

fair, no one disagreed with the proposition that the fact that thiopurine is only effective at certain dosages and is toxic at higher levels is a "law of nature." But then again, that is not what the patent claimed. Instead, the patent claimed an application of that law of nature to the treatment of certain diseases. The Court did not consider this difference to be significant as it concluded that the steps of administering drugs and ways of monitoring their levels are well known. What is important to understand though, is that the Court did not reject the patents for lack of novelty, but rather for failure to claim patent-eligible subject matter. The problem with this approach is that it melds together completely separate inquiries – that of the eligible subject matter and that of novelty. The distinctness of these categories is evident from the structure of the Patent Act, which has a separate section for each requirement.

Not only did the Court misread the statute as a matter of statutory construction, but it effectively put into doubt all method-of-treatment patents. After all, such patents all rely on laws of nature. The only reason certain drugs and biologics work is because they exploit natural phenomena to achieve their purpose. If that is the road that the Court intends to travel, then potential profits from pharmaceutical research (and therefore incentive to conduct such research) will be greatly diminished.

The Supreme Court expressed its belief that having a more stringent patent eligibility requirement will likely benefit the public, because physicians will be better able "to provide sound medical care." This view, expressed by a number of medical associations that have submitted briefs to the Court, has been gaining currency not only in the U.S., but worldwide, reversing the previous trend for a more inclusive patent eligibility regime. It is worth remembering that for quite some time, patents on pharmaceutical compounds were not available in a number of countries, including developed countries like Japan, Switzerland, Italy, Finland, Greece, Iceland, Monaco, Norway, Portugal, and Spain. The reason behind this exclusion was the same moral concern that animated the *Prometheus* Court, i.e., the availability of needed drugs to the public. Yet, in the 30 years that the developed countries have permitted patenting pharmaceuticals, we have developed more and better drugs that have prolonged lives and alleviated suffering for countless individuals. The fear that allowing exclusive rights to drugs will preclude access has turned out to be unfounded. Yet, the *Prometheus* decision is just one episode of the multi-front attack on pharmaceutical and biologic patents.

Recently, litigants and activists in a number of countries have attacked patents on DNA and other genetic materials. The American Civil Liberties Union filed suit to declare DNA to be per se patent ineligible. Bills to accomplish the same result have been introduced in Congress. Similar bills have been introduced in Australia. European geneticists have issued similar calls. Along the same lines, a number of countries simply disregard patent rights by issuing compulsory licenses on valuable drugs. (A compulsory license, after all, is little different from refusal to grant exclusive rights in the

first place). While that approach may be excused and even welcomed in the face of a public health emergency, it is exceedingly hard to justify for drugs like Viagra or Plavix. Yet countries have issued compulsory licenses for both of those drugs.

All of these actions have popular appeal. The public prefers cheaper drugs and tests to the more expensive ones. Thus judicial, executive, and legislative actions that prevent anyone from charging monopoly rents by precluding the availability of exclusive rights are likely to be met with cheers. However, this is very shortsighted. Limiting of patent rights today may lower the cost and increase availability of drugs and tests already on the market, but that approach will also simultaneously lower incentives for further innovation. Fewer treatments and diagnostics will be developed (and they will be developed more slowly) as a result. In essence, limiting patent eligibility for medical products benefits the present generation at the expense of the future ones. If we are to hope that medicine will make as large strides in the next 30 years as it made in the past 30, courts, legislatures, and the public must be convinced that limiting the scope of patent eligibility is precisely the wrong way to go.

Articles

Thomas Hoeren* and Silviya Yankova**

The Liability of Internet Intermediaries – The German Perspective

A. Introduction

The principles concerning the liability of Internet intermediaries in Germany are primarily based on case law. Specific and to some extent divergent liability criteria have been developed not only within all concerned legal areas but regarding almost all different types of service providers as well. This makes it a demanding and challenging task for a legal practitioner to acquire a general idea of the main liability conception on the one hand and to stay well-informed and up-to-date with the new court practice tendencies concerning all various legal aspects of the matter on the other. This article aims to outline the main legal application areas of liability arising from the

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services and the particular activities of Internet intermediaries as well as to provide a holistic overview of the topic.

After an introduction of the relevant statutory provisions, follows a detailed observation of the dogmatic concepts of liability and the German doctrine of *Stoererhaftung* in particular. Afterwards, liability is highlighted from all relevant perspectives of the different fields of law: civil, copyright, trademark, competition and criminal law. The chapters regarding these different legal areas elaborate not only the basic principles and requirements for liability considering the different provider types, but illustrate some basic court decisions and their acceptance by scholars. This comprehensive approach tries to point out certain coherencies and to identify interesting parallels between the various aspects of responsibility. Finally, the legal situation regarding the liability of intermediaries will be analysed, while the weaknesses of the current concepts as well as some ideas for improvement are pointed out.

B. Overview

The liability of online intermediaries according to current statutory and case law in Germany raises questions involving different legal areas. Concerning liability under civil law, the most important question is under which circumstances intermediaries may be held liable for the legality of transmitted content. In this regard several statutory provisions have to be taken into account depending on the unlawful activity in question. These are in particular Sec. 97 Copyright Act (UrhG) for copyright infringements, Secs. 14, 15 Trademark Act (MarkenG) for trademark infringements and Secs. 8, 9 Unfair Competition Act (UWG) for unlawful competitive conduct. Regarding the liability under criminal law the most frequent offences are the incitement to hatred Sec. 130 German Criminal Code (StGB), the dissemination of depictions of violence (Sec. 131 German Criminal Code), the distribution of pornography (Secs. 184 et seq. German Criminal Code) and the defamation offences (Secs. 185 et seq. German Criminal Code). Besides, the Tele Media Act (TMG) contains in Secs. 7–10 a system of rules limiting the liability of online intermediaries depending on the type of service provider. These provisions are seen as privileges or defenses for intermediaries applied like a filter, prior to the application of special provisions under civil and criminal law.

The common remedies which can be awarded against online intermediaries in Germany are, in terms of civil law, injunctions and removal claims in cases of strict liability on the one hand, and fault-based compensation claims on the other. The penalties under criminal law are imprisonment and monetary fines. Pursuant to Sec. 7(2)(2) Tele Media Act injunctive relief remain unaffected by the provisions of Secs. 7–10 of the Act. In other words, due to this provision, the privileges for service providers have no impact on injunction relief. Thus, these rules limit the liability only in regard to compensation claims and criminal offenses. Therefore, the unrestricted injunctions have the biggest actual relevance among all remedies. Their requirements are

dominated by case law and therefore barely unitary specified. As for compensation claims, they can be filed against intermediaries only in cases in which statutory liability privileges are not applicable. Furthermore, the entitlement for information pursuant to Sec. 101 Copyright Act also plays a role as a remedy.

When dealing with the liability of online intermediaries, numerous challenges arise from the fact that they only contribute to the unlawful activities of third parties. Therefore, intermediaries often cannot be held liable as a tortfeasor or an infringer. Hence, different approaches have been developed to deal with the challenges of accessory liability. Consequently, the theories of direct liability as well as the concepts of accessory liability need to be considered when examining the responsibility of online intermediaries.

C. Concepts of Liability

I. Direct Liability as a Tortfeasor/Infringer

It is a common principle in criminal and civil law that liability arises directly from unlawful actions. The specific requirements for these actions in each case depend on the elements of statutory and case law. For example, in the law of unfair competition only a person who performs unlawful actions in the course of business competition is seen as a tortfeasor according to the Unfair Competition Act. In intellectual property law the person directly causing an infringement of a copyright or trademark is liable as an infringer. Having said that, it seems unlikely that online intermediaries directly cause torts or infringements because usually solely their users commit these. Nevertheless, direct liability of Internet intermediaries does not seem unthinkable and the concept is being applied by courts in some cases, e.g. in competition law.

II. Direct Liability as a Participant

The liability for incitement of or assistance in unlawful actions of third parties is recognized as a form of contributory liability (so-called participant liability). In both cases, however, the participant needs to act intentionally in regard to the unlawful action of the third party. This requirement is usually not met by online intermediaries. However, in cases of gross and insistent breach of the obligation to examine an alleged infringement German courts have developed the concept of liability as a participant.¹ Such responsibility was accepted when service providers ignored specific notices of unlawful activities and failed to prevent further violations of the same kind. The courts considered this kind of conduct as participation in an infringement by forbearance. Unfortunately, the distinction between the participation rules and the concept of disturbance liability was not discussed.

¹ Munich District Court, decision of 11 January 2011, case No. 21 O 2793/05, 2006 MMR 332, 334 et seq.

III. Disturbance Liability – The Principles of Disturbance Liability (*Stoererhaftung*)

Due to the fact that indirect causation of unlawful actions is unlikely to result in liability according to statutory principles, civil law courts have developed another concept of liability for contributory actions (so-called “disturbance liability” (*Stoererhaftung*)). This form of liability is not based on the doctrine of tort but arises from the rules governing the violation of intellectual property rights. The property defense claim pursuant to Sec. 1004 German Civil Code mentions the “disturber” as the person being liable. In analogy to this legal doctrine, civil courts broadened the application of the concept of disturbance liability to different areas of law (i.e. copyright, trademark and patent law). Disturbance liability consequently exceeds tort liability and fails to have any impact thereon.² It is rather intended as a tool to extend the legal protection of property rights by broadening the group of possible infringers.

The concept of disturbance liability is relevant particularly for online intermediaries because these providers often not only fail to be liable as a tortfeasor/infringer but also as a participant. Therefore, disturbance liability represents a form of liability that goes beyond these categories. According to the court practice of the German Federal Supreme Court, a person is seen as a “disturber”, if he causes an unlawful action of a third party in an adequate way, provided that it was possible and reasonable for him to prevent this action.³ Thus, a separate, accessory obligation is imposed on the disturber. Disturbance liability is a form of strict liability and therefore requires no fault. Furthermore, the Federal Supreme Court has recognized a type of preventive liability, provided that there is a reasonable threat of an infringement caused by the potential disturber.⁴ However, disturbance liability cannot form a legal basis for damage claims, since the injured party can only claim injunctive relief as well as removal of the infringing content.⁵

The doctrine is criticized among scholars because it creates a form of pure causal liability. Therefore, courts have tried to limit this strict causal liability by requiring a breach of reasonable duties to examine contents. Thus, it appears necessary to review the scope of these duties in each single case in order to determine to what extent an examination act could have been

2 German Federal Supreme Court, decision of 18 October 2001, case No. I ZR 22/99, 2002 GRUR 618, 619 – *Meissner Dekor*.

3 Constant court practice since Federal Supreme Court, decision of 6 July 1954, case No. I ZR 38/53, 1955 GRUR 97, 99 *et seq.* – *Constanze II*.

