

MARIENLYST CONFERENCE 2018



PULS4 vs. YouTube

On a way to a primary liability for intermediaries ?

Initial Situation



- Largest Austrian Private Free to air TV station, established 2007
- ~4,5 % audience market share (E12-49)
- Part of ProSiebenSat.1Puls4 Group
- ~29% group audience market share (with ATV/ATVII, acquired in 2017)
- ~ 500 employees
- Group turnover ~ EUR 150M

Initial Situation



P7S1 Group Company „Studio 71‘ is one of the most important YouTube Content Partners

Initial Situation

- YouTube is a more and more important substitution for linear television, esp. among young people
- The coverage that YouTube (and Facebook) can provide is unique and essential for creators to find an audience ... but at their rules ...
- This duopoly of „social media‘ is absorbing most of the growth in online ad spendings and therefore the biggest threat for traditional business models of refinancing expensive content
- Based on this enormous market strength rightholders need to decide:
ally with the „enemy“ or „fight for your rights“

... fight for your rights ... status quo in member states' judicature

- In several Countries (Spain, Italy, Germany) right holders and Collecting Societies have sued YouTube for copyright infringement
- Until now YouTube has always been qualified as a host provider (but mostly based on factual issues from years ago)
- However OLG Hamburg in 2017 (5 U 175/10) has declared that '*... YouTube has receded from the original concept of a host provider as far as possible ...*'
- This case is pending at the German Federal Supreme Court (BGH) – the decision will be published in September
- Until now the YouTube business model has never been subject to an ECJ ruling
- YouTube has settled lawsuit in recent years and entered into agreements with Collecting Societies (e.g. GEMA in Germany)
- Why did that happen ... ?

Fight for your rights ... ?

Dieses Video ist in Deutschland nicht verfügbar, weil es möglicherweise Musik enthält, für die die erforderlichen Musikrechte von der GEMA nicht eingeräumt wurden.

Das tut uns leid.



To be or not to be ... (on YouTube) .. that is the question ...

Program in Puls4 media library

The screenshot shows the Puls4 website interface. At the top, there is a navigation bar with a menu icon, 'Mediathek', 'Login', and the Puls4 logo. To the right of the logo are search and social media icons (Facebook, Twitter, Instagram). Below the navigation bar, three video thumbnails are displayed:

- Top Thumbnail:** Title: **KONSUMGUT SEX** Ist Prostitution ein Gewerbe wie jedes andere? Duration: Ganze Folge | 01.08.2018 | 00:51:53
- Bottom Left Thumbnail:** Title: **OH MEIN GOTT: SEX UND RELIGION** Wie lassen sich Glaube und Sex vereinbaren? Duration: Ganze Folge | 25.07.2018 | 00:50:30
- Bottom Right Thumbnail:** Title: **DIE GRENZE ZWISCHEN FLIRT UND BELÄSTIGUNG** Was heißt das für die Geschlechterrollen? Duration: Ganze Folge | 18.07.2018 | 00:52:22

Each thumbnail includes a 'PRO & CONTRA' label and a play button icon. A Puls4 logo is visible in the bottom right corner of the page.

To be or not to be ... (on YouTube) .. that is the question ...

Program on YouTube uploaded by third party

The screenshot shows a YouTube search results page for the query "puls4 pro und contra". The browser address bar shows the URL: https://www.youtube.com/results?search_query=puls4+pro+und+contra. The search bar contains the text "puls4 pro und contra". The left sidebar shows navigation options: Start, Trends, Verlauf, DAS BESTE AUF YOUTUBE, Musik, Sport, Gaming, Filme, Nachrichten, Live, 360°-Video, and Kanäle finden. The main content area displays four video results:

- Puls 4 - Pro und Contra - Sendung 18.07.2018 - Wo liegt die Grenze zwischen Flirt und Belästigung?**
Y 01 • 314 Aufrufe • vor 1 Woche
Moderation: PULS 4 NEWS Politik-Chefreporterin Manuela Raidl 18.07.2018 Gäste: Thomas Schäfer-Elmayer, "Benimmppapst", ...
- Pro & Contra - Schlagabtausch zu Skripal-Fall, Sündenbock Russland oder überall böser Putin?**
Deutschland+Russland • 5188 Aufrufe • vor 4 Monaten
Die österreichische Sendung PRO & CONTRA bei puls4, vom 11.04.2018, Thema: "Eiszeit zwischen Russland und dem Westen ..."
- Pro und Contra-Der PULS 4 News-Talk**
TheSztar1 • 1725 Aufrufe • vor 3 Monaten
Sparen, Kürzen und mehr Arbeit - Ist der Sozialstaat in Gefahr?, Magazin, A 2018 Moderation: Thomas Mohr Nach den ...
- Kürzungen im Budget, wer muss sich fürchten? Pro und Kontra Puls4 mit Interview Minister Löger**
videoattac2 • 3311 Aufrufe • vor 5 Monaten
Nach der Budgetrede von Finanzminister Löger: Ex-ÖVP-Finanzsprecher Günter Stammvoll, der sozial...

... nobler in the mind to suffer ... ?

Youtube Pre-roll spot

Sicher | <https://www.youtube.com/watch?v=IFTfmSBSUd8>

puls4 pro und contra

mömax JETZT ENTDECKEN

Gültig von 20.08. bis 08.09.

-20% bei Kauf von einem von vielen **Möbelstücken Ihrer Wahl¹)**

Video beginnt in 4

Anzeige · 0:04 · mömax.at

0:01 / 0:06

Pro und Contra-Der PULS 4 News-Talk

1.730 Aufrufe

6 2 TEILEN

Nächstes Video AUTOPLAY

Der Talk: Homöopathie - Heilung oder Humbug? ORF...
Dietmar Fink
2873 Aufrufe
49:20

Johann Gudenus im FPÖ-TV Sommergespräch 2018
FPÖ TV
1.2K views
Anzeige

Sensation - Rekordfund bei Bares für Rares (28.10.2016)
Dieter Da
Empfohlenes Video
14:14

2011-2012 Australian Cherub National Championships...
Hartas Productions
Empfohlenes Video
5:44

Kokosöl und andere Ernährungsrätümer - Prof....

... . nobler in the mind to suffer ... ?

... . before the program starts

The screenshot shows a YouTube video player with a blurred video frame. The address bar shows the URL <https://www.youtube.com/watch?v=IFTfmSBSUd8>. The search bar contains 'puls4 pro und contra'. The video player shows a blurred scene of an indoor space with a glass roof. The video title is 'puls4 pro und contra'. The player shows 0:01 / 58:02. To the right is a list of recommended videos from 'möma' and other channels.

YouTube Premium
YouTube ganz ohne Werbeanzeigen genießen.

