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**Our sign: 5565/2020**

**Rüsselsheim, 14.01.2022**

### **In the litigation**

**Pasche ./ Universal Music GmbH u.a.**

**310 O 316/21**

we refer to our statement of defense and will request at the hearing:

- 1) The action must be dismissed in its entirety.**
- 2) Order the applicants to pay the costs of the proceedings.**
- 3) The plaintiffs are to be ordered to pay the defendant EUR 2,638.42 in pre-litigation attorney's fees plus interest at 5% above the prime rate from 21.11.2020.**

Chancery  
Account:

IBAN: DE81 5008 0000 0671 0244 00  
BIC: DRESDEFFXXX  
Credit institution: Commerzbank

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(\*)The admission to the bar of Mr. RA Grieser has been suspended since 13.10.2012 due to his election as mayor of the city of Rüsselsheim.

**Substantiation:**

**A. Preliminary note**

The present lawsuit is about the responsibility of a web hosting service for the download of YouTube videos by means of the youtube-dl software.

As part of its web hosting service, the defendant provides storage space for the website <https://youtube-dl.org>, on which third parties have provided links to the location of the software at the host provider GitHub. The software itself is not located on the defendant's servers, the defendant had no knowledge of the contents of the website or the function of the software and did not need to have such knowledge.

To download YouTube content, the youtube-dl software does not have to overcome any effective technical measures. YouTube's "rolling cipher" technology is a rudimentary protection that, when viewed objectively, serves to optimize YouTube's advertising-financed business model. YouTube applies this protection uniformly to the plaintiffs' content as well as to all content uploaded by users. Both YouTube and the vast majority of users have an interest in content being downloadable for certain purposes, as is also permitted under YouTube's terms of use.

The defendant is not liable for an alleged circumvention of effective technical measures of YouTube by the users of the software youtube-dl. As a host provider, the defendant can invoke the liability privilege pursuant to Section 10 p. 1 no. 1 TMG. In the absence of a reference to a clear and easily recognizable infringement, the defendant's liability as a participant is excluded for this reason alone. The further requirements of aiding and abetting are also not met since the users of youtube-dl do not act with the necessary intent to circumvent and the defendant in any case lacks the double intent of aiding and abetting. Because of the liability privilege pursuant to Section 10 TMG and the neutral character of the aiding and abetting of which he is accused, particularly high requirements apply here.

The plaintiffs cannot rely on the protection of effective technical measures in the case of YouTube, as this would lead to a disproportionate restriction of lawful uses. Journalists, content creators, human rights organizations, lawyers, and law enforcement use software to download YouTube content for lawful and socially desirable purposes. Youtube-dl allows saving video streams from over 1000 websites and therefore differs from conversion services that are solely designed to save audio streams as .MP3 files for repeated playback.

## **B. Facts**

### **I. About the plaintiffs**

According to their own statements, the plaintiffs are companies in the recording industry that hold exclusive rights of use to numerous sound and film recordings by national and international artists. As a precaution, this is denied with ignorance.

Insofar as the plaintiffs claim to be the owners of the exclusive rights of use of the disputed sound and film recordings of the artists Mia, Wincent Weiss and Robin Schulz, the defendant denies this with ignorance as a precaution. Such contractual provisions are not open to public inspection and only the plaintiffs can provide clarification here.

### **II. About the defendant**

The defendant operates a web hosting service that can be accessed on the Internet at the URLs <https://uberspace.de> and <https://jonaspasche.com/>. It is true that the defendant is solely responsible for the offer on the aforementioned pages, as also indicated by its imprint.

The defendant provides its customers with storage space on the servers of his web hosting service, on which the customers can store websites and their content. In addition, the defendant offers an e-mail service and technical support for the operation of the websites in this context. The defendant's customers pay a freely selectable monthly amount for the web hosting services. Customers can pay into a "credit balance" from which the selected amount is deducted each month.

The defendant provides the storage space for over 50,000 websites; he has no knowledge of the content stored by his customers. The defendant diligently follows up on indications of legal infringements within the scope of his statutory duties of care.

### **III. About the "youtube-dl" software**

"Youtube-dl" is a software that can be used to store audio and video files from streaming services. Youtube-dl is an open source project that is developed collaboratively by several programmers and can be used and developed by anyone. Accordingly, youtube-dl is open

source software under a free license ("It is released to the public domain"), which is not subject to any commercial exploitation.

Youtube-dl enables the download of openly retrievable video streams from over 350 video portals or over 1,000 websites. These range from public broadcasters such as ARD or SWR to the BBC and Vimeo to YouTube and numerous other websites. Downloading or saving content from commercial streaming services such as YouTube Music, Amazon Prime or Spotify, which are protected by encryption measures such as a "Digital Rights Management (DRM)" of the web browser, is not possible with youtube-dl. A complete list of supported websites is available at <http://ytdl-org.github.io/youtube-dl/supportedsites.html>.

**Evidence:** Excerpt of the website <http://ytdl-org.github.io/youtube-dl/supportedsites.html> as screenshot, Annex B1.

The youtube-dl software can be used for countless purposes. Journalists, scientists, law enforcement agencies and human rights organizations regularly use youtube-dl, for example for the purpose of documentation and preservation of evidence. Lawyers use the software to preserve evidence, such as for recording a report that violates personal rights, to present the appropriately secured evidence to the court. The plaintiffs also presumably use corresponding tools to track down rights violations on YouTube. For example, Amnesty International explicitly recommends the use of youtube-dl to document human rights violations on the Internet, as platforms such as YouTube, Facebook or Twitter remove these videos. Amnesty International describes use cases as follows:

"Despite the immense value of open source content for documenting human rights abuses, this content is increasingly threatened with erasure. Under pressure to remove "extremist" and other sensitive content, third-party platforms such as Youtube, Facebook, and Twitter sometimes delete video evidence. For this reason, it is essential that open source researchers preserve the materials that they collect during their investigations by downloading it from the digital platform where it was originally published and storing it in a secure archive.

youtube-dl is an all-purpose tool to download nearly any piece of audiovisual content that you come across online, not just YouTube as the name seems to denote."

**Proof:** Visual inspection of the website  
<https://citizenevidence.org/2019/12/10/the-only-tool-you-need-to-preserve-video-from-virtually-any-online-source/>

HateAid, a civil society organization that supports victims of digital violence in the legal prosecution of personality rights violations on the Internet, also emphasizes that the documentation of rights violations on the Internet is an important prerequisite for proving rights violations to law enforcement agencies and for victims to assert their claims under civil law. Organizations such as HateAid, the affected persons themselves and their lawyers, and law enforcement agencies therefore rely on downloading content from streaming platforms to document rights violations, they say.

**Evidence:** Statement of Josephine Ballon, HateAid Head of Legal dated February 28, 2022, Exhibit B.2

The human rights organization Human Rights Watch also emphasizes the importance of youtube-dl for its work:

As a recent Human Right Watch report "Video Unavailable" notes, the ability to download, archive, and preserve videos documenting human rights abuses is crucial for human rights work because that potential evidence can be removed by the uploader or by the platform where it was published at any moment, especially as commercial platforms like YouTube prohibit graphic violence on their platforms.

The removal of this tool would seriously hamper a key form of evidence gathering. Social media platforms themselves have acknowledged the problem of losing human rights documentation when they remove content and have encouraged groups to archive videos.

"We use youtube-dl to archive and preserve videos related to human rights violations at the highest resolution available," said Nicole Martin, associate director of archives and digital systems at Human Rights Watch. "Losing the ability to download and preserve content would be disastrous to efforts to hold abusers accountable."

**Proof: Visual** inspection of the website

<https://www.hrw.org/news/2020/11/25/us-archivists-victory-over-overbroad-copyright-claim/>

The Freedom of the Press Foundation also impressively describes the importance of youtube-dl for journalistic work:

"In fact, youtube-dl is a powerful general purpose media tool that allows users to make local copies of media from a very broad range of sites. That versatility has secured it a place in the toolkits of many reporters, newsroom developers, and archivists.

[...]

Numerous reporters told Freedom of the Press Foundation that they rely on youtube-dl when reporting on extremist or controversial content. Øyvind Bye Skille, a journalist who has used youtube-dl at the Norwegian Broadcasting Corporation and as a fact checker with Faktisk.no, said, "I have also used it to secure a good quality copy of video content from Youtube, Twitter, etc., in case the content gets taken down when we start reporting on it." Skille pointed to a specific instance of videos connected to the terrorist murder of a Norwegian woman in Morocco. "Downloading the content does not necessarily mean we will re-publish it, but it is often important to secure it for documentation and further internal investigations."

**Evidence:** Visual inspection of the website

<https://freedom.press/news/riaa-github-youtube-dl-journalist-tool/>

Content creators, i.e. YouTube users who upload content professionally, use tools such as youtube-dl to save videos from YouTube, edit them and use them for their own content, for example to reproduce quotes from political speeches. Rezo, one of the best-known content creators in the German-speaking world, describes this as follows:

"The download of YouTube videos is necessary, for example, for evidence purposes in my journalistic videos. When I deal with statements made by conspiracy ideologues on YouTube, for example, I save their videos on my hard drive so that I can prove that they actually made these statements even if the original video is subsequently blocked. It's also necessary to download videos from various websites or media libraries when reproducing quotes, for example from political speeches."