4 Federal Supreme Court, decision of 19 April 2007, case No. I ZR 35/04, 2007 GRUR 708, 711 – *Internet-Versteigerung II*.

5 Federal Supreme Court, decision of 5 December 1975, case No. I ZR 122/74, 1976 GRUR 256, 258 – *Rechenscheibe*; Federal Supreme Court, decision of 7 July 1988, case No. I ZR 36/87, 1998 GRUR 829, 830 – *Verkaufsfahrten II*; Federal Supreme Court, decision of 17 May 2001, case No. I ZR 251/99, 2001 MMR 671, 673 – *ambiente.de*.

expected from the disturber.⁶ The current case law has developed some criteria for the reasonability of such scrutiny. If, for example, factors taken into consideration are the technical and economic capability to prevent the infringement.⁷ Another criterion is the provider's profit from the service.⁸ Additionally, the significance of the violation⁹ as well as the limitations imposed by constitutional rights¹⁰ (e.g. freedom of the press) play a significant role in the determination of reasonability of the provider's duties. In general, it can be said that the more actual details indicate an infringement, the higher are the expectations on the provider to investigate the alleged content.¹¹ Most important, however, is the fact that in the case of online intermediaries there is neither a general proactive obligation to monitor own facilities nor to actively seek out possible infringements in the own area of responsibility. This obligation arises first when the intermediary becomes aware of the violation. Nevertheless, the disturber may need to take precautions in order to prevent similar violations in the future.¹² This obligation usually applies solely to easily recognizable unlawful activities.¹³

Disturbance liability is currently being controversially discussed, especially in the area of competition law. Because of the fact that competition law is a special field of tort law, it imposes – unlike intellectual property law – specific obligations merely for business conduct. These cannot be compared to the duties in any other area of law. According to critics, disturbance liability disregards these specific requirements for direct liability and includes parties who are, in terms of competition law, not able to commit a violation. Therefore, the application of disturbance liability rules overextends the scope of competition law. Moreover, in competition law, illegality originates in the unfair competitive action itself, meaning the breach of a specific standard of business conduct (*Verhaltensunrecht*). On the contrary, the concept of disturbance liability is based on the violation of absolute

6 Federal Supreme Court, decision of 17 May 2001, case No. I ZR 251/99, 2001 MMR 671, 673 – *ambiente.de*; Federal Supreme Court, decision of 10 October 1996, case No. I ZR 129/94, 1997 GRUR 313, 315 *et seq.* – *Architektenwettbewerb*; Federal Supreme Court, decision of 30 June 1994, case No. I ZR 40/92, 1994 NJW 12827 = 1994 GRUR 841, 842 *et seq.* – *Suchwort*; Federal Supreme Court, decision of 15 October 1998, case No. I ZR 120/96, 1999 NJW 1960 = 1999 GRUR 418, 419 *et seq.* – *Möbelklassiker*.

7 Federal Supreme Court, decision of 30 April 2008, case No. I ZR 73/05, 2008 GRUR 702 – *Internet-Versteigerung III*.

8 Munich District Court, decision of 8 December 2005, case No. 7 O 16341/05, 2006 MMR 179; Cologne District Court, decision of 21 March 2007, case No. 28 O 19/17.

9 Düsseldorf Court of Appeal, decision of 7 June 2006, case No. I-15 U 21/06, 2006 MMR 618, 620.

10 STEINLE, 2006 MMR 180, 181.

11 WEIDERT & MOLLE, “Handbuch Urheberrecht und Internet” 399, marginal note 132.

12 Federal Supreme Court, decision of 11 March 2004, case No. I ZR 304/01, 2004 GRUR 860, 864 – *Internet-Versteigerung I*.

13 Federal Supreme Court, decision of 15 October 1998, case No. I ZR 120/96, 1999 NJW 1960 = 1999 GRUR 418, 419 *et seq.* – *Möbelklassiker*.

rights such as property rights. In this case illegality does not originate from an action but as the result of infringement (*Erfolgswidrigkeit*). Any infringement of an absolute right indicates the illegality of the action causing it. Due to this difference, it is argued that an analogy to Sec. 1004 German Civil Code fails to legitimate the liability for unfair business practices. As a consequence, the doctrine of disturbance liability is criticized as being dogmatically unnecessary and replaceable by the participation rules in tort.¹⁴

This heavy criticism has resulted in a new court practice of the Federal Supreme Court, which tends to neglect the rules of disturbance liability and legally justifies its latest decisions by classifying online intermediaries as direct violators of competition law.¹⁵ Some scholars believe that this is an unambiguous sign for the general inapplicability of disturbance liability in competition law or even in all other areas of law.¹⁶ Even though disturbance liability under competition law may have been restricted, it is still applied by the Federal Supreme Court in the areas of copyright and trademark.

IV. Direct Liability Under Competition Law

Due to the problems resulting from the application of disturbance liability in the area of competition law, the Federal Supreme Court has created a form of direct liability for online intermediaries. In the case *Jugendgefährdende Medien bei eBay* the Court decided that the contributory violator in competition law can be liable, not as a disturber in terms of Sec. 1004 German Civil Code but as a tortfeasor according to the statutory source of the Unfair Competition Act.¹⁷ This decision provoked common consent in German legal literature and research.¹⁸ The Court classified eBay as a tortfeasor because of the direct violation of business conduct standards caused by the sale of obscene content on the platform. This decision and the classification as a tortfeasor were provoked by the direct breach of eBay's duties of care under competition law. Each party that neglects such duties imposed by competition law is seen as a direct violator, even though the infringement was actually caused by a third party. According to the Court, there is a common obligation for all who create a source of danger in their area of responsibility or allow such to continue existing, to undertake all reasonable precautions necessary to prevent risks to the injured party.

If the platform operator is confronted with a concrete notice of an infringement, its duty of care under competition law turns into a concrete obligation

14 KÖHLER, in: KÖHLER & BORNKAMM, Sec. 8 marginal note 2.15 *et seq.*

15 Federal Supreme Court, decision of 12 July 2007, case No. I ZR 18/04, 2007 GRUR 890 – *Jugendgefährdende Medien bei Ebay*.

16 KÖHLER, 2008 GRUR 1, 6 *et seq.*; AHRENS, 2007 WRP 1281, 1287; VOLKMANN, 2008 CR 232.

17 Federal Supreme Court, decision of 12 July 2007, case No. I ZR 18/04, 2007 GRUR 2007, 890 – *Jugendgefährdende Medien bei Ebay*.

18 KÖHLER, 2008 GRUR 1, 6 *et seq.*; VOLKMANN, 2008 CR 232; AHRENS, 2007 WRP 1281, 1287.

to examine the suspected content. From this point on, the operator is responsible not only for blocking the alleged infringement, but must undertake all reasonable measures to prevent further similar violations.¹⁹ Thus, the results of the theory of direct liability in competition law on the one hand and the concept of disturbance liability on the other appear rather similar. Nevertheless, the legal concepts upon which they are based are quite different. The distinction between disturbance liability and direct liability has not only a dogmatic significance. Differences in the result may appear if a third party participates negligently by forbearance in an anticompetitive commercial practice.²⁰ Furthermore, claims for damages against service providers which are direct violators of competition law could be possible (the strict disturbance liability on the contrary can be a legal basis only for injunctive relief and entitlement for information). For compensation claims, however, the filter of the Tele Media Act would restrict the responsibility of service providers in the majority of the cases.

D. Provisions of the Tele Media Act

I. Overview

The liability of online intermediaries is restricted by statutory law. As already mentioned, the Tele Media Act contains rules for criminal and civil law which are applied like a filter prior to the application of the special rules of liability.²¹ The provisions of the Tele Media Act represent the national implementation of the E-Commerce Directive 2000/31/EC Sec. 4 (Liability of intermediary service providers).

According to Sec. 7(1) Tele Media Act, service providers are responsible in accordance with the general rules that apply to the content they provide. The legislature and courts²² share the opinion that providers are not only liable for the contents they have made available, but are also liable for adopted contents according to the general rules of liability. The criteria for the adoption are still a controversial issue.

Pursuant to Sec. 7(2)(1) Tele Media Act there shall be no general obligation for service providers to monitor the transmitted/stored information or to actively seek circumstances indicating an unlawful activity. On the other hand, according to Sec. 7(2)(2) Tele Media Act, obligations to remove or block unlawful content remain unaffected by the privileges for service providers implied in Secs. 8–10 of the Act. As a result, the Tele Media Act offers in fact defenses for intermediaries only in the rare cases of fault-based claims for damages or under criminal law.

19 Federal Supreme Court, 2008 NJW 758 *et seq.* – *Jugendgefährdende Medien bei Ebay*.

20 SPINDLER, 2011 GRUR 101, 103, 104.

21 Federal Supreme Court, decision of 23 September 2003, case No. VI ZR 335/02, 2004 MMR 166 with annotation by HOEREN.

22 BT-Drs. 14/6098, at 23.

Due to the rule in Sec. 7(2)(2) Tele Media Act, an undefined liability for service providers is created, which appears to be in contradiction to the E-Commerce Directive. Unfortunately, the references to the technical possibility and the economic reasonableness to block an infringing content, which were formerly embodied in the Tele Services Act are no longer applicable. Therefore, Sec. 7(2)(2) Tele Media Act could be interpreted as an unrestricted obligation for providers to block information due to injunctive relief. However, the basic principle *impossibilium nemo obligatur* must be applied: if a provider is unable to block the content, he may not be required to do so. Attempts to impose such obligation have failed so far.

II. Service Provider Type

Concerning access providers, Sec. 8 Tele Media Act, which implements Art. 12 of the E-Commerce-Directive, is applicable. The access provider is exempted from responsibility for information of third parties, which he makes accessible for use or transmits through communication nets. However, only the further conduit of user generated information or the intermediation of access to a communications network is considered a transmission. Therefore, only passive, automatic procedures are privileged under Sec. 8 Tele Media Act. Because of the privilege in Sec. 8(1) Tele Media Act, access providers can be subject to damage claims merely in cases of willful collusive collaboration with the violator. If an access provider has positive knowledge of infringing contents transmitted by his users and in agreement with the user refuses to block them, he is obliged to recover the damages (Sec. 8(1)(2) Tele Media Act).