ews-Talk

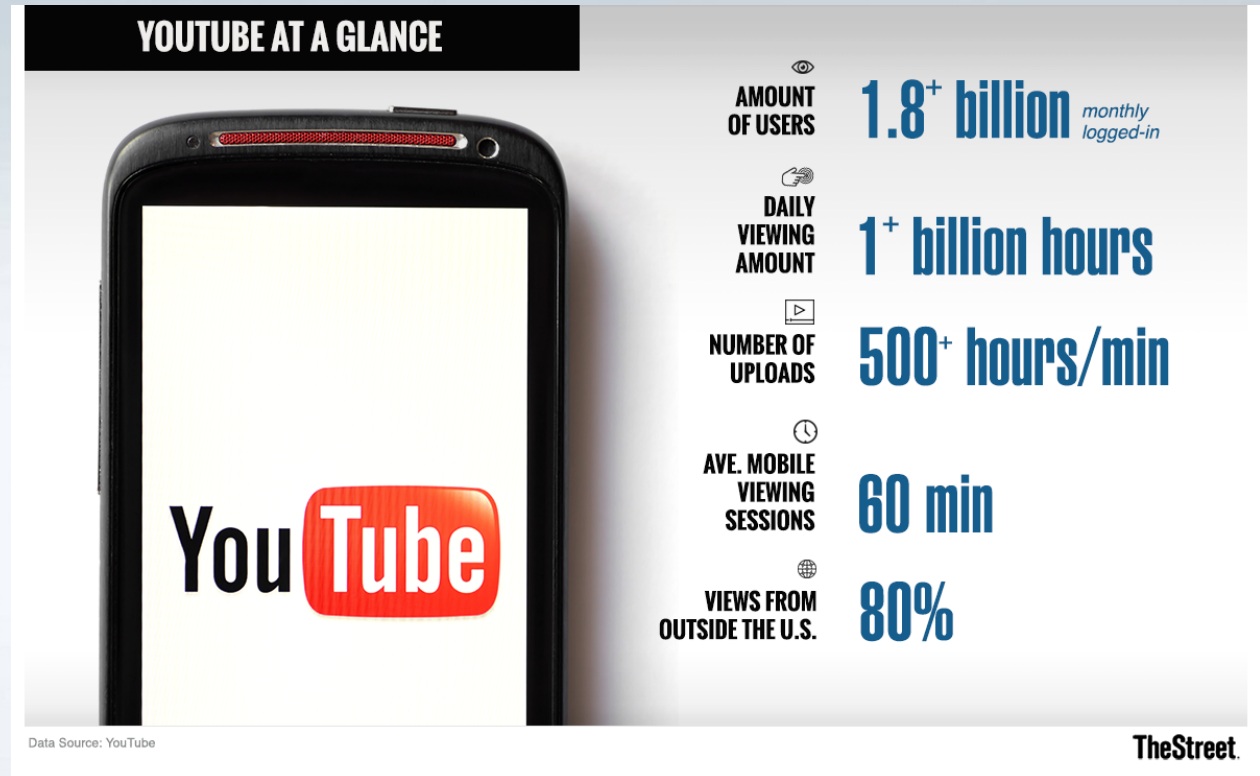
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- Kokosöl und andere Ernährungsirrtümer - Prof...**

... outrageous fortune (by monetarizing "stolen content") ... or

Youtube Facts :



YouTube Inc. estimated anual revenue: \$10 to 15 billion

PLOIL BOESCH

... YOUR LEGAL PARTNER IN ART AND ENTERTAINMENT ..

-FEMR- Foreningen for
Entertainment-og Medieret

... to take Arms against a Sea of troubles ...

- Lawsuit (injunction suit) PULS4 vs. Youtube Inc. (San Bruno, CA) and Google Austria filed in 2014
- Based on §§ 38, 74, 76a UrhG iVm §18 und 18a UrhG (Austrian Copyright Act), which essentially is "making available" and insofar falls under "communication to the Public" as conclusively regulated in Art. 3 InfoSoc Directive 2001/29/EU (fully harmonized !!)
- **Prayer for Relief:**
 - YouTube must refrain from making available videos owned by Puls4 as a rightholder of copyrights and/or ancillary broadcasting rights
 - An alternative Claim was based on unfair competition law (as a backup) to prohibit the combination of copyright infringing content with instream advertising

PULS4 vs. YouTube The Court Case

The essential facts as submitted by the plaintiff:

- The platform YouTube makes available countless videos that have been uploaded by users without permission and infringe Puls4 copyrights as producer of TV programs (and neighboring rights as a broadcaster)
- The platform is personalized, structured and functions as a search engine
- Users can create a YT-channel and upload content without disclosing their identity, which makes their warranty of owning all copyrights for the uploaded content worthless
- Users are provided with proposals and recommendations based on their individual preferences (either based on log in data or cookies (if not registered user))
- Illegal (copyright infringing) content is linked with video ads (mainly pre roll spots) in a 'monetizing' system provided by the platform

PULS4 vs. YouTube The Court Case

The essential facts as submitted by the plaintiff (2):