In addition, Rezo explains that in practice, other content creators or newsrooms often download and reuse Rezo's YouTube videos with Rezo's consent:

"As an active member of the YouTube community and a participant in political discourse, I am generally in favour of other content creators or media being able to download my videos themselves and use them for their own formats, although I am happy to be asked for permission in advance. In practice, for example, TV stations ask

me for permission to show clips from my videos in the news. I then usually grant this permission, but do not send the editorial team a copy of my video. Instead, they download the video directly from YouTube and use it for their own reporting. This is standard practice in the industry and is in the interest of both sides. I would be faced with a lot of extra transactional costs if I had to send copies of my YouTube videos to interested media myself. "

**Evidence:** Statement of Rezo dated February 25, 2022, Exhibit B.3

The steps required to save a video or audio stream are taken by the users of youtube-dl themselves. The computing steps required for this take place on the users' computers after they have downloaded the software.

**Evidence:** Expert opinion

The youtube-dl software is stored on the U.S. open source development platform "GitHub" and can be downloaded from there. On the GitHub platform, in addition to the source code of the software, detailed documentation and development notes are also stored, from which the respective lead developers can be identified, as the screenshots of the plaintiffs on p. 18 of the application accurately reflect. GitHub belongs to the Microsoft group and diligently investigates complaints about illegal content. Under the title "Submitting content removal requests", GitHub provides an official way to submit content removal requests and documents these cases.

**Proof:** Screenshots of the web pages

<https://github.com/github/dmca>; <https://docs.github.com/en/github/site-policy/submitting-content-removal-requests>, Exhibit B4

As a precaution, the defendant denies that the developers of the software could not have been identified via their profiles on the GitHub website. The profiles of the developers of the youtube-dl software on GitHub identified by the plaintiffs, however, contain their e-mail addresses, contrary to the plaintiffs' representation.

The plaintiffs claim that the youtube-dl software is also used by the services "FLVTO.biz" and "2conv.com", which are the subject of a legal dispute in the USA. The plaintiffs fail to provide any evidence for this, and the defendant denies this allegation with ignorance as a precaution.

#### **IV. About the website <https://youtube-dl.org>**

As part of its web hosting service, the Respondent provides storage space on his servers for the website, which is accessible under the domain <https://youtube-dl.org>.

The website <https://youtube-dl.org> contains links pointing to the youtube-dl storage space on the servers of GitHub and to the website <http://ytdl-org.github.io/youtube-dl/>. Neither the software itself nor the documentation and other content can be downloaded from the defendant's servers. On the website <https://youtube-dl.org> there is also no information "around the functioning and development of the YouTube-DL circumvention software" (contrary to the statement of the plaintiffs, p. 25). Every single link, also about the functionality and the contents of the software, refers to a website hosted at GitHub.

The youtube-dl software was not on the defendant's servers in September 2020 (contrary to the statement of claim, p. 7). The plaintiffs have not provided any evidence for this inaccurate assertion. The screenshot on p. 8 of the application shows the "mouse-over" text that is displayed when the mouse pointer is moved over the download link. The URL visible in the screenshot is not identical to the location of the file. It is an HTTPS redirect pointing to the storage of the youtube-dl software at GitHub. The defendant was able to determine that the youtube-dl software was not on its servers in September 2020, but was also stored on GitHub's servers at that time. The download links on the website <https://youtube-dl.org> referred to the storage location of the software youtube-dl at GitHub in September 2020. Copies of the website <https://youtube-dl.org/> from this period can be retrieved via the Internet Archive, proving that the download links also referred to files on the servers at GitHub during this period.

**Evidence:** Expert report; documentation of URLs that open when clicking on the download link on the website <https://youtube-dl.org> via archive.org dated August 19, 2020, September 3, 2020, and September 23, 2020, Exhibit B5.

## **V. On the exploitation of the disputed sound recordings on YouTube**

### **1. YouTube terms of use allow download**

The general terms and conditions of YouTube permit the downloading of content. According to the terms of use referred to by the plaintiffs, downloading is not permitted for every purpose, but within the scope of contractual and legal permissions (application p. 13: "[...] except (a) in the manner authorized on the Service; or (b) after prior permission by YouTube in text form



and, where relevant, by the respective rights holders or (c) to the extent permitted by applicable law.").

It is denied with ignorance that the disputed sound recordings are licensed only for retrieval by way of streaming. The defendant has no knowledge and no knowledge possibilities about the contracts between the plaintiffs and YouTube.

The general terms of use for the service between YouTube and the uploaders generally allow the downloading of content. The terms of use do not provide for a limitation to playback as a stream, nor for its protection through the application of technical measures. In this respect, the terms of use read:

**"License to YouTube**

By providing Content to the Service, you grant to YouTube and its affiliates (including YouTube LLC, Google LLC, and Google Commerce Limited) a worldwide, non-exclusive, royalty-free license to use that Content (including to host, to make publicly available, reproduce, distribute, modify, display, and perform it, taking into account the moral rights) for the sole purpose of operating, and improving the Service (including through the use of third-party service providers), and only to the extent necessary therefore.

**License to Other Users**

You also grant each other user of the Service a worldwide, non-exclusive, royalty-free license to access your Content through the Service, and to use that Content (including to reproduce, distribute, modify, display and perform it, taking into account the moral rights) only to the extent necessary therefore and as enabled by a feature of the Service."

**Proof:**            Inspection of the terms of use at  
<https://www.youtube.com/static?gl=DE&template=terms&hl=de>

Accordingly, when uploading, users grant YouTube and other users rights of use to the extent necessary for use within the scope of the service, including the rights to reproduce, distribute and edit. Within the scope of the service, in turn, downloading is permitted in the case of contractual or legal permission. Accordingly, YouTube does not undertake to the rights holders under the general terms of use to apply technical protection measures to prevent downloading. The defendant disputes with ignorance that and which deviating agreements the plaintiffs may

have made with YouTube. Insofar as the plaintiffs have agreed deviating license agreements with YouTube, they may state and prove this.

## **2. Economic interest of YouTube and users in download option**

Both YouTube and the content uploaders have an economic interest in users being able to download content from YouTube (contrary to Statement of Claim, p. 12). For example, Rezo states that he and other professional YouTube users generally have an interest in their content being downloadable for certain purposes, such as reaction videos, which make up a large portion of YouTube's content (Exhibit B2). In addition, YouTube has an interest in videos being downloaded in certain instances.

YouTube's advertising-financed business model is not limited to the playback of music videos. Contrary to the plaintiffs' opinion, YouTube and other uploaders or rights holders may well have an interest in videos being downloadable and editable. The public area of YouTube in particular, which is at issue here, is characterized by numerous other monetized and non-monetized uses. Entire genres on YouTube such as "reaction videos" are based on videos being downloaded and snippets being reused. These types of usage are also likely to be in the interest of YouTube and the uploaders, as the number of videos increases the number of views ("cost-per-view") and the reach of the uploaders.

**Evidence:** Statement of Rezo dated February 25, 2022, Exhibit B3.

Both YouTube and the vast majority of rights holders who upload content to YouTube's public service have an interest in videos being downloaded within the general terms of use, i.e. on the basis of contractual and legal permissions. Users to increase their visibility and reach, YouTube because as the absolute number of videos increases, so does the number of playbacks. In addition, YouTube offers its users the possibility to upload content under CC licenses, which necessarily includes the possibility to download them (see below).

## **3. YouTube's CC-licensed content precludes use of effective technical measures**

YouTube itself also offers the option of uploading videos under a Creative Commons license and also the option of filtering the display of videos according to Creative Commons-licensed content. YouTube explains this on its support website:

"Creative Commons licenses allow creators to allow others to use their work. Creators have the option of providing their videos with a Creative Commons license of the type

CC BY. [...] The option to tag uploaded videos with a Creative Commons license is available to all Creators. [...] By tagging your original video with a Creative Commons license, you allow the entire YouTube community to reuse and edit it. " (<https://support.google.com/youtube/answer/2797468?hl=de>)

On the one hand, the ability to edit videos requires that these videos be downloaded; on the other hand, the Creative Commons licenses explicitly prohibit the use of effective technical measures, and the license expires in the event of violations. Thus, the license terms of the CC-BY license provide under sections 2a item 5b and section 6a:

"You may not offer **or impose** any additional or different terms or conditions, **or apply Effective Technical Measures to the Licensed Material** if doing so restricts exercise of the Licensed Rights by any recipient of the Licensed Material. "

as well as

"However, if you fail to comply with the Public License, then Your rights under this Public License terminate automatically. (emphasis added by the undersigned)"

**Proof:** Extract from the Creative Commons License, Appendix B.6

The music videos in dispute, like all other videos uploaded by users, are located in the public area of YouTube and are subject to the same terms of use. The defendant denies that YouTube uses technical protection measures (exclusively) for the purpose of complying with the contractual terms vis-à-vis certain rights holders. If that were the case, YouTube would be in breach of contract vis-à-vis all uploaders who choose a Creative Commons license and, because of the lapse of the license, would commit mass infringements by making this content publicly available without authorization.

#### **4. Plaintiffs' assertion linking videos to advertising is inaccurate**

YouTube does not always play commercials of the length claimed by the plaintiffs when playing the music videos in dispute (contrary to complaint, p. 8 et seq.). The "whether" of the playback of an advertising spot as well as the type and length of the advertising spot are controlled in each individual case by the YouTube algorithm and depend on the respective circumstances. The undersigned has attempted to verify the information provided by the plaintiffs; inspection of the URLs provided by the plaintiffs revealed that no commercials or other commercials were displayed.

## VI. On the use of technical measures

YouTube makes all information for the retrieval of videos in the public area of YouTube available to every retrieving device openly and unencrypted. YouTube does not use any "encryption technology" that is intended to prevent YouTube content from being "downloaded without authorization" (contrary to the statement of claim, p. 13). In particular, the "special algorithm" used by YouTube is not an encryption technology (contrary to statement of claim, p. 13).