A special provision defines the liability for caching (Sec. 9 Tele Media Act) and reproduces factually Art. 13 E-Commerce Directive.

Unambiguous criteria for the classification to a certain type of service provider are missing. Especially the determination of the different types of host providers appears difficult. In most cases Internet marketplace operators, sharehosters, web portals and web forum operator act as host providers, unless they adopt the content created by their users.

Host providers only store the information of third parties. They are privileged liable if they have no actual knowledge of illegal activity or information and, concerning damage claims, are not aware of facts or circumstances which make the unlawful activity or information apparent (Sec. 10(1) No. 1 Tele Media Act). In order to prevent the loss of this defense, the provider needs to act expeditiously and remove or disable access to the information after obtaining knowledge of the unlawful activity. Depending on the obviousness and severity of the infringement, the removal of the content within 24 hours²³ up to one week²⁴ is required. The criteria "knowledge" and

23 AG Winsen, decision of 6 June 2005, case No. 23 C 155/05, 2005 CR 682.

24 STRÖMER & GROOTZ, 2006 K&R 553, 555; KÖSTER & JÜRGENS, 2006 K&R 108, 111.

"apparent illegality" have to be proven in court by the plaintiff.²⁵ Questionable remains, if the mere knowledge of the action of the third party itself is sufficient to cause liability. The majority of scholars and courts require in addition the actual knowledge of its illegality as well.²⁶

III. Search Engines and Hyperlinks

The Tele Media Act contains no provisions regarding the liability of search engines and the liability for hyperlinked content. Some scholars therefore insist upon a codification in the Tele Media Act.²⁷

The privileges in Secs. 8–10 Tele Media Act are not applicable for hyperlinks because links are merely a technical reference in a HTML text. As a result, hyperlinks cannot be related to any kind of service provider type listed in the Tele Media Act. Hyperlinks are a technical transmission which stands as a *compositum mixtum* between technical procedure and content performance.²⁸ Therefore, an analogy to the provisions of the Tele Media Act appears to be inappropriate.²⁹ On the one hand there is an intentional legal loophole, and on the other hand there is no legal comparability between hyperlinks and the service offered by service providers.³⁰

The legal situation concerning the liability of search engines is similar. An analogous application of the Tele Media Act provisions seems inappropriate because the loophole was intended by the legislator.³¹ Prior to the *Google France* decision of the European Court of Justice, search engines were often classified as content providers under German law. Recently, however, the criteria for liability stated in *Google France* have been applied by German courts.

E. Liability Under Copyright Law

I. General Principles

The infringer of copyright is strictly liable according to Sec. 97(1)(1) Copyright Act. The copyright holder can demand removal or prohibition of further infringing use by filing an injunctive relief claim. Additionally, the copyright holder can assert compensatory claims, provided that the infringing party has acted willfully or negligently.

25 Federal Supreme Court, decision of 23 September 2003, case No. VI ZR 335/02, 2004 MMR 166 *et seq.* about Sec. 5 para 2 TDG a. F.

26 ECK & RUESS, 2003 MMR 363, 365; SOBOLA & KOHL, 2005 CR 443, 447; HOFFMANN, 2002 MMR 284, 288; SPINDLER, 2002 NJW 921, 923 *et seq.*

27 IGOR STENZEL, 9/2006 MMR S.V.

28 ROGGENKAMP, 6/2007 jurisPR-ITR.

29 SPINDLER, 2007 CR 239, 245.

30 IGOR STENZEL, 9/2006 MMR S.V.

31 RATH, "Das Recht der Suchmaschinen (Law of the Search Engines)" 276 *et seq.*; Berlin Local Court, decision of 20 March 2006, case No. 10 W 27/05.

According to current case law, there is no obligation for access providers to block infringing contents.³² They may not be classified as direct infringer or participant, because they have no direct influence on infringing contents. Preventive injunctive relief prohibiting future infringing actions against access providers and network operators are commonly rejected not only because of the provisions Sec. 7(2)(1) Tele Media Act and Sec. 88 Telecommunications Act. The fact that the intermediaries are technically not able to block the infringing content plays an important role as well. However, pursuant to Sec. 101(2) Copyright Act, information can still be demanded from the access provider.³³

Hosting providers can be held liable pursuant to Sec. 19(a) Copyright Act if they make copyrighted works accessible. They are infringer according to Sec. 97(1) Copyright Act and simultaneously contributory infringer or disturbing party in terms of an injunction.³⁴ In general, host providers have no obligation to monitor the stored contents or to seek actively for indications for a possible infringement. If there is no notice of an alleged infringement, it is presumed that the provider has no knowledge of any infringing action and therefore is not liable.

II. Direct Liability of the Web Portal Operator

Nevertheless, a direct liability can arise, if an intermediary adopts the contents of a third party and as a consequence becomes content provider. A Federal Supreme Court decision concerning the liability of a web portal operator for contents that users uploaded to the platform, has gained enormous attention by courts and scholars.³⁵ The court substantiated the criteria upon which the portal operator adopts user-generated contents as its own and is liable as if he had uploaded the information himself. The examination of the content for accuracy prior to the upload activation inside the portal can be interpreted as such an adoption. The fact that the user can clearly identify this content as user generated and not as information of the web operator was deemed to be irrelevant in this case. The integration of the content under the own emblem and the economic profit should appear as

32 Frankfurt Court of Appeal, decision of 22 January 2008, case No. 6 W 10/08, 2008 CR242 *et seq.*; Frankfurt District Court, decision of 5 December 2007, case No. 2-03 O 526/07, 2008 MMR 121 *et seq.*; Frankfurt District Court, decision of 8 February 2008, case No. 3-12 O 171/07, 2008 MMR 344 *et seq.*; Düsseldorf District Court, decision of 2007, case No. 12 O 550/07, 2008 MMR 349 *et seq.*; Hamburg District Court, decision of 12 March 2010, case No. 308 O 640/08, 2010 MMR 488; Kiel District Court, decision of 23 November 2007, case No. 14 O 125/07, 2008 MMR 123 *et seq.*

33 Hamburg Court of Appeal, decision of 17 February 2010, case No. 5 U 60/09, 2010 MMR 338.

34 VON WOLFF, in: WANDTKE & BULLINGER (eds.), "Urhr", Sec. 97 marginal note 24.

35 Federal Supreme Court, decision of 12 November 2009, case No. I ZR 166/07, 2010 MMR 556 with annotation by Engels – *marions-kochbuch.de*; 2010 CR 471 with annotation by HOEREN & PLATTNER; 2010 K&R 496 with annotation by ROGGENKAMP.

sufficient signs for adoption. Thus, the portal operator is liable under the general rules and was classified as a direct infringer of copyrights.

The Hamburg District Court even failed to require an examination by the portal operator prior to upload by YouTube.³⁶ Instead, the responsibility for adoption was based partially on the fact that the operator breached his duty of care to examine the user's licenses.

The operator of a picture portal shall as well be liable as a content provider.³⁷ According to the court an adoption would require that the provider identifies himself with the content and takes the responsibility for the whole content or for specific parts of it. Significant should be the holistic view at the offer from the perspective of an objective observer. And even if there is no adoption of the content, the operator can be liable under the principle of disturbance liability if an examination of the pictures prior to their upload has taken place.

On the contrary, the Hamburg Court of Appeal denied the adoption of user generated content by the web portal operator Sevenload.³⁸ If the content was not examined for accuracy prior to the actual upload, the combination of use generated with the provider's own editorial and licensed contents as well as the simple arrangement into charts could not result in a liability as content provider.

III. Cases of Disturbance Liability

1. Web Portal Operator

If an adoption of the content is denied, the liability as a content provider and direct infringer is not applicable. In such cases, a disturbance liability for the breach of examination duties has to be considered. In the case *Sevenload* the Hamburg Court of Appeal could not find a legal basis for disturbance liability. It could unlikely be considered reasonable for an operator of a video portal with over 50,000 daily uploads to proactively examine uploads and seek for possible infringements. Only after gaining positive knowledge through a specific notice does the operator have the duty to block the content and to prevent further similar violations.³⁹ This obligation to prevent similar infringements for the future has been currently substantiated by the Hamburg District Court. The platform YouTube shall be obliged not only to use its Content ID Software and thus block uploads of recordings identical to notified music infringements, but needs to install a further word

36 Hamburg District Court, decision of 3 September 2010, case No. 308 O 27/09, 2010 MMR 833.

37 Berlin Local Court, decision of 10 July 2009, case No. 9 W 119/08, 2010 MMR 203.

38 Hamburg Court of Appeal, decision of 29 September 2010, case No. 5 U 9/09, 2011 MMR 49 – *Sevenload*.

39 Hamburg Court of Appeal, decision of 29 September 2010, case No. 5 U 9/09, 2011 MMR 49 – *Sevenload*; Federal Supreme Court, decision of 11 March 2004, case No. I ZR 304/01, GRUR 2004, 860, 864 – *Internet-Versteigerung I*.

filter able to recognise the same music title and interpreter in a divergent music recording.⁴⁰ This obiter dictum suggestion of the court appears rather technically and legally unsustainable; a word filter might not only be easily circumvented, but may paralyse the platform or may even offend the freedom of speech of the uploaders.⁴¹

The web portal operator is deemed to be liable in cases in which he gains a commercial profit from the content.⁴² On the contrary, the infringing adoption of city map extracts for an online personal organizer by the user does not lead to disturbance liability because it exceeds any reasonable scope of scrutiny to scan entries of personal appointments.⁴³

2. Web Forum Operator

A preventive monitoring obligation of a forum operator for the whole content and each single entry does not exist.⁴⁴ Only in cases of suspect threads, must the forum information be investigated within a reasonable scope. For example, there is a duty to examine threads, if the operator has provoked foreseeable infringing post by his own behavior. Otherwise a notice of at least one infringing act of some significance is necessary to cause an obligation to examine the content.⁴⁵ However, the operator is legally obliged to delete the thread immediately after gaining knowledge of a violation.⁴⁶

3. Sharehosting Services

A host provider can be liable pursuant to the concept of disturbance liability due to the fact that he offers memory capacity to an infringer. The liability privilege in Sec. 10 Tele Media Act is inapplicable for injunctive relief because of Sec. 7(2)(2) Tele Media Act. Host providers must examine the content of third parties for possible infringements within the scope of reasonable scrutiny. Based on Sec. 7(2)(1) Tele Media Act, the majority of the courts share the opinion that liability can arise only after gaining knowledge

40 Hamburg District Court, decision of 20 April 2012, case No. 310 O 461/10, 2012 GRUR-Prax 217.

41 HOEREN, "Die Niederlage von YouTube ist ein Pyrrhussieg für die GEMA", 2 May 2012 FAZ 19.

42 Hamburg District Court, decision of 8 September 2008, case No. 310 O 332/08, 2009 MMR 143.

43 Munich Court of Appeal, decision of 9 November 2006, case No. 6 U 1675/06, 2007 K&R 104.

44 Zweibrücken Court of Appeal, decision of 14 May 2009, case No. 4 U 139/08, 2009 MMR 541.

45 Hamburg Court of Appeal, decision of 4 February 2009, case No. 5 U 167/07, 2009 MMR 479; as well as Hamburg Court of Appeal, decision of 4 February 2009, case No. 5 U 180/07, 2009 ZUM 417; Leipzig Local Court, decision of 18 March 2009, case No. 102 C 10291/08, 2009 MMR 507.

