LIDC Congress in Oxford 2011

German Law on Internet Liability of Intermediaries

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A. Foundations of Liability

I. Introduction

The liability of online intermediaries according to the current statutory and case law in Germany raises questions of different legal areas. Concerning liability under civil law the most important question is under what circumstances intermediaries can be held liable for the legality of the transmitted content. In this regard several statutory provisions have to be taken into account depending on the unlawful activity reviewed: In particular § 97 Copyright Act (UrhG) for copyright infringements, §§ 14, 15 Trademark Act (MarkenG) for trademark infringements and §§ 8, 9 Unfair Competition Act (UWG) for unlawful competitive conduct. With respect to liability under criminal law most frequent offences are the incitement to hatred § 130 German Criminal Code (StGB), the dissemination of depictions of violence (§ 131 StGB), the distribution of pornography (§§ 184 ff. StGB) and the defamation offences (§§ 185 ff. StGB). Additionally, the Tele Media Act (TMG) contains a system of rules limiting the liability of online intermediaries depending on the type of service provider, in particular access and hosting provider. Therefore, these provisions are applied like a filter prior to the application of special provisions under civil and criminal law. However, pursuant to § 7 (2) 2 TMG injunctive reliefs remain unaffected by the provisions of §§ 7 – 10 TMG. In consequence these rules limit liability only in respect of compensation claims and criminal offenses while injunctive reliefs and removal claims are not affected.

When dealing with the liability of online intermediaries a lot of challenges arise from the fact that intermediaries only contribute to unlawful activities of third parties. As a consequence online intermediaries often cannot be held liable as tortfeasor or infringer. That is why different approaches have been developed to deal with the challenges of accessorial liability. Consequently, theories of direct liability as well as theories of accessorial liability need to be taken into account when examining the responsibility of online intermediaries.

1. Direct Liability as Tortfeasor/Infringer

It is a common principle in criminal and civil law that persons are liable for unlawful actions that are directly caused by their actions. Whether this requires a specific action by that person depends on the requirements of the statute. For example, in the law of unfair competition only a person who performs unlawful actions in the course of business competition is seen as tortfeasor according to UWG. In intellectual property law on the other hand, the person which directly causes an infringement of copyrights or trademarks is hold liable as an infringer. Regardless it seems unlikely that online intermediaries directly cause torts or infringements because their users usually commit these. Nevertheless, it needs to be evaluated independently in each law area whether online intermediaries can be held liable as tortfeasor or infringer due to direct causation of unlawful actions.

2. Liability as Participant

As form of contributory liability, which is also recognized by statute in criminal and civil law, there is liability for incitement of or assistance in unlawful actions of third parties (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 courts have developed liability as a participant.[1] Such responsibility was accepted when service provider ignored specific notifications of unlawful activities and failed to prevent further violations of the same kind. The court considered this kind of conduct as participation in an infringement by forbearance. Unfortunately the distinction between the participation rules and disturbance liability was not discussed.

3. Disturbance Liability - Principles of Stoererhaftung

Due to the fact that indirect causation of unlawful actions is unlikely to result in liability according to the statutory rules of liability, civil law courts have developed another theory of liability for contributory actions (so called disturbance liability or Stoererhaftung). This liability form is not based on the doctrine of tort but arises from the principles governing violations of intellectual property rights. The property defense claim pursuant to § 1004 BGB mentions the disturber as the person being liable. In analogy to this legal doctrine civil law courts have developed disturbance liability in different areas of law (i.e. copyright, trademark,

[1] *LG München*, Urt. v. 11.01.2011, Az.: 21 O 2793/05 - MMR, 2006, 332, 334f.

and patent law). Disturbance consequently exceeds tort liability and fails to have any impact thereon.[2] It is rather intended as a tool to extend legal protection of property rights by broadening the group of possible infringers.

The theory of disturbance liability is relevant for online intermediaries in particular because these providers oftentimes not only fail to be liable as tortfeasor/infringer but also as participants (see above). Consequently, disturbance liability (Stoererhaftung) represents a form of liability that goes beyond these categories. According to the court practice of the Federal Supreme Court (BGH) a person is seen as a disturber if he causes an unlawful action of a third party in an adequate way, provided that is 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 of the disturber. Furthermore, the Federal Supreme Court has recognized preventive liability, provided that there is a reasonable threat of infringement caused by the potential disturber.[4] However, disturbance liability is no basis for damage claims, since the injured party can only claim injunctive relief as well as removal.[5]

The doctrine is criticized among scholars as it creates a form of pure causal liability. Due to this, courts have tried to limit strict causal liability by requiring a breach of reasonable duties to examine contents. Therefore it is necessary to review the scope of these duties specifically in each single case in order to evaluate to what extent an examination could have been expected from the disturber. [6] The current case law still develops the criteria for the reasonability of such scrutiny. For example, the technical and economical capability to prevent the infringement are taken into consideration.[7] Another criterion is the provider's profit from the specific service.[8] Additionally, the significance of the violation[9] as well as