The so-called "rolling cipher", "signature" or "S-variable" has the consequence that the storage location of the respective audio and video files is not immediately apparent from the URL line in the browser. This is precisely not an encryption method, as encryption always requires a secret component, such as a "key" or other techniques for decryption. YouTube, meanwhile, makes all information used to determine the storage location available openly and unencrypted during retrieval. Any browser and any device, such as smart TVs, can determine the location of the videos *without* any secret component and retrieve the videos.

The mechanism of the "rolling cipher" is embedded in the openly visible program code of the YouTube website and can be viewed by anyone manually or automated by the browser. Youtube-dl, like any browser, can read this information and thus read the "signature" value and thus determine the correct location. Youtube-dl does not use any password, key or other access-restricting components that might be required to access YouTube videos for this purpose. It uses the same mechanism that YouTube provides to each individual user to retrieve a video. The audio and video files are also not encrypted by YouTube, so once the storage space is determined, they are readily retrievable. This is different for certain content, such as in the YouTube Music service or for movies and TV shows, for which YouTube uses real encryption using the "widevine" software and which cannot be decrypted by youtube-dl.

**Evidence:** Expert opinion, inspection of the website:  
<https://developers.google.com/widevine/drm/overview>

The "rolling cipher" thus only results in the fact that the audio and video files cannot be downloaded immediately by clicking a "Download" button or entering the URL in the browser. Users can download the videos manually by using the browser's developer tools. Thus, saving the audio and video files is possible with a few mouse clicks without any special knowledge, and instructions for doing so are ubiquitously available on the Internet. Downloading is possible with a few steps, it does not require programming skills or other special knowledge. The

following instructions illustrate that only the simplest steps are required to save audio and video files. It is possible for every user to display the location of the audio and video sequences in the developer tools. Now it is only necessary to remove the part in the URL that reduces the URL to a partial sequence of the audio and video and the entire video can be saved by right-clicking.

**Evidence:** Expert opinion; screenshot of website.

<https://www.hongkiat.com/blog/download-youtube-media-without-tools/>

Attachment B7

In addition, users can install additional programs ("addons") for all common browsers, with which YouTube videos can be saved directly in the browser. Addons are additional programs that extend the functions of the browser and can be installed by anyone without any prior knowledge, as demonstrated, for example, by the widespread use of so-called "adblockers" as browser addons. For the Firefox browser, for example, the official add-on catalog includes the "Video-Downloadhelper" tool, which allows users to download YouTube videos without having to leave the browser.

**Proof:** Screenshot of the website

<https://addons.mozilla.org/de/firefox/addon/video-downloadhelper>,

Appendix B 8

As a precaution, we point out that in addition to the public area, there are other services of YouTube and special categories of content, such as YouTube Music or such videos for the playback of which users must pay separately. These contents are protected from downloading by effective technical measures and cannot be downloaded with youtube-dl.

## **VII. The infringement at issue**

The plaintiffs have not shown and proven that unauthorized reproductions of the sound recordings in dispute occurred in the past. The downloads of the sound recordings by the witness Kunath are not suitable to prove an infringement. The download of the sound recordings by the witness Kunath was authorized by the plaintiffs and would be permitted under YouTube's terms of use. The plaintiffs have not proven any deviating license agreements that exclude downloading across the board or in which YouTube undertakes to use effective technical measures.

In addition, the process described by the plaintiffs shows that it is hardly practicable to save audio streams for repeated playback using youtube-dl. The download requires the entry of commands in the command line of the operating system, for which the witness Kunath had compressed the URL. An audio file is output in the "WebM" format specially developed by Google. Youtube-dl therefore does not convert this content into the more common MP3/MP4 formats, but stores the content in the format in which YouTube itself makes it available (annex volumes K7 - K9).

### **VIII. On the pre-litigation dispute**

The plaintiffs sent the defendant a warning letter with costs dated September 22, 2020, requesting it to issue a cease-and-desist declaration with penalty clause with the content shown in Exhibit K10 and to hand over the information also mentioned therein. The plaintiffs had not previously notified the defendant of the asserted infringements. We would like to clarify that the plaintiffs falsely claim in the warning letter that the youtube-dl software could be downloaded from the defendant's servers and that the defendant is expressly claimed to be an accessory to a claim for injunctive relief based on the infringement of Section 95a (1) UrhG. The warning letter did not contain any description of YouTube's allegedly effective technical measures or of the functionality of the youtube-dl software.

The defendant had no knowledge of the alleged infringements before receiving the warning letter. Subsequently, the defendant attempted to trace them. In doing so, the defendant discovered that neither the software nor the information about its functionality was located on his servers. He also tried to trace whether the use of youtube-dl circumvented effective technical protection measures. In the process, the defendant came across numerous online sources, including several national daily newspapers that refer to a statement by the Federal Ministry of Justice, the legal portal iRights.info, and the statements of several lawyers that the download of YouTube videos is legal.

**Evidence:** Screenshots, asset volume B9

After the defendant refused to issue the cease-and-desist declaration, the plaintiffs again requested the defendant in a letter dated October 27, 2020, to issue a cease-and-desist declaration with penalty clause because he was liable as the perpetrator for an unspecified infringement.

The plaintiffs explicitly refer to the fact that GitHub has meanwhile blocked the youtube-dl software in the USA (Annex K 11, p. 1). We would like to clarify at this point that GitHub had

temporarily blocked the youtube-dl software in the fall of 2020 due to a DMCA takedown request by the Recording Industry Association of America (RIAA). The RIAA's takedown request was also based on the claim that youtube-dl violated the prohibition against circumvention of effective technological measures pursuant to Sec. 1201 DMCA. This is the parallel provision to Sec. 95a UrhG in U.S. law. On 16.11.2020, however, GitHub lifted the block again. GitHub stated that after a thorough legal review they had concluded that youtube-dl did not circumvent any effective technical measures and therefore did not constitute a violation of Sec. 1201 DMCA.

"After receiving new information showing that the youtube-dl project did not violate the DMCA's provisions on circumvention of effective technical measures, we concluded that the allegation did not constitute infringement. [...] Based on all of the above, we have restored the youtube-dl project and will offer restoration options to all of its forks."

The youtube-dl software has since been made available again on GitHub.

**Proof:** Screenshot of the website:  
<https://github.blog/2020-11-16-standing-up-for-developers-youtube-dl-is-back/>, Appendix B10

The plaintiffs make a claim against the defendant without having even considered other ways to stop the alleged infringement. The plaintiffs have neither in the pre-court correspondence nor in the statement of claim shown that they have tried to take action against parties closer to the act, such as the developers of the software or the host provider GitHub.

### **C. Legal appraisal**

The action is inadmissible and unfounded.

#### **I. Action inadmissible**

The action is inadmissible because the Hamburg Regional Court does not have local jurisdiction and the claims are vague.

1. Hamburg Regional Court not locally competent

The local jurisdiction of the Regional Court of Hamburg does not follow from Section 32 ZPO. Neither for the alleged act of circumvention pursuant to Section 95a (1) nor for the alleged distribution of the disputed software pursuant to Section 95a (3) UrhG is the place of commission pursuant to Section 32 ZPO in the district of the court seized.

The place of performance of a tort within the meaning of Section 32 ZPO exists in the case of an alleged infringement of copyright or related rights by making the subject matter of protection publicly available via a website in Germany if the rights asserted are protected in Germany and the website is publicly accessible in Germany (see BGH, judgment of April 21, 2016 - I ZR 43/14 - An Evening with Marlene Dietrich, juris para. 18).

However, jurisdiction cannot be established here - as the plaintiffs believe - solely on the basis that "the witness Kunath was able to download the content in dispute from Hamburg onto his computer" (p. 21 of the statement of claim). The plaintiffs are engaging in what is known as "forum shopping" here; they are selecting the jurisdiction from which they hope to obtain the most favorable case law, without there being any discernible connection to the matter at hand. This approach harbors considerable potential for abuse, violates the purpose of the jurisdiction standards and, in particular, the requirement of the statutory judge under Article 101 of the German Constitution (Raue/Hegemann, MAH Urheber- und Medienrecht, 2nd edition 2017, Part M. Procedural Law § 36 Zuständiges Gericht; AG Hamburg Urteil v. 30.1.2014 - 22a C 100/13, GRUR-RS 2014, 03550). It is therefore not covered by Section 32 ZPO.

Therefore, in the case of an alleged infringement of rights on the Internet, the place of jurisdiction for the tort pursuant to Section 32 of the German Code of Civil Procedure (ZPO) only applies if the acts deemed to be infringing have a clear connection to the place of the court seized of the matter in the sense that a collision of conflicting interests is significantly closer to the place of jurisdiction in question under the circumstances of the specific case than would be the case on the basis of mere retrievability (OLG Brandenburg, judgment of 28.11.2016 - 1 U 6/16, MMR 2017, 261 marginal no. 14; OLG Jena, judgment of 7.11.2013 - 1 U 511/13, GRUR-Prax 2014, 188; LG Dresden, order of 07 July 2020 - 3 O 648/20 -, juris). The plaintiffs have not demonstrated such a substantive reference.