46 Düsseldorf District Court, decision of 25 January 2006, case No. 12 O 546/05, 2006 CR 563 *et seq.*

of a specific infringement by means of a notice. However, the topic of which obligations to examine the stored information can reasonably be expected after such notice has been controversially discussed.

According to the opinion of several courts, the hosting provider must block and delete infringing data as well as take precautionary measures in order to prevent further similar violations after a notice of an infringement.⁴⁷ The Hamburg Court of Appeal saw a proactive obligation for the future to monitor the content of all users who have already uploaded infringing data.⁴⁸ The court has currently modified this legal view and confirmed the existence of proactive examination duties only in regard to repeated uploads of files with infringing content.⁴⁹

On the contrary, the Duesseldorf Court of Appeal accepts sharehosting as a neutral service which is not simply tolerated by the law, but actually stands within the framework of the legal order.⁵⁰ It is neither practical nor appropriate to block data by the file title, to block IP addresses or to demand a monitoring and selection of the whole uploaded data by a human person.⁵¹ Therefore, according to the Duesseldorf Court of Appeal after a notice of a particular copyright infringement, the hosting provider has simply to delete the infringing content without any further duty to examine data in order to prevent similar infringements in the future.

4. Hyperlinks

A link itself is not an infringing action but merely a technical reference inside an HTML text. In matters of liability, only the linked content is of importance. The liability privileges of the Tele Media Act are, as mentioned above, not applicable. Only if the provider shows solidarity with the content of the inserted link, does he become a content provider, leading to the application of the general rules of liability.⁵²

In the *Paperboy* decision, the Federal Supreme Court denied to classify hyperlinks to copyrighted works, which were accessible on the website of the

47 Hamburg District Court, decision of 12 June 2009, case No. 310 O 93/08, 2009 ZUM 863, 868.

48 Hamburg Court of Appeal, decision of 30 September 2009, case No. 5 U 111/08, 2010 MMR 51, 54 – *Rapidshare II*; similarly Hamburg Court of Appeal, decision of 2 July 2008, case No. 5 U 73/07, 2008 MMR 823 – *Rapidshare*; Hamburg Court of Appeal, decision of 14 January 2009, case No. 5 U 113/07, 2009 MMR 631 – *Usenet I*; Hamburg Court of Appeal, decision of 28 January 2009, case No. 5 U 255/07, 2009 MMR 405 – *Alphaload*.

49 Hamburg Court of Appeal, decision of 14 March 2012, case No. 5 U 87/09 – *Rapidshare III*.

50 Düsseldorf Court of Appeal, decision of 27 April 2010, case No. I-20 U 166/09, 2010 MMR 483, 484; similarly RÖSSEL, 2008 ITRB 6, 7; BREYER, 2009 MMR 14.

51 Düsseldorf Court of Appeal, decision of 27 April 2010, case No. I-20 U 166/09, 2010 MMR 483, 485.

52 Munich Court of Appeal, decision of 6 December 2001, case No. 21 U 4864/00, 2001 ZUM 809.

copyright holder, as a violation of the right to reproduction.⁵³ The copyright holder himself enables the further use of the copyrighted material by making his protected work publically accessible without technical safeguards. Therefore, the simple access alleviation, even in form of a deep link, cannot represent a copyright infringement.

Liability for inserting a link was affirmed by the Munich District Court⁵⁴ and the Munich Court of Appeal.⁵⁵ An article about a new software version for copying DVDs, containing a link to the producer's website was considered as an adequate causal contribution to an infringement.⁵⁶ According to the courts, only the fact that the user is led directly to the infringing website was sufficient to state a liability as a disturber. The search for the infringing content was significantly alleviated and the risk of an infringement was enormously increased. The freedom of the press granted in Art. 5(1) of the German Constitution failed to be a justification because the provisions of the Copyright Act are effective limitations to the freedom of the press, and the latter has to stay behind the legal property interests of the copyright holder in this case.

5. Usenet Service Provider

The liability of the Usenet service provider is still a matter of discussion. The Hamburg District Court classified this kind of Internet service as being comparable to the work of a host, provided that the information is stored for a long period of time.⁵⁷ After a specific notice regarding an infringing content, the Usenet provider is obliged to block the violation.

The Duesseldorf Court of Appeal and the Munich District Court share the opinion that providing access to Usenet is more comparable to caching activities in terms of Sec. 9 Tele Media Act.⁵⁸ Others acknowledge a similarity to access providers because, unlike auctioning websites, the Usenet pro-

53 Federal Supreme Court, decision of 17 July 2003, case No. I ZR 259/00, 2003 NJW 3406; HOEREN, 2004 GRUR 1 *et seq.*

54 Munich District Court I, decision of 5 December 2003, case No. 5 U 2546/02, 2005 CR 460 *et seq.* with annotation by LEJEUNE; Munich District Court I, decision of 7 March 2005, case No. 21 O 3220/05, 2005 MMR 385 *et seq.* with annotation by HOEREN; similarly Munich District Court I, decision of 14 November 2007, case No. 21 O 6742/07, 2008 MMR 192 *et seq.*

55 Munich Court of Appeal, decision of 28 July 2005, case No. 29 U 2887/05, 2005 MMR 768 *et seq.*

56 Munich District Court I, decision of 7 March 2005, case No. 21 O 3220/05, 2005 MMR 385 with annotation by Hoeren; Munich Court of Appeal, decision of 28 July 2005, case No. 29 U 2887/05, 2005 MMR 768; similarly Munich District Court I, decision of 11 October 2006, case No. 21 O 2004/06, 2007 MMR 128.

57 Hamburg District Court, decision of 19 February 2007, case No. 308 O 32/07, 2007 MMR 333, 334.

58 Düsseldorf Court of Appeal, decision of 15 January 2008, case No. I 20 U 95/07, 2008 K&R 183; Munich District Court I, decision of 19 April 2007, case No. 7 O 3950/07, 2007 K&R 330 – *Usenet*.

vider is not able to control the remarkable amount of user generated content.⁵⁹ Besides, the injured parties were not able to prove the existence of an adequate and appropriate filtering system.⁶⁰ As a result, disturbance liability was rejected even after a specific indication of an infringement, if the prevention of further similar violations would be possible only by manual monitoring of stored data or by shutting the website down. These precautionary steps are unreasonable for the Usenet provider. However, stricter obligations to examine stored content can be imposed, if the provider is actively and offensively advertising with the opportunity of copyright infringements on his website.⁶¹

6. Search Engines

Search engines are no intermediaries within the terms of the Tele Media Act as mentioned above, and their liability is currently being discussed with much controversy by the courts. Despite the automatic capture of web offers of third parties and the automatic generation of hit lists, search engine operators have been treated in Germany as normal content providers.⁶² The fundamental decision of the European Court of Justice in the case *Google France* makes this legal perception doubtful. Search engines can be privileged liable under Art. 14 E-Commerce Directive, if their activity is “of a mere technical, automatic and passive nature”.⁶³ In order to classify a search engine as a host provider, it should be necessary to examine whether its role is neutral, pointing to a lack of knowledge or a control of the stored data.

A copyright infringement by the mere use of pictures as thumbnails was denied.⁶⁴ Making thumbnails publicly accessible should be an unfree use of the original under German copyright law.⁶⁵ The Federal Supreme Court also affirmed that a search engine operator is not liable for the use of works of a comic drawer as thumbnails.⁶⁶ The public accessibility of the work is unlikely unlawful, because the search engine was allowed to presume that the

59 Hamburg Court of Appeal, decision of 28 January 2009, case No. 5 U 255/07, 2009 MMR 405 – *Alphaload*; Hoeren, 2007 MMR 334, 335.

60 Munich District Court I, decision of 19 April 2007, case No. 7 O 3950/07, 2007 K&R 330 – *Usenet*.

61 Hamburg Court of Appeal, decision of 28 January 2009, case No. 5 U 255/07, 2009 MMR 405 – *Alphaload*.

62 MICHAEL RATH, “Recht der Internet-Suchmaschinen (Law of Internet Search Engines)” 275 *et seq.* (2005).

63 CJ, decision of 23 March 2010, case No. C-236/08 to C-238/08, CJ, 2010 GRUR Int. 395, 396.

64 Bielefeld Local Court, decision of 18 February 2005, case No. 42 C 767/04, 2006 CR 72 *et seq.*; similarly Charlottenburg Local Court, decision of 25 February 2005, case No. 234 C 264/04.

65 Hamburg District Court, decision of 5 September 2003, case No. 308 O 449/03, 2004 MMR 558–562.

66 Federal Supreme Court, decision of 29 April 2010, case No. I ZR 69/08, 2010 MMR 475.

copyright holder agrees therewith. This is due to the fact that the copyright holder made the content of her website accessible for search engines without making use of any available technical protection measures.