[2] *BGH*, Urt. v. 18. 10.2001, Az.: I ZR 22/99 - GRUR 2002, 618, 619 – Meissner Dekor.
[3] Constant court practice since *BGH*, Urt. v. 06.07.1954, Az.: I ZR 38/53 - GRUR 1955, 97, 99 f. – Constanze II.
[4] *BGH*, Urt. v. 19.04.2007, Az.: I ZR 35/04 - GRUR 2007, 708, 711 – Internet-Versteigerung II.
[5] *BGH*, Urt. v. 05.12.1975, Az.: I ZR 122/74 - GRUR 1976, 256, 258 – Rechenscheibe; *BGH*, Urt. v. 07.07.1988, Az.: I ZR 36/87 - GRUR 1988, 829, 830 – Verkaufsfahrten II; *BGH*, Urt. v. 17.05.2001, Az.: I ZR 251/99 - MMR 2001, 671, 673 – ambiente.de.
[6] *BGH*, Urt. v. 17.05.2001, Az.: I ZR 251/99 - MMR 2001, 671, 673 – ambiente.de; *BGH* Urt. v. 10.10.1996 Az.: I ZR 129/94 - GRUR 1997, 313, 315f.– Architektenwettbewerb; *BGH,* Urt. v. 30.06.1994, Az.: I ZR 40/92 - NJW 1994, 2827 = GRUR 1994, 841, 842f. – Suchwort; *BGH,* Urt. v. 15.10.1998, Az.: I ZR 120/96 - NJW 1999, 1960 = GRUR 1999, 418, 419f.– Möbelklassiker.
[7] *BGH*, Urt. v. 30.04.2008, Az.: I ZR 73/05 - GRUR 2008, 702 – Internet-Versteigerung III.
[8] *LG München*, Urt. v. 08.12.2005, Az.: 7 O 16341/05 - MMR 2006, 179; *LG Köln*, Urt. v. 21.03.2007, Az.: 28 O 19/17.
[9] *OLG Düsseldorf*, Urt. v. 07.06.2006, Az.: I-15 U 21/06 - MMR 2006, 618, 620.

limitations imposed by constitutional rights[10] (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 factual details indicate a specific infringement, the higher are the expectations on the provider to investigate the alleged content.[11] Most important, however, in the case of online intermediaries there is neither a general proactive obligation to monitor own facilities nor to seek actively for possible infringements in the own area of responsibility. This obligation arises at first at point when the intermediary becomes aware of the violation. Nevertheless, the disturber may need to take precautions in order to prevent similar violations.[12] This obligation usually applies to easily recognizable unlawful activities only.[13]

Disturbance liability is being controversially discussed especially in competition law. Because of the fact that competition law is a special field of tort law it imposes – unlike intellectual property law – specific due diligence obligations for business conduct only. These cannot be compared to any other area of law. According to the critics, disturbance liability disregards these specific requirements for direct liability and includes parties which are, in terms of competition law terms, not able to commit a violation. Consequently, application of disturbance liability 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 theory of disturbance liability is based on the violation of absolute rights such as property rights. In this case illegality does not originate in an action but in the result of infringement (Erfolgsunrecht). 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 § 1004 BGB fails to legitimate the liability for unfair business practices. In consequence, the doctrine of disturbance liability is being criticized as 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 violator of competition law.[15] Some scholars believe that this is an unambiguous sign for the general inapplicability of disturbance liability

[10] *Steinle*, MMR 2006, 180, 181.
[11] *Weidert/Molle,* Handbuch Urheberrecht und Internet, S. 399, Rn. 132.
[12] *BGH*, Urt. v. 11.03.2004, Az.: I ZR 304/01 - GRUR 2004, 860, 864 – Internet-Versteigerung I.
[13] *BGH,* Urt. v. 15.10.1998, Az.: I ZR 120/96 - NJW 1999, 1960 = GRUR 1999, 418, 419f.– Möbelklassiker.
[14] *Köhler* in Köhler/Bornkamm, § 8 Rn. 2.15 ff.
[15] BGH, Urt. v. 12.07.2007, Az.: I ZR 18/04 - GRUR 2007, 890 - Jugendgefährdende Medien bei Ebay.

in competition law or even in all other areas of law.[16] Even though disturbance liability under competition may have been restricted, it is still applied by the Federal Supreme Court in the areas of copyright and trademark.