In fair competition law, the legislator has already reacted to the problem and restricted the "flying" jurisdiction in competition law as part of the introduction of the Act to Strengthen Fair Competition of 25.11.2020. According to Section 14 (2) Sentence 3 No. 1 UWG n.F., only the court in the defendant's district has jurisdiction for all infringements in electronic legal transactions or telemedia. The explanatory memorandum to the law states:



"Particularly in the case of infringements under unfair competition law on the Internet, the place of jurisdiction for the tort leads to the plaintiff being able to choose a court, since the place of commission of an act on the Internet is, to a certain extent, "everywhere." This "flying jurisdiction" puts the defendant at a disadvantage because the plaintiff can choose a court near him or a court that is more likely to rule in his favor on the amount in dispute. For those who have been warned, a threatened lawsuit in a faraway court is a burden that often induces them not to defend themselves against the claims and to sign the required cease-and-desist declaration (Bundestag-Drucksache 19/12084, p. 35)."

Insofar as the plaintiffs request referral to the court with local jurisdiction, we agree in advance.

It is requested to decide on the referral for this case in accordance with Section 281 (1) in conjunction with Section 128 (4) of the Code of Civil Procedure by written procedure without oral proceedings.

## 2. claims undefined

The motions do not meet the requirements for definiteness pursuant to Section 253 (2) No. 2 of the German Code of Civil Procedure (ZPO). Pursuant to Section 253 (2) no. 2 of the Code of Civil Procedure, an application for prohibition may not be worded so vaguely that the subject matter and scope of the court's decision-making power (Section 308 (1) sentence 1 of the Code of Civil Procedure) are not recognizably delimited, the defendant is therefore unable to defend himself exhaustively and ultimately the decision as to what the defendant is prohibited from doing is left to the enforcement court.

The request under I. does not satisfy the requirements of certainty of Section 253, Subsection 2, No. 2, ZPO. The defendant cannot defend himself exhaustively, since it is unclear to which act or which contribution of the defendant the motion relates. It is clear from the statement of grounds that the defendant is being claimed as a participant in and interferer with an infringement pursuant to Section 95a (1) UrhG; however, the request under I. speaks of the defendant himself circumventing effective technical measures. Accordingly, the motion asserts the defendant as the perpetrator. Insofar as the defendant is claimed to be liable as an aider and abettor or interferer, this is not reflected in the request under I. ("to circumvent"). It is probably undisputed between the parties that the defendant does not himself circumvent technical protection measures, since he neither hosts the software nor does the processing of the data take place on his servers. Therefore, the action is in any case incoherent with regard to claim I.

According to the statement of grounds in the statement of claim, the claim under II. appears to be based on a perpetual infringement of Section 95a (3) UrhG. However, the statement of reasons for the application does not contain any explanations of the facts of Section 95a (3) UrhG, so that the defendant cannot even understand by which action he should have fulfilled which alternatives of Section 95a (3) UrhG. For this reason, the defendant also cannot exhaustively defend himself against the claim asserted with the motion under II. Therefore, this claim is also too vague, and the action is incoherent in this respect at least for this reason.

## **II. action unfounded**

The action is also unfounded. The plaintiffs are entitled to neither injunctive relief nor damages against the defendant.

### **1. On the right of action**

At the outset, this is already disputed with ignorance. The details of the plaintiffs' exploitation rights are beyond the defendant's knowledge. This applies to all three disputed music recordings by the artists Mia, Wincent Weiss and Robin Schulz. The denial also extends to the reproduction rights concerning the works of the aforementioned artists.

### **2. No liability of the defendant as a participant**

There are no claims against the defendant for aiding and abetting an infringement pursuant to Section 1004 sentence 1 BGB analog, 823 para. 2 BGB in conjunction with Section 95a para. 1 UrhG. The defendant is privileged against liability pursuant to Section 10 TMG (see a)). The plaintiffs have not established either an eligible principal act (see b)) or an aiding and abetting act on the part of the defendant (see c)). In any case, the defendant lacks a double aiding and abetting intent (see d)).

#### **a) Defendant may invoke liability privilege pursuant to Section 10 TMG**

The web hosting service of the defendant is privileged from liability according to Section 10 TMG. The defendant is not liable in the present case as a participant in the asserted infringement, since he is not responsible for the infringement pursuant to Section 10 p. 1 no. 1 TMG. The defendant is a service provider in the sense of Section 2 no. 1, § 10 p. 1 TMG. The data stored on his servers is third-party information pursuant to Section 10 p. 1 TMG. According to Section 10 S. 1 No. 1 TMG, service providers are not responsible for third-party information

that they store for a user, provided that they have no knowledge of the illegal act or the information and, in the case of claims for damages, they are also not aware of any facts or circumstances from which the illegal act or the information becomes apparent. These conditions are met in the present case.

aa. Liability standard for web hosting services

In view of Sections 7 (2) and 10 of the German Telemedia Act (TMG), the operator of a web hosting service is not obliged to actively search for infringements and is only required to take action once it has been notified of a clear infringement (BGH, judgment of January 21, 2021 - I ZR 20/17 - Davidoff Hot Water IV, juris marginal no. 38 with further references). In order to trigger the host provider's knowledge of an infringement, the notice must be so specific "that the addressee of the notice can easily - i.e. without detailed legal or factual examination - determine the infringement" (BGH, GRUR 2011, 1038, marginal no. 28 - Stiftparfüm; BGH, MMR 2012, 124 marginal no. 26).

If the infringement does not result from the information itself, the notice must also contain the factual and legal circumstances from which an obvious infringement results (BGH, GRUR 2011, 1038, marginal no. 36 - Stiftparfüm). The service provider must be enabled by the notice not to "carry out complicated assessments in individual cases as to whether an offer objected to as infringing a property right actually [...] (is) infringing a property right. This would otherwise require the involvement of a lawyer familiar with the matter, which [...] cannot be expected" (BGH, GRUR 2011, 152 marginal no. 48 - Kinderhochstühle im Internet I).

Pursuant to Art. 14 (1) a) of the E-Commerce Directive (Directive 2000/31/EC), the implementation of which is served by Section 10 sentence 1 no. 1 TMG, the Member States must ensure that, in the case of an information society service consisting in the storage of information entered by a user, the service provider is not liable for information stored on behalf of a user, unless the provider has actual knowledge of the unlawful activity or information. In this context, the ECJ clarified in the YouTube/Cyando decision that liability of the host provider is only established if the service provider has positive knowledge of the unlawfulness of information, or the unlawfulness is obvious, i.e. concretely established or easily recognizable (ECJ, judgment of 22.06.2021, C-682/18, C-683/18 - YouTube/Cyando, para. 113). Further, the ECJ stated in this decision that

"a notification that protected content has been illegally communicated to the public via a video-sharing platform or a file-hosting and -sharing platform must contain sufficient information to enable the operator of that platform to satisfy itself, without a detailed

legal examination, that that communication is illegal and that removing that content is compatible with freedom of expression" (ECJ loc. cit., para. 116).

Compared to a video-sharing service or a sharehosting platform, much stricter requirements apply to a web hoster to establish liability. The unlawfulness of a website or information contained on it is significantly more difficult to establish than the unlawful public reproduction of copyrighted works on video sharing or share hosting platforms. This is illustrated by the case at hand. The defendant is faced with the decision to delete an entire website on the indication that a link on the website refers to software hosted at another location that can allegedly be used for illegal purposes. In addition to the question of the obviousness of the infringement, the defendant must be able to ascertain that the deletion of an entire web page would be compatible with freedom of expression. These difficulties must not be to the defendant's detriment, since they are based on the plaintiffs' decision to seek the blocking of a web page that merely contains a hyperlink to the software instead of the deletion of the software, which would completely stop the infringement.

bb. No knowledge of the defendant of the claimed infringement

According to this standard, the defendant had no knowledge of the alleged infringement. The plaintiffs claim out of hand that the defendant has "always" been aware of the offer and the function of the youtube-dl software. This is not true.

i. No obligation of the defendant to investigate

The defendant hosts tens of thousands of websites. He cannot know their content in detail and does not have to do so, Section 7 (2) TMG. Such an obligation would significantly jeopardize or disproportionately complicate the lawful and socially desirable business model of many service providers on the Internet, who operate daily with an enormous amount of constantly changing information (BGH GRUR 2015, 1129 - Hotelbewertungsportal; BGH GRUR 2007, 890 - Jugendgefährdende Medien bei eBay).

The defendant only learned about the alleged call for donations on a third-party website through the statement of claim. The plaintiffs fail to recognize that this is not a call for donations in favor of the defendant, but in favor of the website operators, which is aimed at replenishing the website operators' credit account with the defendant's hosting service to pay the monthly hosting costs (cf. already Annex K11, p. 5). The defendant also has no influence on it if third parties provide his bank details on a website to which he has no connection. As a precaution, we point out that the defendant checked these details after receiving the statement of claim

and that they are in any case no longer on the website [ytdl-org.github.io/youtube-dl](https://ytdl-org.github.io/youtube-dl), a corresponding printout is attached as:

Attachment B11

ii. Warning letter not an effective notice pursuant to Section 10 TMG

The warning letter of the plaintiffs also does not meet the above-mentioned standards for a notice justifying liability pursuant to Section 10 TMG. In particular, the plaintiffs did not inform the defendant of a clear violation of the law, which the defendant could have ascertained without a detailed legal or factual review. The warning letters of the defendant did not contain sufficient factual or legal circumstances from which a clear infringement could be inferred. The warning letter did not contain any explanations or evidence about the functioning of any technical measures at YouTube or the functioning of the youtube-dl software. The information in the warning letter is limited to the mere assertion that the software was developed and marketed "solely for the purpose of circumventing YouTube's technical protection measures" and refers as evidence to "publicly available information" according to which the software has adapted to YouTube's protection measures over time. In addition, the plaintiffs base their claims against the defendant on the allegation that the defendant offers users the "opportunity to obtain the YouTube-DL software from [his] server." However, as explained above, this is not the case. Legally, the plaintiffs asserted an undifferentiated liability of the defendant as perpetrator, participant and interferer and demanded the omission of an act that the defendant did not commit. This sparse, legally and factually incorrect information is not suitable to establish knowledge of an infringement, let alone knowledge of an easily ascertainable infringement or knowledge of the compatibility of the deletion of a website with freedom of expression.