7. Holder of Unsecured WLAN Access

Even private persons are obliged to control and examine the connection they distribute and to prevent the misfeasance of third parties.⁶⁷ Providing unsecured access to the Internet is a causal contribution to infringing acts. The private holder of unsecured WLAN can be held liable, if unauthorized parties use his network access for copyright infringements.⁶⁸ The holder enables access to the Internet for everyone and thus makes infringements possible.⁶⁹ Even in case that the holder is considered as a service provider in terms of Sec. 2(1) No. 1 Tele Media Act⁷⁰, he might be liable as a disturber. Therefore, his liability gives no basis for compensation claims.⁷¹

The Federal Supreme Court considers it as a reasonable effort to examine the security of the own WLAN through appropriate safeguards even without a notice of an infringement (so-called preventive monitoring obligations). The unsecured WLAN gives third parties the opportunity to hide behind the identity of the holder and thus infringe copyright anonymously and without any anxiety.⁷² In order to prevent this, the holder is expected to ensure that the WLAN is secured by safeguards, which were customary in the market at the time the router was brought first into service. However, there is no duty to consecutively update the safeguards to the latest standards of the market.⁷³

8. Holder of Internet Access

Beside the cases of unsecured WLANs, there are also situations in which the holder willingly provides his family members or some third parties access to the Internet. Because of the fact that the infringing actions are still taken

67 Federal Supreme Court, decision of 12 May 2010, case No. I ZR 121/08, 2010 GRUR 633.

68 Federal Supreme Court, decision of 12 May 2010, case No. IZR 121/08; Federal Supreme Court, 06/2010 MIR.

69 Düsseldorf Court of Appeal, decision of 27 December 2007, case No. I-20 W 157/07, 2008 MMR 256; Hamburg District Court, decision of 26 July 2006, case No. 308 O 407/06, 2006 MMR 763 with annotation by MANTZ; Frankfurt/M. District Court, decision of 22 February 2007, case No. 2/3 O 771/06, 2007 ZUM 406 with annotation by GIETL; Mannheim District Court, decision of 25 January 2007, case No. 7 O 65/06, 2007 MMR 537.

70 WEIDERT & MOLLE, "Handbuch Urheberrecht und Internet" 410, marginal note 165; the opposite opinion VOLKMAN, 2008 CR 232, 237.

71 Federal Supreme Court, decision of 12 May 2010, case No. I ZR 121/08.

72 Düsseldorf District Court, decision of 16 July 2008, case No. 12 O 195/08, 2008 MMR 684.

73 Federal Supreme Court, decision of 12 May 2010, case No. I ZR 121/08, marginal note 23; Federal Supreme Court, decision of 12 May 2010, case No. IZR 121/08, 06/2010 MIR.

without his knowledge or direct participation, the holder is not directly liable. According to the Hamburg District Court, the holder has the reasonable obligation to prevent infringements by instructing his children, by introducing the risks to his relatives, by undertaking random inspections of the use, and by arranging different user accounts and firewalls.⁷⁴ Thus, a form of preventive monitoring duty is imposed.

The Duesseldorf Court of Appeal sees the unlimited supply of Internet access to family members as a breach of reasonable duties of examination and control, but lowers the standards.⁷⁵ The Mannheim District Court does not consider monitoring duties as reasonable prior to any specific notice of infringing activities and demands only an instruction of minors depending on their age and comprehension ability.⁷⁶ The Frankfurt am Main Court of Appeal declines the precautionary monitoring and instruction obligation at all and endorses liability only in cases in which the holder has had clear indications of a threat of infringement.⁷⁷

An employer should not be liable for infringing participation of his employee in file-sharing services.⁷⁸ Examination and safeguarding duties can be expected from the employer only after knowledge of an infringement by means of a specific notice because there is no common experience according to which the employer should expect violations of law in his office.

Within this context, the operator of an Internet cafe is considered contributory liable for the copyright infringements which his customers commit if he fails to undertake the necessary technical steps to block and prevent violations of the law.⁷⁹

9. Access Provider

Some court decisions have not completely denied the possibility of disturbance liability for access providers.⁸⁰ However, the majority of the courts and the scholars do not share this perception.⁸¹ The access provider has a major and decisive role in the functioning of the Internet. Filtering and

74 Hamburg District Court, decision of 15 July 2008, case No. 310 O 144/08, 2008 MMR 685, 687.

75 Düsseldorf Court of Appeal, decision of 27 December 2007, case No. I-20 W 157/07, 2008 MMR 256.

76 Mannheim District Court, decision of 30 January 2007, case No. 2 O 71/06, 2007 MMR 459.

77 Frankfurt/M. Court of Appeal, decision of 22 January 2008, case No. 6 W 10/08, 2008 MMR 169, 170.

78 Munich District Court I, decision of 4 October 2007, case No. 7 O 2827/07, 2008 CR 49; MANTZ, 2008 CR 52.

79 Hamburg District Court, decision of 25 November 2010, case No. 310 O 433/10.

80 Hamburg Court of Appeal, decision of 28 April 2005, case No. 5 U 156/04, 2005 MMR 45.

81 Frankfurt/M. Court of Appeal, decision of 16 May 2007, case No. 5 U 220/06, 2008 GRUR-RR 94; Flensburg District Court, decision of 25 November 2005, case No. 6 O 108/05, 2006 GRUR-RR 174.

blocking measures would be a violation of the user's secrecy of telecommunication (Art. 10 German Basic Law; Secs. 3 Nos. 6, 88(1) Telecommunications Act) and no statutory restriction allows such interference with civil liberties.⁸² Beside this issue of legal permissibility, access providers usually fail to have the technical capability to prevent infringements as well. As a consequence, filtering and blocking of user contents are not only unreasonable for the access provider, but ineffective as well due to the small effort that has to be made to circumvent such measures.⁸³

F. Liability Under Trademark Law

I. Cases of Direct Liability

Pursuant to Secs. 14, 15 Trademark Act, if third parties use a protected industrial property right in an identical or similar way, the holder of the right can be entitled to claim compensatory damages and injunctive relief under trademark law. This form of liability requires an unauthorized commercial use of the trademark.

In regard to domains under trademark law, the mere allocation and administration of domain names is not sufficient to cause direct liability of the DENIC eG (responsible for the granting of domains in Germany). The Admin-C (administrative contact) is in general also not liable in terms of Secs. 823, 830 German Civil Code due to the lack of a willful infringing use of trademarks. Further, neither the Tech-C (technical contact), nor the Zone-C (zone contact) make commercial use of the signs which domains contain. There is also no direct liability of the domain parking operator because it is commonly neither actively assisting in an unauthorized use by the domain holder nor has it willful intent to violate the trademark.⁸⁴

However, the legal perception of liability concerning online auctioning is different. The Hamburg Court of Appeal decided that an Internet marketplace operator might directly infringe a trademark or contribute to an unauthorized trademark use by forbearance.⁸⁵ The principles of tort by omission should be applied, if the focus of the offence lies in the omission or failure to prevent further similar infringements even after gaining specific notices regarding trademark violations. The liability is deemed to depend on the ability and reasonability for the Internet marketplace operator to preclude infringing offers. The disturbance liability is relevant in this legal situation.⁸⁶

⁸² Cologne District Court, decision of 31 August 2011, case No. 28 O 362/10, 2011 MMR 833; Hamburg District Court, decision of 12 March 2010, case No. 308 O 640/08.

⁸³ REHART, 2010 MMR-Aktuell 303415; Hamburg District Court, decision of 12 November 2008, case No. 308 O 548/08, 2009 MMR 506.

⁸⁴ LUCKHAUS, 2008 GRUR-RR 113, 114.

⁸⁵ Hamburg Court of Appeal, decision of 24 July 2008, case No. 3 U 216/06, 2009 MMR 129 with annotation by WITZMANN.

⁸⁶ Hamburg Court of Appeal, decision of 24 July 2008, case No. 3 U 216/06, 2009 MMR 129 with annotation by WITZMANN.

The owner of a private account at an auction webpage was also held liable as a direct infringer of trademarks, if a third party (here the owner's wife), uses the owner's account and violates trademark law.⁸⁷ The account owner's liability arises from the breach of his own duty to keep the account access information secret.

II. Disturbance Liability

1. Internet Marketplace Operators

According to the opinion of the Federal Supreme Court, Internet marketplace operators are liable for trademark infringements committed on the platform pursuant to the principles of disturbance liability.⁸⁸ The requirements for the injunction claim of the injured party are a commercial practice and a reasonable controlling capability of the operator to block trademark infringements. It might be unreasonable for the operator to examine each offer prior to the actual upload, if users upload automatically to the platform. If the operator has gained knowledge of a trademark infringement, however, he is not only obliged to block the specific offer immediately but has to undertake all technical and reasonable steps to prevent further similar infringements.⁸⁹ Nevertheless, a compensation claim against the operator cannot be asserted.⁹⁰ Still preventive injunctive relief is not rejected, if according to the circumstances the disturber creates a threat of primary infringements.⁹¹ This proactive investigation obligation shall not be unreasonable or challenge the entire business concept. The use of filter software, which searches for suspected words and the manual examination of the results are still considered reasonable. Unreasonable, on the contrary, is the manual control of all photographs shown in automatically uploaded offers under a trademark, in order to search for pictures of products, which are divergent from the original.⁹²

⁸⁷ Berlin District Court, decision of 5 November 2001, case No. 103 O 149/01, 2002 CR 371 with annotation by LEIBLE & SOSNITZA.

⁸⁸ Federal Supreme Court, decision of 11 March 2004, case No. I ZR 304/01, 2004 MMR 668 – *Internet-Versteigerung I*; similarly Federal Supreme Court, decision of 10 April 2008, case No. I ZR 227/05 = 2008 NJW 3714, 2008 MMR 818 *et seq.*

⁸⁹ Federal Supreme Court, decision of 19 April 2007, case No. I ZR 35/04, 2007 MMR 507 *et seq.*; Hamburg District Court, decision of 4 January 2005, case No. 312 O 753/04, 2005 MMR 326 with annotation by RACHLOCK; similarly Brandenburg Court of Appeal, decision of 16 November 2005, case No. 4 U 5/05, 2006 CR 124.

⁹⁰ Federal Supreme Court, decision of 11 March 2004, case No. I ZR 304/01, 2004 MMR 668 *et seq.*

⁹¹ Federal Supreme Court, decision of 19 April 2007, case No. I ZR 35/04, 2007 MMR 507 – *Internet-Versteigerung II*; Federal Supreme Court, decision of 12 July 2007, case No. I ZR 18/04 = 2007 MMR 634.

