



Higher Regional Court
Dresden

Civil Senate

File number: **14 U 503/23**
Regional Court Leipzig, 05 O 807/22

IN THE NAME OF THE PEOPLE

FINAL JUDGMENT

In the legal dispute

[REDACTED]

- Plaintiff and appellee -

Authorized representative:

[REDACTED]

against

Quad9 Foundation, [REDACTED]

[REDACTED]

- Defendant and appellant -

Authorized representative:

Rickert Rechtsanwaltsgesellschaft mbH, [REDACTED]
[REDACTED]

Concerning injunctive relief

the 14th Civil Senate of the Higher Regional Court of Dresden by

Presiding Judge at the Higher Regional Court [REDACTED]r,
Judge at the Higher Regional Court [REDACTED] and
Judge at the Higher Regional Court [REDACTED]

based on the oral hearing of 14.11.2023

found to be right:

1. On appeal by the defendant, the judgment of the Regional Court of Leipzig dated March 1, 2023, case no. 05 O 807/22, is amended and the action dismissed.
2. The plaintiff is ordered to pay the costs.
3. The contested judgment is provisionally enforceable. The plaintiff may avert enforcement by providing security in the amount of 120% of the amount enforceable on the basis of the judgment, unless the defendant provides security in the amount of 120% of the amount to be enforced in each case prior to enforcement.
4. The appeal is not permitted.

Amount in dispute for the appeal proceedings: EUR 100,000

Reasons

A

The plaintiff, a producer of sound recordings, is suing the defendant, which offers a Domain Name System (DNS) resolver, for injunctive relief under copyright law and, in the alternative, for blocking under the German Telemedia Act.

A DNS resolver is a server that is integrated into the so-called DNS lookup. The aim of the DNS lookup is to convert a domain name into the corresponding IP address. The DNS system enables users to use memorable names instead of numerical addresses for computers.

In its judgment of March 1, 2023, to whose factual findings reference is made, the Regional Court ordered the defendant in accordance with the main motion on pain of an administrative fine to be determined by the court for each case of infringement and, in the event that this cannot be collected, an administrative detention order or imprisonment for up to 6 months (administrative fine in individual cases not exceeding € 250,000.00 in individual cases, imprisonment for a maximum of two years in total),

to refrain from distributing the music album " [REDACTED] " with the sound recordings contained therein 1. [REDACTED]

[REDACTED]
[REDACTED] accessible to the public

by providing its users with a DNS resolver service that translates the domain "[REDACTED]" and/or the subdomain "[REDACTED]" into numerical IP addresses, so that with the help of these numerical IP addresses it is possible for the Defendant's users to access the Internet service under the domain "[REDACTED]" and/or the subdomain "[REDACTED]" and/or the other domain(s) and to access links to illegal storage of the album there,

as happened when the defendant provided its users with the DNS resolver service "Quad9" under the IP address 9. 9.9.9, with the help of which the users for the contribution shown in the attached Annex K 36 and the Internet address [http://\[REDACTED\]](http://[REDACTED]), as well as the contribution shown in the attached Annex K 37 and the Internet addresses

[http://\[REDACTED\]](http://[REDACTED]),

[http://\[REDACTED\]](http://[REDACTED])

and [http://\[REDACTED\]](http://[REDACTED])

numerical IP addresses, which enabled them to access the information available at the aforementioned addresses hyperlinks provided at the aforementioned addresses to the storage locations [http://\[REDACTED\]](http://[REDACTED]) and [http://\[REDACTED\]](http://[REDACTED]) and to access the copies of the aforementioned album illegally stored there.

By its appeal, the defendant contests that finding. She claims that she is not liable as a perpetrator for the mere transmission and can invoke liability privileges. She had not carried out an act of communication. A blocking claim also does not exist because the plaintiff has not done enough to take legal action against the host provider of the disputed service.

The defendant applies,

amending the judgment of the Regional Court of Leipzig dated 01.03.2023, Ref. 05 O 807/22 to dismiss the action .