For the first time, the plaintiffs have made more substantiated submissions on the facts giving rise to the claim and a legal assessment in the statement of claim. In the following, we explain under b) that the statements in the statement of claim also do not constitute a notice substantiating liability pursuant to Section 10 TMG according to the above-mentioned standards. Even on the basis of the statement of claim, the defendant would not have been able to ascertain a clear infringement, especially without consulting a lawyer familiar with the matter (BGH, GRUR 2011, 152 para. 48 - Kinderhochstühle im Internet I). Even the consultation of legal advice would not have led to a different result, since a clear infringement cannot be established in the present case.

cc. No active role of the defendant

Citing the ECJ judgment of 22.06.2021, C-682/18, C-683/18 - YouTube/Cyando, the plaintiffs submit that the defendant cannot invoke the liability privilege pursuant to Section 10 TMG because his role is no longer neutral and his conduct is not purely technical.

The referenced para. 106 of the judgment does not support these conclusions, on the contrary. It states:

"Therefore, in order to ascertain whether the operator of a video-sharing platform or a file-hosting and -sharing platform may be exempted, under Article 14(1) of the Directive on Electronic Commerce, from liability for the protected content which users illegally communicate to the public via its platform, it is necessary to examine whether the role played by that operator is neutral, that is to say, whether its conduct is merely technical, automatic and passive, which means that it has no knowledge of or control over the content it stores, or whether, on the contrary, that operator plays an active role that gives it knowledge of or control over that content (see, by analogy, judgment of 12 July 2011, L'Oréal and Others, C-324/09, EU:C:2011:474, paragraph 113 and the case-law cited)." (ECJ, Judgment of 22.06.2021, C-682/18, C-683/18 - YouTube/Cyando, para. 106).

According to this statement, the liability privilege for host providers does not apply if they play an active role by virtue of which they have knowledge of or control over the content they host. The question here is therefore whether the activity of the service provider leaves the realm of neutral hosting in that the service provider contributes to infringements beyond the mere provision of the platform. According to the ECJ, this is the case in particular if the operator of a platform

"despite the fact that it knows or ought to know, in a general sense, that users of its platform are making protected content available to the public illegally via its platform, refrains from putting in place the appropriate technological measures that can be expected from a reasonably diligent operator in its situation in order to counter credibly and effectively copyright infringements on that platform, or where that operator participates in selecting protected content illegally communicated to the public, provides tools on its platform specifically intended for the illegal sharing of such content or knowingly promotes such sharing, which may be attested by the fact that that operator has adopted a financial model that encourages users of its platform illegally to communicate protected content to the public via that platform." (ECJ, Judgment of 22.06.2021, C-682/18, C-683/18 - YouTube/Cyando, para 107).

This is clearly not the case here. The defendant offers its customers a web hosting service and does not contribute to infringements beyond that. The defendant's business model consists solely of offering hosting services for websites. The defendant merely provides storage space to its users, neither does it create, screen, select nor control the uploaded content (ECJ, Judgment of 22.06.2021, C-682/18, C-683/18 - YouTube/Cyando, paras. 92, 97). Moreover, its business model does not favor or promote copyright infringements in any way. The web hosting service is a socially desirable, neutral business model that does not encourage customers to commit infringements. The complex questions in this context concerning peer-to-peer networks, sharehosters or video platforms, which gave rise to the ECJ decisions on the "active role" of host providers in the YouTube/Cyando and Stichting Brein decisions (ECJ, judgment of June 14, 2017, C-610/15 - Stichting Brein), therefore do not arise in the present case.

b) No eligible principal act

In any case, there is no principal act eligible for assistance. Liability as an aider and abettor presupposes an aiding and abetting, i.e. an intentional, unlawful principal offense pursuant to Section 27 of the German Criminal Code (StGB). The plaintiffs claim that the main act eligible for assistance is an infringement of Section 95a (1) UrhG by the users of the youtube-dl software when they download content from YouTube using the software (statement of claim, p. 26).

Pursuant to Section 95a (1) UrhG, effective technical measures for the protection of a work protected under this Act or another subject matter protected under this Act may not be circumvented without the consent of the rightholder, insofar as the person acting is aware or must be aware under the circumstances that the circumvention is taking place to enable access to or use of such work or subject matter. These requirements are not met. The technology used by YouTube is neither a technical measure within the meaning of Section 95a (2) sentence 1 UrhG (see aa.) nor is it effective within the meaning of Section 95a (2) sentence 2 UrhG (see bb.) nor do the users act with the intent to circumvent required under Section 27 StGB, Section 95a (1) UrhG (see cc.).

aa. No technical measure within the meaning of Section 95a (2) sentence 1 UrhG

According to Section 95a (2) sentence 1 UrhG, a technical measure is a technology, a device or a component which, in normal operation, is intended to prevent or restrict acts not authorized by right holders. Consequently, not any technical measure is protected, but only those measures that are intended in "normal" operation to prevent or restrict acts not authorized by

right holders. Whether a measure is "intended in normal operation" to restrict unauthorized acts of use is to be determined objectively and depends on the concrete use of the protective measure (Wandtke/Ohst/Bullinger, Urheberrecht, 5th ed. 2019, Section 95a UrhG, margin no. 43 with further references). Insofar as technical protective measures also prevent lawful uses, legal protection with regard to the principle of proportionality is only granted for those technical measures which, on the one hand, are suitable for preventing unlawful uses, but which, on the other hand, do not go beyond what is necessary and unduly restrict lawful possibilities of use. In particular, it must be examined whether there are no other equally effective precautions that lead to less interference with the lawful actions of third parties (ECJ, GRUR Int. 2014, 285 - Nintendo/PC Box, para. 31 f).

Accordingly, the "rolling cipher" is not a technical measure pursuant to Section 95a (1) UrhG, since YouTube does not use it objectively to prevent actions not authorized by copyright holders, but to optimize its advertising-financed business model. Accordingly, the plaintiffs also argue that YouTube generates as much revenue as possible in the advertising-financed area by playing video streams as frequently as possible. Contrary to the plaintiffs' opinion, however, it does not follow from this that YouTube has no interest in video streams being downloadable under contractual or legal permissions. As already explained, the reference to YouTube's terms of use is misguided in this respect, as they do not contain any statement about the use of technical measures and only prohibit downloading to the extent that it is not otherwise permitted. Objectively, it is advantageous for YouTube and many uploaders if content can be downloaded and edited and uploaded again. This is because it increases the absolute number of videos on YouTube and thus the possibility for YouTube to generate advertising revenue via views of these videos. For uploaders, it is advantageous because referencing increases their reach and thus also their income via the monetization of their video streams.

The plaintiffs' argument that the "rolling cipher" is a technical measure because YouTube thereby ensures compliance with the license terms in relation to them falls short and does not consider the further purposes of the "rolling cipher". To even assume an objective purpose to ensure compliance with the license terms, the plaintiffs would first have to demonstrate and prove these agreements. Equating their own interests with those of other users and YouTube amounts to circular reasoning that the "rolling cipher" is a technical measure because "YouTube implements technical protection measures to ensure that content cannot be downloaded" (Statement of Claim, p. 26). The mere assertion that it is a "technical protective measure" cannot replace the determination of the objective purpose of this measure in the context of the examination of Section 95a (2) sentence 1 UrhG.



The plaintiffs impermissibly equate their interests with those of YouTube and other rights holders. The starting point is to consider that YouTube applies the "rolling cipher" indiscriminately to the music videos at issue and all other videos in its public section, including CC-licensed and public domain content, as well as all videos uploaded under the general terms of use. In these terms of use, YouTube does not commit to the use of technical measures to prevent downloading. Rather, uploaders grant YouTube and other users simple rights of use for the uses permitted under the service, including downloading for purposes permitted by contract and law. Contrary to what the plaintiffs think, in these cases permanent downloading is neither "explicitly not authorized" nor is it to be prevented in every case (Statement of Claim, p. 26). Thus, the plaintiffs may have agreed with YouTube that the videos at issue would be licensed for streaming purposes only. In relation to the plaintiffs, YouTube may therefore use "rolling ciphers" to comply with the requirements of the license agreements with such rights holders who do not permit downloading in YouTube's ad-supported service. Meanwhile, in relation to all other rights holders who upload videos within the scope of the general terms of use, YouTube has no obligation to prevent the downloading of content within the scope of contractually and legally permitted uses through technical measures. On the contrary, it would counteract YouTube's offer to upload content under CC licenses. Because in this case, YouTube would intentionally violate the license terms, which expressly prohibit the use of technical measures, and make these videos publicly accessible in violation of the law.

Objectively, then, YouTube uses rolling ciphers for a variety of purposes, the common denominator of which is that they help optimize YouTube's ad-supported business model. This is because, on the one hand, by using "rolling ciphers," YouTube ensures that while some users may be discouraged from immediately downloading videos, sharing, editing, and reusing the videos by other users - especially professional content creators - remains possible, provided that this is desired by the respective rights holders, in order to promote sharing and thus the production of more videos in line with YouTube's business model. In addition, by foregoing more effective protection measures, YouTube ensures that playback on as many end devices as possible, such as smart TVs, remains possible because the information is transmitted unencrypted for retrieval.