⁹² Federal Supreme Court, decision of 22 July 2010, case No. I ZR 139/08 – *Kinderhochstuehle im Internet*.

The Court of Justice (CJ) was recently concerned with the liability of market-place operators in the case *L'Oréal SA*.⁹³ According to this decision, eBay cannot rely on the exemption from liability as a host provider if it fails to limit its activity to a mere technical, automatic and passive role. Rather, the operator plays an active role when it provides active assistance, in particular, by optimizing the presentation of the online offers or by promoting those offers.⁹⁴ Moreover, the operator is even liable if it is merely aware of facts or circumstances on the basis of which a diligent economic operator should realize that an offer on the website is unlawful. After a notice of an infringement the operator shall be further not only obliged to bring the infringement to an end but also to prevent further infringements of that kind.⁹⁵ Meanwhile, the Federal Supreme Court is seeking to implement this legal view in its case law and points out the many similarities between the theses of *L'Oréal SA* and its own decisions.⁹⁶

2. Search Engines and Google's AdWords

Search engines do not directly infringe the trademark by showing AdWords since they use the trademark neither directly nor commercially. Instead, an AdWord only creates the possibility for customers to have their advertisement appear in listings, which are shown next to the search results.⁹⁷ Nevertheless, the liability of the operator is only denied if he plays no active role in the trademark infringement such as e.g. having knowledge of the stored data or controlling it. The operator of the search engine cannot be held liable for the stored content, provided that he only contributes to the infringement in a passive way, has no knowledge of the unlawful nature of the content or activity, and has not failed to expeditiously remove or disable access to the concerned data.⁹⁸ Moreover, the disturbance liability of operators of meta-search engines also depends on their conduct after obtaining knowledge of an infringement, especially on the breach of examination duties.⁹⁹

93 CJ, decision of 12 July 2011, case No. C-324/09, 2011 MMR 596 with annotation by HOEREN – *L'Oréal SA*.

94 CJ, decision of 12 July 2011, case No. C-324/09, 2011 MMR 596 with annotation by HOEREN – *L'Oréal SA*.

95 CJ, decision of 12 July 2011, case No. C-324/09, 2011 MMR 596 with annotation by HOEREN – *L'Oréal SA*.

96 Federal Supreme Court, decision of 17 August 2011, case No. I ZR 57/09, 2012 MMR 178.

97 CJ, decision of 23 March 2010, case No. C-236/08 to C-238/08, 2010 GRUR Int. 395, 396.

98 CJ, decision of 23 March 2010, case No. C-236/08 to C-238/08, 2010 GRUR Int. 395, 396.

99 Berlin Court of Appeal, decision of 10 February 2006, case No. 9 U 55/05, 2006 MMR 393, 394.

3. DENIC

The criteria for disturbance liability of DENIC are the common ones: the breach of examination duties and their scope determined by whether and to what extent an examination of the alleged domain could have been expected.¹⁰⁰ A proactive examination prior to the domain's actual registration is, however, unreasonable for DENIC.¹⁰¹ After the registration, only an examination concerning a specific infringement notice could be required if the suspected violation of third-parties' rights is evident and easily detectable.¹⁰² That should be the case, if a *res judicata* title exists or the infringement is clear without ambiguity to such an extent, that the violation would suggest itself to the administrator in charge.¹⁰³ The claims against DENIC have the purpose to delete the registration of the infringing domain. Still, DENIC could not be obliged to keep negative lists of the trademarks or labels, which are blocked for registration.¹⁰⁴ As a result of the high requirements, a liability of DENIC occurs rarely.

4. Admin-C

Claims under trademark law against an Admin-C (administrative contact) require the specific interaction between the domain name and the content of the website. Only the combination of both criteria shows for what kind of services the trademark is being used. The practice of the courts concerning the liability of the Admin-C is controversial. Some appellate courts have denied any liability of the Admin-C.¹⁰⁵ A significant aspect, which speaks against disturbance liability is the fact that a removal claim against the Admin-C would go further than the injunctive relief against the domain holder (direct infringer).¹⁰⁶ Still, the Federal Supreme Court has stated that the Admin-C can be liable in accordance with the concept of disturbance

100 Federal Supreme Court, decision of 17 May 2001, case No. I ZR 251/99, 2001 MMR 671, 673 – *ambiente.de*.

101 Federal Supreme Court, decision of 17 May 2001, case No. I ZR 251/99, 2001 MMR 671, 674 – *ambiente.de*.

102 Federal Supreme Court, decision of 27 October 2011, case No. I ZR 131/10 – *regierung-oberfranken.de*; Federal Supreme Court, decision of 17 May 2001, case No. I ZR 251/99, 2001 MMR 671, 674 – *ambiente.de*.

103 Federal Supreme Court, decision of 17 May 2001, case No. I ZR 251/99, 2001 MMR 671, 675 – *ambiente.de*; Frankfurt/M. Court of Appeal, decision of 17 June 2010, case No. 16 U 77/09, 2010 MMR 689 with annotation by WETZEL.

104 Federal Supreme Court, decision of 19 February 2004, case No. I ZR 82/01, 2004 MMR 467 with annotation by HOEREN, 2004 LMK 136; Frankfurt/M. District Court, decision of 15 April 2009, case No. 2-06 O 706/08, 2009 MMR 704 – *Lufthansa-Domains*.

105 Cologne Court of Appeal, decision of 15 August 2008, case No. 6 U 51/08, 2009 MMR 48 *et seq.*; Düsseldorf Court of Appeal, decision of 3 February 2009, case No. 20 U 1/08, 2009 MMR 336.

106 Stuttgart Court of Appeal, decision of 24 September 2009, case No. 2 U 16/09, 2010 GRUR-RR 12, 14; STADLER, 2006 CR 521, 526.

liability.¹⁰⁷ This responsibility does not arise from the mere function as an Admin-C, because this position leads solely to contractual obligations between the holder of the domain and DENIC. These parties sign the registration contract without participation of the Admin-C who is nominated by the domain holder. Nevertheless, an examination obligation can be based on the statement of the Admin-C that it accepts the nomination by the future domain holder, because this act actually initially enables the registration of the domain. If free domain names are detected and automatically registered, so that no examination of possible infringements prior to the registration takes place, the Admin-C is obliged to minimize the created risk of infringements and monitor the automatically registered domain names.¹⁰⁸

5. Tech-C, Zone-C and Operator of Domain-Name-Servers

The Tech-C only acts as a technical assistant, thus it is not legally entitled to prevent infringements of trademarks. Subsequent to registration, only the domain holder and the Admin-C have the legitimation to delete the domain.¹⁰⁹ According to the legal opinion of the Bielefeld District Court the Zone-C is also not liable as a disturber.¹¹⁰ In fact, its legal position might be comparable to that of DENIC, with the consequence that responsibility arises after a certain notice of an evident and easily detectable infringement, for example under an existing *res judicata* title.¹¹¹

The domain-name-server operator is likewise under no obligation to proactively examine for infringements during the primary connecting. Conceivable are only restricted duties to check for violations such as in the case of DENIC.¹¹² Thus, liability is imaginable only in cases of unambiguous infringements and under *res judicata* titles.¹¹³

6. Domain Provider and Domain Parking

According to the Hamburg Court of Appeal, a host provider who offers his customers a platform to organize their domains by different tools or by forwarding goes beyond the services of a simple domain registrar like

107 Federal Supreme Court, decision of 9 November 2011, case No. I ZR 150/09, 2012 GRUR 304 – *Basler Haarkosmetik*.

108 Federal Supreme Court, decision of 9 November 2011, case No. I ZR 150/09, 2012 GRUR 304 – *Basler Haarkosmetik*.

109 STADLER, 2004 CR 521, 524.

110 Bielefeld District Court, decision of 16 May 2005, case No. 16 O 44/04 = 2004 MMR 551; similarly BÜCKING & ANGSTER, “Domainrecht”, marginal note 390.

111 STRÖMER, 2004 K&R 440, 441.

112 Hamburg Court of Appeal, decision of 25 April 2005, case No. 5 U 117/04 = 2005 MMR 703, 704; HOEREN, in: HOEREN & SIEBER (eds.), “Handbuch Multimedia-Recht”, Chap. 18.2 marginal note 168.

113 Hamburg Court of Appeal, decision of 25 April 2005, case No. 5 U 117/04, 2005 MMR 703, 704.

DENIC and can otherwise be deemed to be a disturber.¹¹⁴ However, disturbance liability will most commonly lack the reasonable possibility for the domain registrar to monitor the domain contents.¹¹⁵

The Duesseldorf District Court has stated that the liability of providers of domain marketplaces where unused domains are parked and offered for sale depends on their awareness of trademark infringements.¹¹⁶ An extensive examination of all parked domains was considered to be unreasonable for the operator. As a consequence, liability arises only if further violations occur after the provider has obtained knowledge of a trademark or name right infringement.¹¹⁷ A general examination duty would unnecessarily challenge the whole business concept of domain parking.¹¹⁸

G. Liability Under Competition Law

I. Direct liability

Pursuant to Sec. 3 Unfair Competition Act, unfair commercial practices are illegal if they are suited to be a tangible impairment of the interests of competitors, consumers or other market participants. The provisions of Secs. 4–7 Unfair Competition Act enumerate some examples and cases of unfair commercial practices. Whoever uses an illegal commercial practice can be sued for elimination and, in the event of the risk of recurrence, for injunctive relief (Sec. 8 Unfair Competition Act). Moreover, if somebody intentionally or negligently uses an illegal commercial practice, he is obliged to compensate competitors for the damages arising therefrom (Sec. 9 Unfair Competition Act).

The courts have applied a concept of direct liability in competition law since the decision of the Federal Supreme Court in *Jugendgefährdende Medien bei Ebay* (see above). As stated above the dogmatic reasoning for the judgment evolved the criteria for liability under competition law: the breach of competitive duties of care is regarded as a form of unfair commercial practice and makes the service provider a tortfeasor. Thus, the contribution to a violation of competition law becomes a direct violation of own duties

114 Hamburg Court of Appeal, decision of 29 April 2010, case No. 3 U 77/09 = 2010 MMR, 470.

115 Hamburg Court of Appeal, decision of 29 April 2010, case No. 3 U 77/09 = 2010 MMR 470.

116 Düsseldorf District Court, decision of 15 January 2008, case No. I 20 U 95/07 = 2008 MMR 254 *et seq.*; Hamburg District Court, decision of 18 July 2008, case No. 408 O 274/08 = 2009 MMR 218; Berlin District Court, decision of 3 June 2008, case No. 103 O15/08 = 2009 MMR 218; Frankfurt/M. District Court, decision of 26 February 2009, case No. 2-03 O 384/08 = 2009 MMR 364.