At the Senate hearing on 14.11.2023, the plaintiff, on the advice of the court, filed an alternative motion to the motion filed at first instance in the event that the court assumes a privilege pursuant to Section 8 German Telemedia Act (TMG):

the defendant to avoid a fine to be determined by the court for each case of infringement and, in the event that this cannot be collected imprisonment or detention for up to 6 months [REDACTED]

(fine in individual cases not exceeding in individual cases not exceeding € 250,000.00, imprisonment not exceeding two years in total, to be enforced on its managing director)

its Quad9 DNS service to block its users' access to the Internet service currently called "██████████", as accessible via the URLs ██████████ and ██████████, by blocking the resolution of the domain "██████████" and/or the subdomain "██████████" into numerical IP addresses, insofar as the music album "██████████" with the sound recordings contained therein 1. ██████████

██████████ in the territory of the Federal Republic of Germany made available to the public,

as happened when the defendant provided its users with the DNS resolver service "Quad9" under the IP address 9.9.9.9, with the help of which the users for the contribution shown in the attached Annex K 36 and the Internet address <http://██████████>, as well as the contribution shown in the attached Annex K 37 and the Internet addresses <http://██████████> and <http://██████████> and <http://██████████>, which enabled them to link the hyperlinks provided at the aforementioned addresses to the storage locations <http://██████████> and <http://██████████> and to access the unlawfully stored copies of the aforementioned album.

The appellant applies for

for the appeal to be dismissed.

It supplements and expands on its submissions at first instance.

For further details, reference is made to the exchanged written pleadings including annexes and the minutes of 14.11.2023.

B

The defendant's admissible appeal is successful. The plaintiff has no claim against the defendant to refrain from making the music album "██████████" with the title "██████████" publicly accessible on the territory of the Federal Republic of Germany by offering a DNS resolver that provides a translation of the domain "██████████" and/or the subdomain "██████████" into numerical IP addresses, so that it is possible for users of the DNS resolver to reach these or other websites and to call up existing links to illegal storage of the album.

- I. The action is admissible.
 1. German courts have international jurisdiction.

With regard to the allegation of copyright infringement in relation to the defendant domiciled in Switzerland, international jurisdiction is determined in accordance with the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, concluded in Lugano on 30 October 2007 (OJ L 333, p. 3). October 2007 (OJ L 339, p. 3), which entered into force for the European Union on January 1, 2010 (BGBl. I 2009 p. 2862; amended by the amendment of March 3, 2017 [OJ L 57, p. 63; hereinafter Lugano Convention II]). According to Art. 5(3) of the Lugano Convention II, a person domiciled in a Contracting State may be sued in another Contracting State before the court of the place where the harmful event occurred or is likely to occur, if the action concerns a tortious act or an act similar to a tortious act, or claims arising from such an act. The content of this provision corresponds to Art. 5 No. 3 Brussels I Regulation and Art. 7 no. 2 Brussels Ia Regulation (see Zöllner in Ceph/Voß, ZPO, 2nd edition, before § 12 para. 26). In the case of an alleged infringement of copyright or neighbouring rights by making the protected object publicly accessible via a website, the place of performance of a tortious act within the meaning of Section 32 of the German Code of Civil Procedure (ZPO) is Germany if the rights asserted are protected in Germany and the website is (also) publicly accessible in Germany (BGH GRUR 2022, 1328 - Uploaded III). It is not necessary that the website is (also) accessible in Germany as intended (BGH GRUR 2016, 1048 - Ein Abend mit Marlene Dietrich). In this case, the websites referring to the music album can (also) be accessed in Germany via the defendant's service.

2. The head of claim is not sufficiently specific in this respect and the judgment based on it is too vague as, before describing the specific form of infringement, it refers to "further domain(s)" under which the internet service can be accessed and links to illegal storage of the album can be called up. With regard to these domains that are not specifically named, the enforcement court would have to decide - in a way that should be avoided - whether the requirements for a claim are met, for example with regard to the claim. This is inadmissible - despite the "hare and hedgehog" problem exacerbated by the expected change - Section 253 (2) no. 2 ZPO (BGH, decision of 26.01.2023 - I ZR 111/21 - juris para. 15), which was pointed out at the hearing.
- II. The action is unfounded. The claim for injunctive relief pursued in the appeal instance pursuant to Section 97 (1) UrhG due to a perpetrated communication to the public in the form of making available to the public within the meaning of Section 85 (1) sentence 1 case 3, Section 19a UrhG does not exist against the defendant as a DNS resolver.
1. The claims asserted by the plaintiff are to be assessed in accordance with German law. According to Article 8(1) of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II Regulation), the law applicable to non-contractual obligations arising out of an infringement of intellectual property rights is the law of the country for which protection is claimed. In particular, the existence of the right, the ownership of the right by the infringed party, the content and scope of the protection as well as the facts and legal consequences of an infringement must be assessed in accordance with this law (established case law; see BGH GRUR 2015, 264 - Hi Hotel II). Since the subject matter of the action is solely claims due to an infringement of the phonogram producer rights pursuant to Section 85 (1) sentence 1 UrhG, for which the plaintiff claims protection in Germany, German copyright law is applicable in the case in dispute (BGH GRUR 2022, 1328 - Uploaded III).
 2. The plaintiff is the record producer of the music album by the group "██████████" entitled "██████████". It is indicated with a "(P) & (C)" note on the cover of the sound carrier (ASt 13, K 21). Such a note can give rise to the assumption of own (Section 10 (1) UrhG accordingly) or derived (Section 10 (3) UrhG) ownership of exclusive rights pursuant to Section 85 UrhG (Schulze in Dreier/Schulze, UrhG, 7th edition, Section 10 para. 14, with further references, and Section 85 para. 62a). The P-note may also

