 sentence 1 Copyright Law. The fact that YouTube's Terms of Use prohibit converting YouTube

content into a permanently saveable format does nothing to change this assessment.

Aside from the fact that not every user of youtube-mp3.org has a registered account with YouTube, as a result of which YouTube's Terms of Service would become applicable, it is debated whether the limitations of the Copyright Law can be contracted out of. Even if it were to be assumed that derogation from paragraph 53 Copyright Law is possible, this would only have contractual consequences. As a result infringements of the YouTube Terms of Service bring with them no infringement of the Copyright Law (Gräbig, GRUR 2012, 331, 337).

Due to the requirements for being an accessory, liability for aiding or in nuisance is not incurred.

Moreover YouTube has no right of action under paragraph 97 Copyright Law and following paragraphs.

Conclusion

The infringement of YouTube's Terms of Service brings with it no legal consequences for youtube-mp3.org. Youtube-mp3.org is also not at fault so far as Copyright Law is concerned. Youtube-mp3.org undertakes no copyright-relevant action. Also, liability of the user's for copyright infringement is not incurred because their actions are covered by the right to make private copies under paragraph 53 sub-paragraph 1 sentence 1 Copyright Law. The demand for youtube-mp3.org to bring about a cessation of its service is therefore unfounded.