117 Federal Supreme Court, decision of 30 June 2009, case No. VI ZR 210/08, 2009 NJW-RR 1413 *et seq.*; Frankfurt/M. Court of Appeal, decision of 25 February 2010, case No. 6 U 70/90.

118 Düsseldorf District Court, decision of 28 November 2007, case No. 2a O 176/07, 2008 MMR 349, 350.

for business conduct committed by an unfair commercial practice of the contributor. The duties of care are deduced from Sec. 3 Unfair Competition Act. They encompass the idea that each party who creates a commercial source of danger has, under competition law, an obligation to undertake all possible and reasonable precautions in order to restrict and limit the violation of commercial interests of the competitors.¹¹⁹ The duty of care of a service provider is the examination of violating contents. The scope of the examination shall be the same as in cases of disturbance liability and be measured upon its reasonability.¹²⁰

In the case *Kinderhochstuehle im Internet* the Federal Supreme Court confirmed that the liability as a disturber in competition law is not applicable in cases in which the anticompetitive offence lies in the breach of rules of business conduct.¹²¹ If the platform operator is confronted with a specific indication of an infringement, his duties of care under competition law become a concrete obligation to examine the suspected content. Liability as a tortfeasor requires a notice of an unambiguous violation.¹²² The service provider is not bound to undertake a comprehensive evaluation in order to determine whether the offer is anticompetitive. This is deemed to be a task, which only a legal practitioner can accomplish. Moreover, it seems to be unreasonable to evaluate every single offer.¹²³

The private account owner on an auction platform is also directly liable under competition law as mentioned above.¹²⁴ The liability of the account owner arises from the breach of the own duty to keep account access information secret.

A definite statement as to the complete abandonment of disturbance liability under commercial law is still outstanding. Some scholars plead for its final and general inapplicability under commercial law¹²⁵ and others believe that

119 Federal Supreme Court, decision of 12 July 2007, case No. I ZR 18/04, 2007 GRUR 890 – *Jugendgefährdende Medien bei Ebay*.

120 Federal Supreme Court, decision of 12 July 2007, case No. I ZR 18/04, 2007 GRUR 890 – *Jugendgefährdende Medien bei Ebay*.

121 Federal Supreme Court, decision of 22 July 2010, case No. I ZR 139/08 – *Kinderhochstühle im Internet*; Federal Supreme Court, decision of 15 May 2003, case No. I ZR 292/00, 2003 GRUR 969, 970 = 2003 WRP 1350 – *Ausschreibung von Vermessungsleistungen*; Federal Supreme Court, decision of 14 June 2006, case No. I ZR 249/03, 2006 GRUR 957 = 2006 WRP 1225 – *Stadt Geldern*; Federal Supreme Court, decision of 12 July 2010, case No. I ZR 121/08, 2010 GRUR 633 – *Sommer unseres Lebens*.

122 Federal Supreme Court, decision of 11 March 2004, case No. I ZR 304/01, 2004 MMR 668 – *Internet-Versteigerung I*; Federal Supreme Court, decision of 30 April 2008, case No. I ZR 73/05, 2008 GRUR 702 – *Internet Versteigerung III*.

123 Federal Supreme Court, decision of 22 July 2010, case No. I ZR 139/08 – *Kinderhochstühle im Internet*.

124 Berlin District Court, decision of 5 November 2001, case No. 103 O 149/01, 2002 CR 371 with annotation by LEIBLE & SOSNITZA.

125 DÖRING, 2007 WRP 1131, 1136.

it can be further made use of if the violator of competition law does not undertake commercial actions according to Sec. 2(1) No. 1 Unfair Competition Act.¹²⁶ In cases in which the emphasis of the offence lies on the result of the violation, the disturbance liability continues to be taken into consideration by the courts.¹²⁷

II. Case Law Regarding Disturbance Liability

According to the Federal Supreme Court, the press cannot be liable for the insertion of violating links (gambling offers) as far as the link is merely an addition to an editorial article.¹²⁸ Such a link, which does not refer to an unambiguously infringing content, has to be seen in the light of Art. 5(I) Basic Law and therefore fails to provoke the liability of the editor. This privilege is applicable, however, only in advantage of the press. On the contrary, liability can be affirmed in cases, where links lead to infringing websites of other companies via web banners.¹²⁹

The use of Google's AdWords is, in accordance with European Law, anti-competitive only if the advertisement fails to enable an average user to ascertain whether the goods or services originate from the holder of the trade mark or, on the contrary, originate from a third party.¹³⁰

According to the Duesseldorf Court of Appeal, the use of metatags, which have no actual relevance to the information and content of the offered website, is not considered per se as an anticompetitive practice.¹³¹

The Dresden District Court has decided that proactive examination duties should not be imposed on the Admin-C.¹³² It is not reasonable to constantly monitor the website, especially considering the frequent change of the content and the necessary knowledge in law. Most of the legal scholars share this view.¹³³

126 LEISTNER & STANG, 2008 WRP 533, 538, 540.

127 Federal Supreme Court, decision of 30 April 2008, case No. I ZR 73/05, 2008 GRUR 702 – *Internet-Versteigerung III*.

128 Federal Supreme Court, decision of 1 April 2004, case No. I ZR 317/01, 2004 CR 613 et seq. with annotation by DIETLEIN – *Schöner Wetten*; similarly Deggendorf District Court, decision of 12 October 2004, case No. 1 S 36/04, 2005 CR 130 et seq.

129 Hamburg Court of Appeal, decision of 14 July 2004, case No. 5 U 160/03, 2004 MMR 822 et seq.

130 CJ, decision of 23 March 2010, case No. C-236/08 to C-238/08, 2010 GRUR Int. 395, 396.

131 Düsseldorf Court of Appeal, decision of 1 October 2002, case No. 20 U 93/02, 2003 WRP 104.

132 Dresden District Court, decision of 9 March 2007, case No. 43 O 128/07, 2007 MMR 394 = 2007 CR 462 with annotation by WIMMERS & SCHULZ.

133 STADLER, 2004 CR 521, 526; WIMMERS & SCHULZ, 2006 CR 754, 755, 762 et seq.; BÜCKING & ANGSTER, "Domainrecht", marginal note 392 et seq.; KÖHLER, ARNDT & FETZER, "Recht des Internet", marginal note 801; STADLER, "Haftung für Informationen im Internet", marginal note 255.

H. Liability Under Criminal Law

I. General Overview

In terms of criminal law, offences are usually committed by users or content providers. The most frequent offences concerning the use of Internet are the incitement to hatred (Sec. 130 Criminal Code), the dissemination of depictions of violence (Sec. 131 Criminal Code), the distribution of pornography (Secs. 184 et seq. Criminal Code) and defamation offences (Secs. 185 et seq. Criminal Code). There are special criminal provisions under copyright law (Secs. 106, 108 Copyright Act, 33 Art Copyright Act), trademark law (Secs. 143 et seq. Trademark Act), competition law (Secs. 16 et seq. Unfair Competition Act) and other special provisions as well.

In generally, access and host providers are not liable under criminal law; even if their contribution to the unlawful act can be classified as aiding, their conduct hardly can be proven as intentional. As a result, liability of the hosting provider can, in most cases, only be caused by omission if the elimination of incriminating contents is persistently rejected. Even in this case, however, it needs to be considered that in the event of liability, the privileges in Secs. 8–10 Tele Media Act are also applicable in criminal law.

II. Criminal Liability for Hyperlinks

The Local Court of Berlin Tiergarten¹³⁴ was the first German court to decide that the liability of the person who inserts a link depends upon the overall statement made by the hyperlink. If the solidarity with the illegal content of the link is declared by its insertion, then a liability as a content provider arises.¹³⁵ In such cases Sec. 7(1) Tele Media Act is applicable; the person who placed the link is liable according to the general rules. Hence, the privileges in Secs. 8–10 Tele Media Act are not applicable.

A different valuation is required if the link represents no adoption of the third parties' contents. If somebody (for example out of an academic interest) places a link to third-party content without indicating any kind of solidarity with it, there is no reason to assume that he adopted the content by the mere setting of a link. Therefore the liability is regularly excluded in such cases. Besides, in criminal law the basic principle *in dubio pro reo* applies: in case of doubt there is no liability for the insertion of links to criminally relevant contents. Exculpation is possible as well if the link inserter dissociates himself from the content and the link is part of a reporting about past events of the day.

¹³⁴ Berlin Tiergarten Local Court, decision of 30 June 1997, case No. 260, DS 857/96, 1998 CR 111.

¹³⁵ See on this the case of the Munich Court of Appeal, in which someone combined links with the naming of names, whereby the linked content contained defamation in the sense of Sec. 186 Criminal Code; decision of 6 July 2001, 2001 ZUM 809.

III. Orders Against Service Providers Under the German Code of Criminal Procedure

During the investigation of cyber crimes, service providers can also play a role, in particular since they store information about the offender. According to the Karlsruhe District Court,¹³⁶ a search warrant is considered justified in search of someone who has inserted a link to websites with child pornography. Even if the criminal content is reachable after a chain of other links, each single link remains causal for the broadcasting thereof.

The strong suspicion of copyright infringements in the terms of Secs. 106, 108 Copyright Act can also justify a search warrant in the office of a provider of a file-sharing system.¹³⁷

The German Federal Constitutional Court had to decide if a search warrant against a web forum operator was adequate and proportional where hyperlinks with copyright infringing content were inserted on the forum website. According to the Court's opinion there can be no suspicion of a copyright offence against the forum operator till it was investigated whether a user could have also inserted the link.¹³⁸

The copyright owner can also demand an inspection of the files of the public prosecution, where the IP addresses of the infringer participating in a file-sharing system can be found. Such a demand was rejected concerning the sharing of a single song¹³⁹ but was allowed a case in which a user shared 620 music titles.¹⁴⁰

After the implementation of the entitlement for information pursuant to Sec. 101 Copyright Act, according to the Copyright Act the plaintiff in civil law does not have to make a detour to the inspection of the files because Sec. 101 Copyright Act allows, under certain circumstances, direct civil claims against service providers.