indicate that the company was only granted certain exclusive rights of use; in the present case, however, there are no indications of this. The defendant does not show who else should be the producer of the phonogram or that there should be concrete evidence that would cast doubt on the plaintiff's status as the producer of the phonogram. According to Section 85 I UrhG, the plaintiff therefore has, among other things, the exclusive right to make the phonogram publicly accessible within the meaning of Section 19a UrhG.

3. The music album in dispute was made available to the public unlawfully via the website "██████████" and the storage space "██████████".

The phonogram producer's right to make available to the public is a special right of communication to the public (cf. Section 15 (2) and (3) UrhG), which is fully harmonized under Article 3 (2) (b) of Directive 2001/29/EC and must therefore be interpreted in conformity with EU law in accordance with the case law of the Court of Justice of the European Union. Accordingly, a "communication to the public" requires an individual assessment of both the communication to the public and the public nature of the communication, taking into account a number of other criteria which must be applied individually and in their interaction with the other criteria. Among these criteria, the Court has emphasized the central role of the user and the intentionality of his act (ECJ GRUR 2021, 1054 para. 68 - YouTube and Cyando; ECJ GRUR 2016, 684 para. 35 ff. - Reha-Training; ECJ GRUR 2016, 1152 para. 32 ff. - GS Media; ECJ GRUR 2017, 610 para. 49 et seq. - Stichting Brein; BGH GRUR 2018, 1132 - You Tube I).

In the case in dispute, the album was listed on the website "██████████" on 11.3.2021 and 13.3.2021 until 27.06.2021 - before the UrhDaG came into force on 1.8.2021 - and could be downloaded via download links posted there from the server of the file hosting service "██████████" can be downloaded. It is also undisputed that the website "██████████" on March 23 and 24, 2021 using only the defendant's DNS resolver and in this way downloaded the music album from the storage space at "██████████" could be downloaded. This offer was unlawful as the plaintiff had not consented to the music album being made available to the public. As a result, the link reached a new audience that the author had not thought of (see ECJ GRUR 2016, 1152 para. 41 et seq. - GS Media).

A person linking with the intention of making a profit can be expected to carry out the necessary checks to ensure that the work in question has not been made available to the public on the original site without authorization. There is therefore a rebuttable

presumption that hyperlinks have been placed with the intention of making a profit in the knowledge that the work is protected by copyright and that the rights holder has not granted permission to make the work available to the public. If the presumption is not rebutted, the posting of a hyperlink to a work published on the internet without authorization constitutes a "communication to the public" within the meaning of Art. 3 (1) Directive 2001/29 (ECJ GRUR 2016, 1152 para. 51 - GS Media). Here, the presumption is not rebutted, but confirmed (see expert opinion of P.M. GmbH on the "share of protected media offers on the website [REDACTED]", Ast 2 in the associated summary proceedings LG Hamburg 310 O 99/21). Contrary to the opinion of the defendant, the fact that the protected works are not in the access sphere of the person making them available does not speak against making them publicly available through the hyperlinks to illegal download offers.

4. The defendant is neither as offender nor as participant according to Sections 97 para. 1, 15, 19a, 85 UrhG for the infringement.

The defendant makes its DNS resolver available to users and also refers to the disputed domain and the copyright-infringing material via this connection. However, it does not operate the website "[REDACTED]" or the website "[REDACTED]", nor has it provided the link to the storage space on "[REDACTED]" on the website "[REDACTED]".

However, the defendant is also not liable on the basis of Sections 97 para. 1, 15, 19a, 85 UrhG because it did not immediately block access after being notified of an infringement.