Even if one assumes that YouTube may also use the "rolling cipher" to secure licensing terms with individual rights holders, no protection pursuant to Section 95a UrhG would have to be granted for the "rolling cipher", as such far-reaching protection would be disproportionate due to the uniform application to all content, as it would impair legal uses beyond what is necessary (ECJ, GRUR Int. 2014, 285 - Nintendo/PC Box, para. 31). The BGH also confirmed in the decision "Videospielkonsolen III" that the party claiming protection under Section 95a UrhG for a technical measure must demonstrate and prove that there is no other measure that leads to

a lesser impairment or restriction of permissible acts of third parties and offers comparable protection (BGH, judgment of 02.03.2017 - I ZR 273/14, ZUM 2017, 490, 494 - Videospielekonsolen III).

The plaintiffs have not demonstrated this, and they will not succeed in doing so, as they have options available to them to ensure compliance with the license terms more effectively and at the same time more sparingly vis-à-vis lawful uses. To comply with their license terms, the plaintiffs make use of a technical device of YouTube, which YouTube uses for videos in the advertising-financed area, i.e. all videos uploaded by users. For the vast majority of videos, downloading is permissible within the framework of the legal provisions and YouTube's terms of use, and is desired by both the rights holders and YouTube. If legal protection pursuant to Section 95a UrhG were granted for this measure, the consequence would be that all lawful uses would be prevented. At the same time, YouTube's business model makes it clear that there are more effective and targeted measures to ensure compliance with the licensing terms of certain rights holders who want to prevent the downloading of content. For example, YouTube uses true encryption technology for certain content (YouTube Music, theatrical and television movies) that effectively prevents downloading while not interfering with lawful uses and the interests of other rights holders.

bb. "Rolling Cipher" not effective within the meaning of Section 95a (2) sentence 2 UrhG

The rolling cipher is not an effective measure within the meaning of Section 95a (2) sentence 2 UrhG. A measure is effective if it enables the rights owners to keep the use of a protected object under control, Section 95 (2) sentence 2 UrhG. Effectiveness does not require that the protection mechanism is impossible to circumvent. It merely has to meet a certain minimum standard. To assess whether a certain minimum standard is met, an average user is to be considered (Wandtke/Bullinger/Ohst, UrhG, 5th ed. 2019, Section 95a no. 50 with further references). According to this, measures are not to be classified as effective which the rights holder uses with the aim of limiting use but which do not guarantee any appreciable minimum protection, for example because they can be easily circumvented with the generally available program tools (Dreier/Schulze, 7th ed. 2022, Section 95a UrhG no. 15; OLG Hamburg, CR 2010, 125, 128). Accordingly, when determining the effectiveness of measures to prevent downloading from streaming portals, the distribution, usability and availability of the program tools that enable downloading must also be taken into account (Spindler/Schuster, Recht der elektronischen Medien, 4th ed. 2019, UrhG, Section 95a margin no. 12).

According to these standards, the "rolling cipher" lacks the necessary minimum level of effectiveness, as average users who are familiar with the use of a browser can download

videos permanently (so also Schricker/Loewenheim, 6th ed. 2020, Section 95a UrhG, para. 22; Janisch/Lachenmann, MMR 2013, 213, 214, Härting/Thiess, WRP 2012, 1068). YouTube videos can be downloaded without additional programs or programming knowledge by any user who is familiar with retrieving Internet pages and using search engines. Corresponding instructions can be found in a few seconds via Google search. Users only need to perform a few steps for the download, which any average user of a browser can perform, such as right-clicking or searching for the files with the names "Audio/MP4" or "Video/MP4". Therefore, even users who have no experience in using the "developer tools" of browsers can perform the necessary steps to download a video.

In addition, the "rolling cipher" cannot be considered effective because the program tools required for circumvention are generally available. This is because the means for "circumventing" the "rolling cipher" are available in the official app stores of browsers, popular online portals such as chip.de and numerous other ways and can be used by anyone, so that these tools must be counted as "generally available program tools". In addition to web-based services, and tools for downloading, there are, for example, browser add-ons that allow YouTube videos to be downloaded, which are widely available, for example, via the Mozilla Firefox app store. Users can therefore, without leaving the browser environment or using the developer tools, install a corresponding add-on that, instead of displaying a video in the web player, permanently saves it.

At this point, we again clarify that YouTube makes the content itself and all information for retrieving the content available to anyone openly and unencrypted. Contrary to the plaintiffs' opinion, the "rolling cipher" is not "encryption" within the meaning of Section 95a (2) UrhG, since it does not require a "key" to retrieve the content ("key-lock principle", cf. Wandte/Bullinger/Ohst, UrhG, 5th ed. 2019, Section 95a margin no. 19). The fact that YouTube uses an algorithm to disguise the storage space, which changes the format of the URLs several times a week, is irrelevant, since YouTube always openly provides the information for retrieval. Thus, contrary to what the plaintiffs believe, YouTube does not restrict the playback of the videos to playback in the "web player" by certain browsers. Rather, all browsers, end devices such as smart TVs, other applications, or browser users can read this information in plain text. In this respect, software such as youtube-dl performs the same steps that a browser performs to retrieve video streams. The fact that YouTube uses this measure to make it more difficult to download the videos in the advertising-financed area does not mean that it is an effective technical measure within the meaning of Section 95a (2) UrhG, since according to the aforementioned standard it depends on whether this measure is objectively used to prevent or restrict uses not authorized by rights holders.

The statement by Dr. Georg Nolte (Annex K11) is also not suitable to prove that the "rolling cipher" is an effective technical measure within the meaning of Section 95a (2) UrhG. First of all, it is not clear from this statement that YouTube has committed itself to the plaintiffs to use effective technical measures. The defendant expressly denies this. The statement that YouTube uses "rolling ciphers" to comply with license agreements with copyright holders does not allow the conclusion that YouTube has contractually committed itself to the use of technical measures. Moreover, it does not follow from this statement that this is a technical measure within the meaning of Section 95a (2) UrhG, nor that it is effective. This is because, as explained above, the purpose of a measure is to be assessed objectively on the basis of the specific uses. Neither does Dr. Georg Nolte refer to the "rolling cipher" in his statement as an effective technical measure, nor can the statement of a YouTube employee replace the objective assessment of this measure.

The court decisions cited by the plaintiffs do not provide any indications for assessing the effectiveness of a measure within the meaning of Section 95a (2) sentence 2 UrhG.

To the extent that the plaintiffs refer to para. 42 of the decision of the ECJ in case C-392/19 (ECJ, judgment of 09.03.2021, C-392/19 - VG Bild-Kunst), it is already unclear to what extent conclusions could be drawn from the court's statement that authors who use technical measures thereby aim to restrict the communication to the public of the works thus protected about the effectiveness of the measure at issue here. In the present case, the first issue is the upstream question of whether YouTube uses an effective technical measure at all. In particular, the statement by Dr. Georg Nolte (Exhibit K6) is not suitable to prove the assertion that the "rolling cipher" is an effective technical measure. This is because both the intended purpose and the effectiveness of technical measures pursuant to Section 95a (2) UrhG must be determined objectively (see above). In addition, it does not follow from the statement - as explained above - that YouTube has committed itself to the plaintiffs to use an effective technical measure. Only in the event that the plaintiffs succeed in proving that YouTube had committed itself to the use of technical measures vis-à-vis them would the statement of the ECJ referred to be relevant to the present case at all. Second, even if one assumes that YouTube has committed itself to the plaintiffs to use effective technical measures, the reference to the ECJ's decision is misguided, since the vast majority of rights holders upload their content under the general terms of use. These rights holders have precisely not expressed the will to exclude contractual and legal permissions to retrieve their works, as these permissions are expressly included within the framework of YouTube's general terms of use.

The judgments of foreign courts cited by the plaintiffs are irrelevant. Both essentially focus on a violation of the right of communication to the public, not on the violation of technical measures

in the context of a reproduction. In addition, they refer to services other than YouTube's offering in Germany and concern other legal systems, so that no statements about the effectiveness of the "rolling cipher" in the sense of a technical measure pursuant to Section 95a (2) UrhG can be derived from them either. For the sake of completeness, it should be noted that the court in the case "Young Turks vs. BT" expressly leaves open the question of whether the services at issue there circumvent an effective technical measure and bases its decision solely on an infringement of the right of communication to the public (Annex K 18, para. 85). Similarly, it cannot be inferred from the judgment of the "Court of Holbaek" in Denmark that YouTube Germany uses effective technical measures. This decision also deals with the question of whether a service other than youtube-dl is engaging in unlawful communication to the public. Here, too, the court bases its decision not on a violation of the prohibition of circumvention of technical protection measures, but on a violation of the right of communication to the public. To the extent that the court paraphrases Georg Nolte's statement in an obiter dictum, nothing can be inferred from this about the qualification of the "rolling cipher" as an effective technical measure within the meaning of Section 95a (2) UrhG (see above).

cc) No intentional circumvention of technical measures by the users of youtube-dl

In any case, due to the lack of intent on the part of the principal offender, there is no principal offense eligible for assistance. Users who download content from YouTube using youtube-dl are not acting with the intent to circumvent required under Section 95a (1) UrhG. Accordingly, the person acting must be aware that he is circumventing effective technical measures when using the work. This requires at least conscious negligence on the part of the actor (Wandtke/Bulliger/Ohst, UrhG, 5th ed. 2019, § 95a marginal no. 63).