I. Analysis

The German legislature has implemented the basic principles of the E-Commerce Directive 2000/31/EC. However, it failed to create a regulation corresponding to the notice-and-take-down procedure. Moreover, by the general application of disturbance liability and over-expansion of injunction relief,

¹³⁶ Karlsruhe District Court, decision of 26 March 2009, case No. Qs 45/09, 2009 MMR 418 et seq.

¹³⁷ Saarbrücken District Court, decision of 23 April 2009, case No. 2 Qs 9/09, 2010 MMR 205–206.

¹³⁸ German Federal Constitutional Court, decision of 8 April 2009, case No. 2 BvR 945/08, 2009 K&R 394 et seq.

¹³⁹ Darmstadt District Court, decision of 12 December 2008, case No. 9 Qs 573/08, 2009 K&R 211 et seq. with annotation by SANKOL.

¹⁴⁰ Darmstadt District Court, decision of 9 October 2008, case No. 9 Qs 410/08, 2009 MMR 52 et seq.

the Federal Supreme Court misconceives the main goals pursued by European and national legislators¹⁴¹ when drafting the Directive and the Tele Media Act. General, unambiguous, and binding liability standards, which the Tele Media Act and the Directive intended to create, are absent. Instead, in every single case, courts observe the relevant circumstances and facts before attempting to find a fair balance between the interests of the parties involved. Thus unfortunately, legal certainty and legal security for service providers are missing. It remains particularly uncertain to what extent future infringements have to be prevented. In this regard the term “quintessentially similar” and the criteria for the “reasonability” are at the moment not sufficiently substantiated. Moreover, if providers are required to prevent similar infringements from occurring in the future by the use of filtering software, it can be expected that users will find a technical possibility to circumvent this system.¹⁴² Therefore, measures of prevention will remain ineffective in the end, unless there is a form of human control. This however, cannot be required in many cases without challenging the business concept of the provider.

The observations beneath outline the basic critic points on the present legal situation in Germany concerning the liability of service providers.

I. Liability for Adopted Contents

The Tele Media Act describes the information of content providers with the term “own contents” and that of intermediaries with the help of the term “contents of third parties”. This explains the origin of the court practice, according to which an intermediary adopting the contents of third parties, becomes a content provider in this regard. On the contrary, the E-Commerce Directive speaks technically of “information made available by third parties” (recital 42). For that kind of information, intermediaries are exempted from liability under European law. The German statutory statement that service providers are liable under the general rules for information, which was not made available by third parties, is redundant and therefore missing in the Directive.¹⁴³ Despite that fact, Sec. 7(1) Tele Media Act makes exactly that statement. It seems obvious that this provision can by no means create a new basis for liability. However, the court practice transforms this rule into a statutory source for liability for adopted contents, creating a legal view not supported by the interpretation of the Directive.¹⁴⁴ Therefore, this court practice can appear as rather questionable.

141 HOEREN, 2004 MMR 672.

142 BERGER & JANAL, 2004 CR 917, 923.

143 SIEBER & HÖFINGER, “Handbuch Multimedia Recht”, marginal note 18.1.40.

144 For example, Federal Supreme Court, decision of 12 November 2009, case No. I ZR 166/07 – *marions-kochbuch.de*.

II. Proactive Examination Obligations

Pursuant to Sec. 7(2)(1) Tele Media Act (the national implementation of Art. 15 E-Commerce Directive) service providers neither have an obligation to monitor the information which they transmit or store nor are they obliged to actively seek for circumstances indicating an illegal activity.¹⁴⁵ This implies that barely any socially adequate provider activity is considered as a source of danger that needs a preventive control mechanism in order to be handled. Article 15 of the E-Commerce Directive has to be seen in the context of recital 47, which distinguishes between monitoring obligations “of a general nature” and those “in a specific case”. The latter should be monitoring obligations, which are restricted for a specific time period, specific websites and specific illegal activities. Such specific monitoring obligations are the regressive removal of a single infringement and the prevention of re-entry of the same infringing data.¹⁴⁶ An injunction to prevent future similar infringements refers neither to a specific field nor to a specific time period and can in no way represent a monitoring obligation in a specific case. This proactive duty establishes rather a monitoring obligation of a general nature.¹⁴⁷ However, according to the CJ and the Federal Supreme Court, online marketplace operators are deemed to be obliged to undertake all technically possible and reasonable measures to prevent further similar trademark infringements.¹⁴⁸ If they fail to prevent future similar violations, Internet marketplace operators are even considered to be direct infringers by forbearance.¹⁴⁹ According to this opinion, a marketplace operator is obliged to award damages from the point of gaining knowledge of the illegal activity; injunctive relief against the intermediary on the other hand could be asserted even if the provider is not aware of the illegal activity. However, for the Internet marketplace operator, injunctions have no less severe legal consequences if they lead to the inevitability to install expensive filter technology. A breach against this obligation might even have a much bigger financial impact on the intermediary than any compensatory claims.¹⁵⁰ Thus, the imposition of proactive monitoring obligations is not only dogmatically

145 Commission, Proposal for a European Parliament and Council Directive, COM(1998) 586; similarly VOLKMANN, 2003 CR 440, 443.

146 HOEREN, “Handbuch Multimedia Recht”, marginal note 18.2.102.

147 HOEREN, “Handbuch Multimedia Recht”, marginal note 18.2.102 *et seq.*; BERGER & JANAL, 2004 CR 917, 919; RÜCKER, 2005 CR 347, 353; VOLKMANN, 2003 CR 440, 442.

148 CJ, decision of 12 July 2011, case No. C-324/09, 2011 MMR 596 with annotation by HOEREN – *L'Oréal SA*; Federal Supreme Court, decision of 19 April 2007, case No. I ZR 35/04, 2007 MMR 507 *et seq.*; Hamburg District Court, decision of 4 January 2005, case No. 312 O 753/04, 2005 MMR 326 with annotation by RACHLOCK; similarly Brandenburg Court of Appeal, decision of 16 November 2005, case No. 4 U 5/05, 2006 CR 124.

149 Hamburg Court of Appeal, decision of 24 July 2008, case No. 3 U 216/06, 2009 MMR 129 with annotation by WITZMANN.

150 HOEREN, 2004 MMR 672.

unsustainable, but disregards the statutory privileges of host providers as well as the guidelines of the E-Commerce Directive.¹⁵¹ It seems appropriate that the liability of host providers shall arise only after a specific and sufficient notice of an apparent infringement. The obligation to prevent “further similar infringements” appears to be too vague. Having gained knowledge of the apparent violation, the host provider must only prevent identical infringements for the future.

III. Disturbance Liability

The further development of court practice concerning disturbance liability needs to be awaited. At least in competition law, the liability for intermediaries will have its legal foundation in the duties of care imposed by the standards of business conduct. This new approach offers the dogmatic advantage of a consistent application of the competition law provisions (for example Sec. 8(3) No. 2 Unfair Competition Act) and makes the analogy to Sec. 1004 German Civil Code obsolete.¹⁵² The direct liability under competition law has an impact on the possibilities to claim damages according to Secs. 9 and 10 Unfair Competition Act.

The concept of disturbance liability is still applied in copyright and trademark law. As a result, dogmatic inconsistencies may occur, if the Federal Supreme Court continues to apply different rules for intellectual property rights and unfair competition: under copyright and trademark law, only injunctions may be asserted against the infringer, even if he acts willfully; under competition law, the violator can be held liable for damages, even if he acts slightly negligently.¹⁵³ However, this dogmatic inconsistency should not have an impact on the liability of service providers, since the provisions of the Tele Media Act restrict claims for compensation.

Meanwhile, the Federal Supreme Court has also made attempts to find another basis for liability of intermediaries under copyright law.¹⁵⁴ Unfortunately, as already mentioned, the criterion “adopted contents” is not appropriate to cause direct liability.

Despite the partial inaccuracy of specific legal views, the trend of the courts to avoid the application of disturbance liability deserves approval.

IV. Redrafting of the Tele Media Act

A redrafting of the Tele Media Act might appear recommendable. A new version of the Tele Media Act was already planned,¹⁵⁵ but unfortunately did

not pass legislation due to the principle of discontinuity in German constitutional law. The draft stated that service providers are generally not liable for the contents of third parties. They would have been obliged to remove or block contents only as ultima ratio after a check of reasonability (Sec. 7(2) Tele Media Act-E). In order to stimulate their participation in the prevention of infringements, duties of care could have been imposed on service providers (Sec. 7(4) Tele Media Act-E). Moreover, the liability of search engines (Sec. 8a Tele Media Act-E) and for hyperlinks (Sec. 10a Tele Media Act-E) would have been regulated by law for the first time. Proactive examination obligations were generally rejected and the liability for links occurred at first after gaining knowledge of the violation.

J. Conclusion

The German court practice regarding in particular the doctrine of disturbance liability, the proactive obligation to examine contents and the adoption of contents pursuant to Sec. 7(1)(1) Tele Media Act might be replaced by liability criteria much more in accordance with the E-Commerce Directive. The Directive should also be regarded as the main reference point of the national courts for the interpretation of the liability privileges in the Tele Media Act. Within this context the mentioned failed redrafting of the Tele Media Act seemed to be a step in the right direction. A holistic regulation of liability privileges, which also has an impact on injunction claims, might be advisable. Moreover, a procedure like the US notice-and-take-down is necessary to prevent misuse and to offer the courts and practitioners some guidelines. Unitary requirements for liability need to be established in order to reduce the amount of contradicting court decisions and to create a secure legal environment for Internet service providers.

151 HOEREN, online script Internet Law, <http://www.uni-muenster.de/Jura.itm/hoeren/lehre/materialien> (last visited 27 March 2012).

152 DÖRING, 2007 WRP 1131, 1137.

153 DÖRING, 2007 WRP 1131, 1137.

154 Federal Supreme Court, decision of 12 November 2009, case No. I ZR 166/07, 2010 MMR 556 with annotation ENGELS – *marions-kochbuch.de*; 2010 CR 471 with annotation by HOEREN & PLATTNER; 2010 K&R 496 with annotation by ROGGENKAMP.