- a) A DNS resolver service does not perform an act of reproduction if it does not block the translation to the IP address after being notified of an infringement. It cannot be established that the defendant as a DNS resolver plays a central role with regard to making potentially infringing content accessible (OLG Cologne, judgment of 3 November 2023 - 6 U 149/22 para. 30 f. - juris).

The DNS resolver helps the internet user to resolve domain names into numerical IP addresses during the so-called DNS lookup. The DNS resolver starts the request sequence, which ultimately leads to the URL requested by the user being translated into the required IP address. Only this DNS lookup enables the Internet user, who does not

know the IP address of the domain, to access the site and is therefore invisible. Hypothetical causal processes of using a different DNS resolver do not prevent causality (Nordemann, GRUR 2021, 18, 20).

However, this causality does not result a central role for the DNS resolver. According to Recital 27 of Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society, "the mere making available of the facilities which make possible or bring about a communication" does not constitute a communication (ECJ GRUR 2021, 1054 para. 79 - YouTube and Cyando). The Agreed Declaration of December 1996 on Art. 8 WCT already states: "The making available of the material conditions which enable or result in a communication does not in itself constitute a communication within the meaning of this Treaty or the Berne Convention."

In the case in dispute, the users of the defendant do not make infringing content available for public access, but at best request it. The defendant does not store this content. Nor does she transmit such content, but only the domain request of a user and the IP address of the server on which this content may be stored. She does not initiate this transmission, nor does she select the addressee and the content of the information. She plays a less central role not only in comparison to those who have committed the infringement themselves (operator of the internet site) or have contributed to it by providing services (host provider) (BGH GRUR 2022, 1812 - DNS-Sperre). The DNS provider is also further away from the infringement in relation to the Internet access provider (access provider), which itself did not make any public communication outside of the extended liability regime of the UrhDaG, as it does not transmit any infringing content. Accordingly, the defendant does not play a central role in carrying out infringements on the Internet.

- b) The limited responsibility of access providers also speaks against the DNS being held liable as a perpetrator. The Internet access service provider grants its customers access to protected subject matter that is made publicly available on the internet by a third party. It is therefore to be regarded as an intermediary whose services are used to transfer rights within the meaning of Article 8(3) of Directive 2001/29 (see ECJ GRUR 2014, 468 para. 32 - UPC Telekabel Wien). Its activity of transmission, which is limited to the transmission of information, differs from that of a provider that stores information on a website (ECJ GRUR 2016, 1146 para. 60 - McFadden). At most, the access providers

can be held liable in court as transmitters of information pursuant to Section 7 (4) TMG, but not as perpetrators for communication to the public (see ECJ GRUR 2014, 468 para. 32 - UPC Telekabel Wien; ECJ GRUR 2016, 1146 para. 34 - McFadden; BGH GRUR 2022, 1812 para. 24 et seq. - DNS-Sperre). The more recent case law of the ECJ, which relates to host providers, does not depart from this (GRUR 2021, 1054 para. 77 - YouTube and Cyando). According to the amended case law of the Federal Court of Justice, liability as a perpetrator replaces the previous "Stoererhaftung" (for the operator of a video sharing platform BGH GRUR 2022, 1308 para. 112 f. - YouTube II; for the operator of a share hosting platform BGH GRUR 2022, 1328 para. 41 f. - Uploaded III). This does not automatically extend to service providers other than hosting providers (Ohly, NJW 2022, 2961, 2962 f.).

Otherwise, the liability privilege for transmission, access and Caching services in Art. 12, 13 eCommerce Directive, which was implemented by Section 8 (1), (2), Section 9 TMG would also be evaded (see below). If a resolution of domain names into the IP address by a DNS resolver were to constitute a communication to the public after it has become aware of infringing content, it could not invoke the liability privilege for the mere transmission of information from a DNS resolver.

Section 8 para. 1 TMG, which, however, exempts him from an obligation to react even in the case of positive knowledge (Spindler/Schmitz/Spindler, 2nd ed. 2018, TMG § 8, para. 1; Zurth ZUM 2021, 829).

III. This liability privilege under Section 8 (1) TMG precludes the defendant's liability as interferer ("Störer"), which is expressly pursued in the alternative, especially since it is also not liable as a perpetrator.

1. Pursuant to Section 8 (1) sentence 1 TMG, service providers are not responsible for third-party information that they transmit in a communication network or to which they provide access for use, provided that they fulfill the further requirements specified therein. If these service providers are not responsible, they cannot be held liable for damages or injunctive relief in accordance with Section 8 (1) sentence 2 TMG, in particular due to an unlawful act by a user.