Users who download content from YouTube using software such as youtube-dl are not deliberately circumventing an effective technical measure or are grossly negligent in not knowing this. Tools for downloading YouTube content are widespread and, as explained above, are offered via browser app stores or major German Internet portals such as chip.de, among others. Downloading YouTube videos is permitted within the scope of the private copying exception. This is confirmed to users through any simple research via publicly accessible sources. In addition, YouTube does not mark content in the advertising-financed area as protected by a technical measure pursuant to Section 95d (1) UrhG. Even average users may find that certain YouTube services and content, such as paid content, are protected by other technical measures and cannot be easily downloaded using ubiquitously available software.

c) No double aiding and abetting intent

Finally, the so-called double intent of the aider and abettor is lacking in any case. The aider and abettor's intent must relate both to his aiding and abetting and to the existence of an intentional unlawful principal offense.

The Federal Court of Justice does not allow it to be sufficient in every case that the aider and abettor's intent merely covers the "broad outlines" of the main offense (contrary to the statement of claim, p. 31). Rather, the Federal Court of Justice as well as the higher courts require knowledge of the concretely threatening main offense (Federal Court of Justice, judgment of July 12, 2007 - I ZR 18/04, GRUR 2007, 890; Federal Court of Justice, judgment of August 15, 2013 - I ZR 80/12, GRUR 2013, 1030, marginal no. 28; Federal Court of Justice, judgment of 5.2.2015 - I ZR 240/12, GRUR 2015, 485, marginal no. 37; OLG München Urt. v. 2.3.2017 - 29 U 1818/16, GRUR-RS 2017, 106239).

In the present case, more stringent requirements also apply to the intent to aid and abet, because web hosting is a neutral activity. In this case, it is not sufficient if the person providing assistance merely considers it possible that his actions will be used to commit an infringement, unless the perceived risk of criminal activity was so high that the assistance leads to the conclusion that a perpetrator with a recognizable propensity to commit an act is being promoted (BGH NJW 2014, 1098, marginal no. 31 with further references). Accordingly, these "neutral acts" are only to be regarded as aiding and abetting if the actions of the principal offender are aimed exclusively at the commission of a criminal act and the person providing assistance is aware of this (BGH, judgment of March 8, 2001 - 4 StR 453/00, NJW 2001, 2409).

According to this standard, the defendant had no intent regarding the commission of alleged copyright infringements by circumventing technical measures by third parties downloading software from the servers of another third party (GitHub) for this purpose. The defendant's activity, described by the plaintiffs as "aiding and abetting," is to be seen as a "neutral," "professionally typical" act. As a web host, the defendant provides server capacity for thousands of websites in return for payment of a fee. The defendant provides this service regardless of the purpose of the respective website. The defendant's website states, for example, "No matter what: travel blog, wallpaper store, or do-it-yourself project - we provide you with the engine for your ideas!" The defendant provides the services uniformly for all websites as part of its activities as a web hoster.

Applying the principles explained above, the following results here: The defendant has no positive knowledge of the intentions of individual users of software offered for download by third parties when providing the alleged aid action (web hosting). In view of the multitude of

possibilities to use the offer of the defendant, it cannot be said that the defendant, by providing server capacity, is aiming to promote users who are recognizably inclined to violate copyright usage rights.

Insofar as the plaintiffs claim that the defendant acted with double intent because he had "at the latest since the warning of 22.09.2020 [...] knowledge of the software Youtube-DL, its purpose and the fact that it can be obtained via a website hosted by him" (Statement of Claim, p. 31), they fail to recognize both that the defendant thus had no knowledge whatsoever of a concretely imminent, allegedly illegal act, and that at this point the liability privilege of Section 10 TMG must be taken into account. The defendant has no knowledge according to Section 10 TMG (see above under 2. a) aa.). Even after the legal examination, which the defendant carried out although it was not obliged to do so, it could assume that the use of the youtube-dl software by individual users to download the music videos in dispute did not constitute a copyright infringement. Even with the help of legal expertise, the defendant would not have been able to ascertain a clear infringement with the necessary certainty. Even the legal literature predominantly does not judge "Rolling Cipher" to be an effective technical measure (cf. 2. c. aa), bb) above). In addition, GitHub publicly stated that, after a thorough legal review, it had come to the conclusion that youtube-dl did not circumvent any effective technical measures of YouTube. Accordingly, the defendant did not have to assume that individual users would use the link on the page <https://youtube-dl.org> to download the youtube-dl software to intentionally circumvent effective technical measures of YouTube.

### **cc. No liability of the defendant as an interferer**

The defendant is also not liable for the alleged infringement by users of the youtube-dl software pursuant to Section 95a (1) of the German Copyright Act (UrhG) as an interferer, since this claim is excluded for reasons of subsidiarity and he did not breach any reasonable duties of care.

#### **a) Subsidiarity of interferer liability**

The claim against the defendant as interferer is excluded from the point of view of subsidiarity. It is undisputed that the plaintiffs did not undertake all reasonable efforts to take action against the perpetrators of the alleged infringement or other parties closer to the perpetrators. In particular, it would have been reasonable for the plaintiffs to take action against the host provider of the software in dispute, GitHub.

A claim as interferer is generally not subsidiary to perpetrator liability if interferer liability offers more effective legal protection because it is not necessary to take action against a large number of infringers (BGH GRUR 2007, 724 para. 13). This is not the case here.

The plaintiffs have legal protection options against parties closer to the act in order to effectively end the asserted infringement. The deletion of the software by its developers or its host provider GitHub would have the consequence that the making available to the public of the software in dispute would be completely terminated. Instead of taking action against a large number of infringers, the plaintiffs would therefore only have had to take action against one of the closer parties in order to effectively end the infringement.

In this respect, the case differs from the constellation that has been the subject of court decisions on the interferer liability of host providers. These cases involved claims against share hosting providers who hosted the copyright-infringing content themselves (see, for example, BGH, GRUR 2018, 1132 - uploaded.to). With share hosts, users upload files to the share host's servers and can make these files accessible to third parties by sharing a link to these files. A claim against these host providers as interferers can put an end to the infringement completely, as the host provider can delete the relevant content. The defendant, meanwhile, has no access to the allegedly infringing content, as it is located on a GitHub server. The deletion of the link or the web page located on the defendant's servers only leads to the deletion of one among thousands of references to the location of the software and leaves the allegedly infringing information untouched. The legal action against the defendant is therefore not suitable to effectively stop the asserted infringement. In the event of success, only a hyperlink to the software in dispute would cease to exist. The software itself would otherwise continue to be accessible at the known storage location of the host provider GitHub, accessible via all other existing hyperlinks on the Internet and findable via search engines.

The plaintiffs should therefore have first exhausted all reasonable measures to claim against parties closer to the act. In particular, it would have been reasonable for them to primarily contact the host provider of the software in dispute, GitHub. GitHub belongs to the Microsoft group, follows up on deletion requests based on reports of infringements and has set up various reporting channels for this purpose. The plaintiffs could also have pursued the infringement of Section 95a (1) UrhG asserted in these proceedings against GitHub, since GitHub expressly offers rights holders the possibility of asserting infringements against legal systems other than those of GitHub's country of origin. The fact that the plaintiffs are not claiming GitHub, but the defendant, only allows the conclusion that the plaintiffs are not concerned with ending the asserted infringement. Legal action against the defendant may



appear to them to be the easier path because the defendant has far fewer resources than the Microsoft subsidiary GitHub.

b) No violation of reasonable duties of care

In addition, the defendant did not breach any reasonable duties of care. According to the case law of the Federal Court of Justice, interferer liability for content on the Internet that is claimed to be infringing is subject to different requirements depending on the structure of the function and activity of the party making the claim (BGH, judgment of October 15, 2020, I ZR 13/19, marginal no. 21). Since the interferer liability may not be extended unduly to third parties who have not themselves carried out the unlawful interference, the liability of the interferer presupposes the violation of obligations of conduct. The extent of these obligations is determined by whether and to what extent the party held liable as an interferer can reasonably be expected to carry out an inspection under the circumstances (BGH, loc.cit., marginal no. 13).

In principle, the defendant, as a host provider, does not have any testing and monitoring obligations with regard to the information that customers store on his servers. According to the case law of the Federal Court of Justice (BGH), testing and monitoring obligations for host providers, the breach of which gives rise to interferer liability, only arise after a *clear infringement has been* indicated (BGH, loc. cit., para. 24, BGH, judgment of August 15, 2013, I ZR 80/12, para. 45 - *Stoererhaftung des File-Hosting-Dienstes*; BGH GRUR 2013, 370 - *Alone in the Dark*). In this respect, the evaluations included in sections 7 and 10 TMG must also be taken into account in the context of interferer liability (OLG Hamburg, ZUM-RD 2009, 246). The requirements developed in the context of Section 10 TMG and Article 14 (1) of the E-Commerce Directive for information giving rise to liability must therefore also be taken into account in the context of interferer liability, so that the party held liable as an interferer is put in a position, on the basis of the information, to be able to establish the alleged infringement without a detailed legal or factual review (BGH GRUR 2011, 1038, marginal no. 28). As stated above under 2. a) aa., these requirements were not met in the present case. Even after a thorough legal and factual examination, a diligent economic operator would not have been able to ascertain an infringement with the necessary certainty.

As a precaution, we would like to point out that a notice substantiating a claim should have included all requirements substantiating a claim, in this case also evidence of unsuccessful claims against the parties closer to the claim (BGH, judgment of October 15, 2020, I ZR 13/19, marginal no. 35). Since the plaintiffs did not make reasonable efforts (see above), the warning

letter could not establish any verification and monitoring obligations on the part of the defendant for this reason either.