- YouTube offers numerous support channels and similar tools to facilitate uploading the content
- YouTube uses automated filtering tools and partly also manual control (mostly to avoid inappropriate advertising results) and insofar performs editorial tasks
- YouTube has more and more developed into a medium, offers and advertises original content (YouTube Red, YouTube Music, sports events) and adopts user generated content as its own ('zu Eigen machen')
- As a result YouTube can (no longer) be qualified as a host provider according to § 16 ECG (E-commerce Act), which is the Austrian implementation of Art. 12 to Art. 15 E-commerce Directive (2000/31/EU)

PULS4 vs. YouTube The Court Case

Legal consequence:

- As a result YouTube is no neutral intermediary and can (no longer) be qualified as a host provider according to § 16 ECG (E-commerce Act), which is the Austrian implementation of Art. 12 to Art. 15 E-commerce Directive (2000/31/EU) → **no safe harbour !!**
- YouTube is liable for copyright infringements committed on the platform as a **primary (at least joint) infringer** (and not only based on the concept of interferer's liability (German 'Störerhaftung'))
- The claim was entirely focused on that legal issue - claimant made no efforts to prove any breach of host providers obligations by YouTube (e.g. non compliance with notice and take down procedures)

PULS4 vs. YouTube The Court Case

YouTube's rebuttal:

- **YouTube is a Host Provider and thus privileged under § 16 ECG**
- All content is uploaded by the Users and YouTube does not perform any ex ante checks for copyright infringements (automated or manual)
- Controlling the uploads would be impossible due to the massive load of content uploaded (400 hrs per minute)
- Uploading users have to confirm that they own all necessary copyrights for the uploaded content
- YouTube does not perform any editorial tasks – the whole structure of the platform is automated and based on algorithms and AI
- Making available videos that had already been published on puls4.com previously on YouTube is not for a 'new audience' (because with the same technical means (internet)) and therefore no 'communication to the public'

PULS4 vs. YouTube The Court Case

YouTube's rebuttal (2):

- The decision to monetize a video is triggered by the uploading users only – who then conclude agreements with Google Ireland Ltd. (and not YouTube Inc.)
- YouTube has implemented a costly system to prevent copyright infringement (Content ID), which rightholders can use to either block or 'monetize' their content themselves
- All videos that have been 'claimed' during the proceedings were removed immediately



- Unfair competition is unfounded because it is subsidiary to copyright law

PULS4 vs. YouTube – The Court Case

First decision (2015):

- Claim based on copyright infringement dismissed
- YouTube qualified as a host provider and therefore privileged
 - **no liability**
- But the alternative claim based on unfair competition (UWG) was granted and YouTube convicted to refrain from combining Puls 4 Content with instream advertising
- Ruling extremely contradictory as the reasons that the court took into account to grant the UWG claim were exactly those against the host provider privilege
- Both parties appealed successfully
- Court of 2nd instance reversed the ruling and sent the case back to the 1st instance court with 2 important guidelines:

PULS4 vs. YouTube – The Court Case

First decision (2015) (2):

• Court of 2nd instance Guidelines:

- The Court should collect additional evidence regarding the circumstances of the presentation (i) on Claimants website and (ii) on YouTube in order to assess whether Youtube takes an 'active role' in the uploading of infringing content
- Based on recent Supreme Court judicature in a case of radio streaming it was made clear (based on ECJ C-466/12 Svensson) that it qualifies for a 'new audience' if content that has been published in combination with commercials by the right holder is then made available circumventing such refinancing efforts **even if no different technical means are used. (This concept might be obsolete after CJEU C-166/17)**

PULS4 vs. YouTube - The Court Case

The Courts findings:

•Based on undisputed facts and judicial inspection:

- Appearance and Functionalities of the YouTube platform
- Country specific Landing page
- Structured Categories
- Search engine function
- User specific recommendations
- System of monetarization

•Based on testimony of Google employees:

- Uploaded videos are tagged with metadata by the users within given categories (or if not by AI provided by YouTube) to make them accessible in the search engine
- If untitled by the Uploader, file name (and eventual tags deducted from the file name) are generated by the system
- When embedding YT-videos in other websites, the YouTube player Logo is always a part of the video

PULS4 vs. YouTube – The Court Case

The Courts findings:

•Based on testimony of Google employees (2):

- YouTube monitors users behaviour (search history) using cookies to build user profiles
- Profiles are used to personalize 'custom tailored' recommendations based on previous search results
- YouTube does not perform any content checks when a video is uploaded, the notice and take down procedures are always triggered by a claim or complaint from the user community
- Functionality of the Content ID system
- YouTube provides support sites/channels to help users with uploading and producing (however no 'YouTube Spaces' in Austria) content

PULS4 vs. YouTube – The Court Case

The Courts Ruling:

The Court came to the conclusion that by

- Hyperlinking
 - Categorizing
 - Filtering
 - Using structured indexes within given categories
 - Monitoring user behavior
 - Offering the suitable recommendations based on the user profile and
 - providing support
- **YouTube played an active role in enabling and facilitating the users to upload copyright infringing content**
 - **hereby left the scope of § 16 ECG (host provider privilege) and is therefore liable as a "instigator or at least assistant" of the copyright infringement.**

PULS4 vs. YouTube – Analysis

- The verdict of HG Wien is – even though the opinion of the Court is not overly elaborated – totally in line with the autonomous concept of liability the CJEU has established in recent years.
- The criteria of HG Wien are very similar to those the CJEU has established in the 'The Pirate Bay' ruling (EUGH C-610/15 – Stichting Brein/Ziggo, GRUR 2017, 790):
 - Structured presentation of metadata (to **facilitate** access to the files)
 - Provision of a search engine
 - Indexes based on categories (genres)
 - Performing editorial tasks
- **CJEU confirmed the concept of deliberate intervention and**
- **no actual knowledge of individual infringement is required** (different from GS Media C-160/15)

PULS4 vs. YouTube - Analysis

- Art. 3 InfoSoc Directive fully harmonizes the interpretation of 'communication to the public'
- The new 'European concept of primary liability by contributory acts' will lead to a new approach in member states' tort law, especially the established systems of primary and secondary liability (including the concept of interferers liability ('Störerhaftung'), that has governed judicature in Germany so far) and the respective requirements might have to be redefined or even replaced
- 'Presumed knowledge' by commercial operators of 'dangerous' platforms (i.e platforms with an inclination to copyright infringements and operators knowing about that risk) or rather an more objective duty of care approach and the requirement of 'necessary checks' ?

PULS4 vs. YouTube – Analysis

- Based on information from the hearing it can be expected that the German BGH will use similar criteria when deciding the Petersen/YouTube (OLG Hamburg) case:
 - *Embedding of the YouTube Logo*
 - *Search Engine functionality*
 - *Categories and links to uploaded Content*
 - *Editorial presentation*
 - *User profiles*
 - *user specific recommendations based on these profiles*
- The outcome – announced as a decision of fundamental importance – can be expected with suspense as the BGH has already adopted the CJEU approach in a verdict 2017 (I ZR 11/16 Vorschaubilder III) even though liability of a 'thumbnail search engine' was finally denied

PULS4 vs. YouTube — the way forward

- Draft Art.13 Directive on Copyright in the Digital Single Market (DSM Directive) – „Value Gap Legislation’
- Different approaches from Commission and several compromise papers (Bulgarian Presidency, JURI, German MEP Voss)
- European Parliament voted against JURI proposal in July → back to the start
- Will recent judicature (esp. BGH Petersen/YouTube) influence the process ?

PULS4 vs. YouTube — the way forward

- Is regulating platform operators without changing either InfoSoc or E-Commerce Directive a realistic option?
- „... in cooperation with right holders ... ‘
- „... appropriate and proportionate measures ... ‘
- „... no general obligation to monitor ...

Thank you for your attention

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