It is true that the defendant does not transmit the content of the website "██████████"

as third-party information in a communication network and it does not provide access to the use of such third-party information. However, the claim is not directed against access to this content. Rather, it is aimed at refraining from translating the specific domains into IP addresses. This includes transmitting the domain name to the name server and the IP address to the requesting customer. Section 8 (1) TMG exempts the DNS resolver as an offer of intermediary services within the meaning of Section 2 No. 1 TMG for the transmission of this information. Section 8 (1) TMG, interpreted in conformity with Art. 12 E-Commerce Directive, not only privileges the provider who transmits information entered by the user in a communication network, but also the provider who provides access to a communication network, without it being important whether the access is provided precisely for the use of information (Spindler, CR 2022, 318; OLG Cologne, judgment of November 3, 2023 - 6 U 149/22 para. 37; a. A. OLG Cologne GRUR 2021, 70 para. 148 - HERZ KRAFT WERKE; LG Cologne ZUM-RD 2023, 299 para.210; LG Hamburg, judgment of 30.11.2021 - 310 O 99/21 para. 43).

The voluntary filtering of malware does not lead to an active role of the defendant and thus not to the loss of the liability privilege (see ECJ GRUR 2021, 1054 para. 68 - YouTube and Cyando).

Moreover, DNS resolvers are further removed from the infringement than access providers. Access providers undoubtedly fall under the exclusion of liability of Section 8 (1) TMG, but they also regularly operate recursive DNS resolvers. If the DNS request were not exempted from liability, this would mean that access providers would still be liable in their capacity as providers of a recursive DNS resolver.

2. In any case, from February 17, 2024, the date of application of the Digital Services Act (DSA) pursuant to Article 93 DSA, the defendant as a DNS resolver service will be able to invoke the liability privilege of Article 4 para. 1 DSA, which is modeled on Article 12 eCRL and is almost identical in wording to Section 8 para. 1 TMG.

The Digital Services Act clarifies in Article 4, Recital 28 in conjunction with Recital 29 DSA. Recital 29 DSA clarifies the liability-privileged status of DNS providers. In Recital 28 to the Digital Services Act, the EU Commission points out that, with

the further development of technologies, DNS services may also fall under the category of intermediaries with privileged liability, provided that their services are limited to the mere transmission of information. Recital 29 emphasizes this: "Intermediary services of a 'pure conduit' include, for example, (...) DNS services and DNS resolvers" (cf. Gerdemann/Spindler, GRUR 2023, 3, 5).

The question of whether the EU regulation has a prior effect can be left undecided. If Article 4 DSA is not merely a clarification, the plaintiff is in any case prevented from asserting the claim for injunctive relief under copyright law pursuant to Section 242 BGB. By refraining from making the content available to the public, the plaintiff is requesting a service that it would have to return on the basis of the liability privilege that would then apply. ("dolo agit, qui petit, quod statim redditurus est"). This is prohibited by the principle of good faith, Section 242 BGB (BGH NJW-RR 2021, 294; BGH NJW 2011, 229; BGHZ 110, 30).

IV. Section 7 (4) TMG is therefore applicable, but does not help the plaintiff to obtain the alternative claim to set up DNS blocks due to a lack of subsidiarity.

1. The subsidiary motion is admissible. The defendant who was successful with the main application at first instance only has to join the appeal of the opposing party in accordance with Section 524 ZPO if it not only wishes to defend the judgment at first instance, but also to extend the applications it made at first instance or to submit a new cause of action (BGH NJW 2015, 1608). However, it has already filed the subsidiary motion in the first instance, so that it did not have to be asserted with the cross-appeal.

2. However, the subsidiary motion is unsuccessful. The plaintiff has not exhausted the concrete and reasonable other possibilities for legal protection. However, this is required under Section 7 (4) sentence 1 TMG in accordance with Article 8 (3) of Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society (see BGH, decision of 26.01.2023 - I ZR 111/21 -, juris para. 3; Leistner, GRUR 2023, 142, 144). Recital 27 sentence 2 of the Digital Services Act also speaks in favor of settling such conflicts without involving the providers of intermediary

services concerned (Hofmann, juris- PR-WettbR 1/2023 note 1).