#### **dd. No infringement of Section 95a (3) UrhG**

To the extent that the plaintiffs also base legal consequences on an infringement of Section 95a (3) UrhG in the factual alternatives of possession for commercial purposes and distribution of the software at issue, the action is also incoherent, and in any case unfounded.

In detail:

Insofar as the plaintiffs claim that the defendant is in possession of the software in dispute, this is incorrect. Possession within the meaning of Section 95a (3) UrhG is to be qualified within the meaning of Sections 854 et seq. BGB (Wandtke/Bullinger/Ohst, UrhG, 5th ed. 2019, Section 95a marginal no. 78). The software in dispute is not located on the servers of the defendant, who therefore cannot exercise any actual power over it, Section 854 (1) BGB. The accusation of distribution also fails, since the defendant neither kept the software on his servers nor passed on physical or incorporeal workpieces of the software. The defendant is also not responsible for the setting of links by third parties on the website <https://youtube-dl.org>, so that he cannot be accused of "distribution" for this reason either.

Liability for infringements of Section 95a (3) UrhG also requires, in addition to the realization of one of the acts specified in Section 95a (3) UrhG, that the software is the subject of a sales promotion or similar (Section 95a (3) No. 1 UrhG) or has only a limited economic purpose or benefit in addition to circumventing effective technical measures (Section 95a (3) No. 2 UrhG) or was designed primarily to circumvent such measures (Section 95a (3) No. 3 UrhG). In accordance with the general principles of the burden of proof, the plaintiffs also have the burden of presenting and proving the existence of these requirements. The plaintiffs will not be able to satisfy their burden of proof, since the requirements of Section 95a (3) Nos. 1 - 3 UrhG are obviously not met.

There are no indications that the software in dispute is the subject of a sales promotion measure within the meaning of Section 95a (3) no. 1 UrhG. The youtube-dl software, even if one assumes that the "rolling cipher" is an effective technical measure within the meaning of Section 95a (2) UrhG, does not have only a limited economic purpose or benefit. This alternative action is intended to exclude the possibility that multifunctional services are sanctioned because effective technical measures can also be circumvented with their help (von Lewinski, MMR 1998, 115, 118). According to the ECJ, when determining the purpose,

the manner in which a device is actually used by third parties must be taken into account, i.e., how often a device is used to circumvent effective technical measures and how often it is used for lawful purposes (ECJ GRUR 2014, 255, para. 36 - Nintendo/PC Box). Likewise, the proportionality of the legal action must be presented in this context with reference to the protection of effective technical measures (ECJ loc. cit., para. 32; BGH, judgment of 27.11.2014, I ZR 124/11 - Videospielekonsolen II, - juris para. 56 f.). As explained above under 2. c. aa), the party invoking the protection of effective technical measures must in particular demonstrate that there is no other measure that leads to a lesser impairment or restriction of permissible actions by third parties and offers comparable protection for the rights of the party concerned (BGH loc. cit., marginal no. 107).

The plaintiffs have not even begun to meet these requirements and will not be able to provide this evidence. First of all, the actual uses for circumventing effective technical measures must be weighed against the uses for legal purposes. The plaintiffs have not shown that the asserted infringements would outweigh the numerous legal uses of the youtube-dl software. In this context, it must be taken into account in the starting point that the youtube-dl software enables the downloading of video streams from over 1000 websites. The use of the youtube-dl software to save YouTube videos is therefore only one of numerous possible uses. For all of these uses - with the exception of YouTube - the protection provided by the "rolling cipher" is irrelevant. Since the plaintiffs have not argued that youtube-dl circumvents other technical measures, it must be assumed that the use of youtube-dl for downloading from other websites is lawful. Also against the background of YouTube's importance and popularity, the use of youtube-dl for downloading content from the more than 1000 other portals and websites is likely to be at least equivalent. In addition, a large proportion of the uses for downloading YouTube videos also does not constitute acts of circumvention, as the rights holders have explicitly consented to a download, for example by using the CC licenses offered by YouTube or implicitly for legally permitted uses under YouTube's general terms and conditions. Therefore, uses for which the rights holders have not agreed with YouTube on blanket, exclusive playback by way of streaming must also be included in the weighting as legal uses.

In the present case, it must be taken into account that the youtube-dl software differs from the service that was the subject of the aforementioned decision of the Regional Court of Hamburg. This was a conversion service designed solely for the permanent storage of audio streams of audiovisual content as .MP3 files (LG Hamburg, ZUM-RD 2019, 174). In this respect, the purpose of this service differs from the youtube-dl software, as the service is solely designed to download audio tracks in order to permanently store them in .MP3 format. Youtube-dl, on the other hand, opens up numerous other possible uses by downloading the videos (see

above, such as preservation of evidence, documentation, remix, editing), which require a different evaluation of the software.

Furthermore, the plaintiffs have not submitted any arguments as to whether the legal action based on the protection of effective technical measures complies with the principle of proportionality and does not unduly restrict legal uses (BGH loc. cit., paras. 56 et seq., 107). As explained above under 2. c. aa), in view of the numerous lawful uses of the youtube-dl software and the fact that YouTube applies the "rolling cipher" indiscriminately to the plaintiffs' content and content uploaded by other users, it is likely to be disproportionate to grant the plaintiffs legal protection for circumventing this measure (cf. 2. c. aa above; ECJ loc. cit.).

#### **ee. Regarding the legal consequences**

The plaintiffs assert extensive legal consequences on p. 33 of the statement of claim. The asserted legal consequences are reflected neither in the claims nor in the statement of the grounds for the application.

##### **a. Action for injunctive relief due to perpetual infringement of Section 95a (1) UrhG unfounded**

Insofar as the plaintiffs under 4. a) base their request for injunctive relief on a culpable infringement of Section 95a (1) UrhG by the defendant, the action is already incoherent, but in any case unfounded, since the above reasoning accuses the defendant of liability as a participant in or interferer with an infringement of Section 95a (1) UrhG by third parties and not of independent circumvention.

##### **b. Request for declaratory judgment unfounded**

The plaintiffs are obviously not entitled to a declaration of damages on the merits. The plaintiffs do not name the act by which the defendant is said to have incurred liability for damages, nor the legal basis on which they base this claim. To the extent that the plaintiffs claim that the sole purpose of the youtube-dl software is to circumvent technical measures for downloading the sound recordings at issue, this is obviously incorrect in view of the numerous other possible uses for downloading other YouTube content and the content of other websites. Finally, the assertion that the defendant acted with "intent in the form of intention" is also unsubstantiated and far-fetched in light of the above requirements for knowledge pursuant to Section 10 TMG and for the intent of an accomplice.

##### **c. Claim for information unfounded**

In the absence of a claim for damages, the asserted claim for information is also unfounded. The obligatory relationship between the parties required for this does not exist, since the defendant is liable neither as a participant nor as an indirect interferer for the asserted infringement.

As a precautionary measure, we point out that the defendant has not generated any revenue from the alleged call for donations. Transfers to the defendant's account in favor of youtube-dl are credited to the defendant's customers who operate the website <https://youtube-dl.org> and this credit is used for the monthly payments to the defendant for the hosting services. Thus, no economic benefits remain with the defendant.

d. Claim for reimbursement of expenses unfounded

The plaintiffs are also not entitled to the asserted claim for reimbursement of expenses pursuant to Section 97a (3) UrhG. The warning of 22.09.2020 was not justified, as the plaintiffs had not previously informed the defendant of the asserted infringement and the warning did not meet the requirements for a notice establishing liability. As a host provider, the defendant is liable pursuant to Section 10 sentence 1 TMG only from the time he becomes aware of the infringement, and interferer liability also arises only upon breach of reasonable duties of care. The claim for injunctive relief thus only arises after a notice giving rise to liability. It is undisputed that this has not been issued before. The defendant first became aware of the asserted infringement through the warning letter, so that any claim for reimbursement of expenses did not exist at the time of receipt of the warning letter. However, the costs for the lawyer's letter that establishes knowledge are not recoverable (LG München I, judgment of July 20, 2014, 33 O 8007/14).

### **III. Dispute value**

The amount in dispute is set too high at EUR 100,000. The amount in dispute is to be determined in accordance with Sections 53 GKG, 3 ZPO. In assessing the amount in dispute, it must be taken into account that the present case does not involve the liability of the manufacturers of an alleged circumvention software, but rather a neutral web hoster who merely hosts a website on which there is a link to the software in dispute. The economic significance of the defendant's alleged contribution to the crime is therefore significantly less than in the previously decided constellations in which the operators of conversion services themselves were held liable. Therefore, a maximum amount in dispute of EUR 25,000 seems

appropriate, such as the Munich Regional Court I assumed in the proceedings against the operators of the website <http://tubebox.org> (LG München I, ZUM-RD 2013, 76).

#### **IV. Counterclaim**

With the motion under III. the defendant claims the expenses necessary for its legal defense by way of counterclaim. The unjustified claim for costs by the plaintiffs in connection with the threat to take legal action against the defendant made it necessary for him to have recourse to legal assistance out of court as well. The plaintiffs must bear these costs pursuant to Section 97a (4) UrhG. It was also apparent to the plaintiffs that the warning without prior reference to the infringement was unjustified, since it is undisputed between the parties that the defendant is a host provider within the meaning of Section 10 TMG and no circumstances that could justify liability of the defendant as an interferer prior to receipt of the warning letter of September 22, 2020 were presented by the plaintiffs or are otherwise apparent.

Kind regards

RA von der Heiden