- a) According to Section 7 (4) sentence 1 TMG, if a telemedia service has been used by a user to infringe the intellectual property rights of another person, the owner of the right may request the service provider concerned to block the use of information in accordance with Section 8 (3) TMG in order to prevent the infringement from being repeated if the owner of this right has no other way of remedying the infringement of their right. The blocking must be carried out in accordance with Section 7 para. 4 sentence 2 TMG must be reasonable and proportionate.

Section 7 (4) sentence 1 TMG is already applicable if a work has been made publicly accessible without the consent of the rights holder on a website to which the telemedia service used provides access (OLG Cologne, judgment of November 3, 2023 - 6 U 149/22 para. 40). This is the case here. The defendant classifies the DNS resolver itself as an intermediary service. The works at issue can be retrieved from the internet service in question via this service and are therefore publicly accessible within the meaning of Section 19a UrhG.

- b) However, in the case in dispute, the requirement of Section 7 para. 4 sentence 1 TMG that there is no other way for the rights holder to remedy the infringement of their rights is not met. A blocking order pursuant to Section 7 para. 4 sentence 1 TMG should only be considered as a last resort in order to avoid the creation of a legal protection gap (see BT-Drucks. 18/12202, p. 12; BGH GRUR 2022, 812 para. 28 - DNS-Sperre).

- (1) Thus, the rights holder is obliged to a reasonable extent to carry out investigations to determine the parties primarily to be held liable by involving state investigative authorities by way of a criminal complaint, the extrajudicial assertion of a claim for third-party information against the host provider or private investigations, for example by a detective (see BGHZ 208, 82 [juris para. 87] - Breach of Duty of Care of the access provider). As a rule, the right holder can also be reasonably expected to take extrajudicial action against a known operator of the website or host provider to remove the copyright-infringing content. In principle, the rights holder must initiate proceedings for interim legal protection against operators or host providers based within the

European Union (BGH GRUR 2022, 1812 para. 41 - DNS-Sperre). Generally reasonable efforts can be omitted in individual cases if they lack any prospect of success for reasons to be explained by the claimant. This may result, for example, from the unsuccessfulness of previous measures - such as interim legal protection proceedings conducted in a different context against the same host provider (BGH GRUR 2022, 812 para. 39 et seq. - DNS blocking).

- (2) Here, the plaintiff has not demonstrated in detail the unreasonableness of further efforts or the hopelessness of a priority claim against the direct infringers, website operators or host providers.

The plaintiff did not initiate investigations by means of a criminal complaint or private investigators. Like the commissioned proMedia GmbH and a courier service (K 31), the attorney of record is a company that carries out investigations in connection with legal violations on the Internet. The plaintiff sent a warning letter to the host provider by e-mail dated March 31, 2021 (K 15, 16) without a response. Before taking action against the defendant, however, it could have first taken action against the Lithuanian host provider of the website in dispute before a German court by way of preliminary injunction proceedings for information. Such efforts in another EU Member State are reasonable for the plaintiff, which is one of the leading German producers of sound recordings (statement of claim, p. 5) and has a considerable self-interest in preventing future copyright infringements (BGH GRUR 2022, 1812 para. 55 - DNS-Sperre).

The plaintiff was aware of the postal address and email addresses of the host provider in Lithuania and Ukraine (K 15, 16). It cannot be assumed per se that a legal claim against the host provider and possibly also against the website operator was futile from the outset, despite the host provider's own statement that it would not respond to abuse notices. It does not appear completely impossible that the direct infringers would have removed the disputed music album from the offer in order to be able to continue using the plaintiff's services with regard to other content in their own economic interest.

An unsuccessful attempt at service in other proceedings conducted at the Copyright Clearing House by a courier service stating that the recipient could not be found at the address given (K 31) was not sufficient. Such an attempt does not deprive a Lithuanian bailiff of the likelihood of success. Nor does it create a factual presumption in this regard (see Leistner, GRUR 2023, 142, 145). It cannot be assumed that this address is not correct in Lithuania. The address stated in the imprint is listed in the commercial register.

Revenue and employees subject to social security contributions were regularly reported at this company address.

- V. The decision on costs is based on Section 91 (1) sentence 1 ZPO. The decision on provisional enforceability is based on Sections 708 No. 10, 711 ZPO.

There is no reason to allow an appeal pursuant to Section 543 (2) ZPO. The judgment is based on the application of recognized principles of interpretation and application of the law to an individual case. The legal problems relevant to the decision have been clarified by the cited decisions. The legal matter is neither of fundamental importance nor does the further development of the law or the safeguarding of uniform case law require a decision by the appellate court.

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