3. 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 direct liability for online intermediaries. In the case "Jugendgefaehrdende Medien bei EBay" the court decided that the contributory violator in competition law can be liable not as a disturber in terms of § 1004 BGB but as a tortfeasor according to the statutory source UWG.[17] This decision provoked common consent in German legal literature and science.[18] The Federal Supreme Court classified the operator of EBay as a tortfeasor because of the direct violation of business conduct standards caused by the sale of obscene content on the platform. The decision of the court and the classification as a tortfeasor was caused by the direct breach of EBay's due diligence duties under competition law. Each party that neglects its due diligence duties imposed by competition law is seen as a direct violator, even though the infringement was factually caused by a third party. According to the Federal Supreme Court, there is a common obligation for everyone, who creates a source of danger in his area of responsibility or allows it to continue existing, to undertake all reasonable precautions, which are necessary to prevent the risks for the injured party. When the platform operator is confronted with a concrete notification of an infringement, its competition law due diligence obligation becomes a concrete obligation to examine the alleged content. From this point on, he is responsible not only for blocking the alleged infringement but has to undertake all the reasonable measures to prevent further similar violations.[19] In consequence, the results of the theory of direct liability in competition law on the one hand and the theory of disturbance liability on the other hand are similar, indeed. Nonetheless, the assumptions they are based on are quite different.

II. Liability under Copyright Law

[16] *Köhler*, GRUR 2008, 1, 6 f.; *Ahrens*, WRP 2007, 1281, 1287; *Volkmann*, CR 2008, 232.
[17] BGH, Urt. v. 12.07.2007, Az.: I ZR 18/04 - GRUR 2007, 890 - Jugendgefährdende Medien bei Ebay.
[18] *Köhler*, GRUR 2008, 1, 6 f.; *Volkmann*, CR 2008, 232; *Ahrens*, WRP 2007, 1281, 1287.
[19] BGH, NJW 2008, 758 ff. – Jugendgefaehrdende Medien bei Ebay.

1. General Principles:

The infringer of copyright is strictly liable according to § 97 (1) 1 UrhG. 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.

According to the current case law, there is no obligation for access providers to block infringing contents.[20] They may not be classified as direct infringer or participant, because they have no direct influence on infringing contents. Preventive injunctive reliefs prohibiting future infringing actions against access provider and network operator are commonly rejected not only because of the provisions § 7 (2) 1 TMG and § 88 TKG, but because of the fact that they are technically not able to block the infringing content. However, pursuant to § 101 (2) UrhG, information can still be demanded from the access provider.[21]

Hosting provider can be held liable pursuant to § 19a UrhG when making copyrighted works accessible. They are infringer according § 97 (1) UrhG and simultaneously contributory infringer or disturbing party in terms an injunction.[22] If a hosting provider infringes the right of making the work accessible according to § 19a UrhG depends on the specific service offered. Generally, host service providers have no obligation to monitor the stored contents or to seek actively for indications for a possible infringement. If there is no notification of an alleged infringement, it is presumed that the provider has no knowledge of any infringing action and consequently is not responsible.

2. 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 content users had uploaded to the platform, gained enormous attention by courts and scholars.[23] The court substantiated the criteria upon which the portal operator adopts user-generated contents as its own and as a

[20] *OLG Frankfurt*, Beschl. v. 22.01.2008, Az.: 6 W 10/08 - CR 2008, 242ff.; *LG Frankfurt*, Urt. v. 05.12.2007, Az.: 2-03 O 526/07 - MMR 2008, 121ff.; *LG Frankfurt*, Urt. v. 08.02.2008, Az.: 3-12 O 171/07 - MMR 2008, 344ff.; *LG Düsseldorf*, Urt. v. 13.12.2007, Az.: 12 O 550/07 - MMR 2008, 349ff.; *LG Hamburg,* Urt. v. 12.03.2010, Az.: 308 O 640/08 - MMR 2010, 488; *LG Kiel*, Urt. v. 23.11.2007, Az.: 14 O 125/07 - MMR 2008, 123ff.

[21] *OLG Hamburg*, Urt. v. 17.02.2010, Az.: 5 U 60/09-MMR 2010, 338.

[22] *v. Wolff* in: Wandtke/Bullinger, UrhR, § 97 Rn. 24.

[23] *BGH*, Urt. v. 12.11.2009, Az.: I ZR 166/07 - marions-kochbuch.de - MMR 2010, 556 with annotation *Engels*; CR 2010, 471 with annotation *Hoeren/Plattner*; K&R 2010, 496 with annotation *Roggenkamp.*

consequence is liable as if he uploaded the specific information. The examination of the content for accuracy prior to the upload activation inside the portal can be interpreted as such 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 sufficient signs for adoption. Thus, the portal operator is liable under the general rules and therefore was classified as a direct infringer of copyrights.

The Regional Court of Hamburg even failed to require an examination by the portal operator prior to the user's upload and considered the combination of circumstances as sufficient for an adoption of user-generated videos by YouTube.[24] Instead, the responsibility for adoption was based partially on the fact that the operator breaches his due diligence obligation to examine the user's licenses. Moreover, YouTube often does not have the possibility to require a license from the uploading user at all because the majority of the users on the platform act anonymously.

The operator of a picture portal was also deemed to be liable as a content provider.[25] 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. The important criteria should be the way of data adoption, the goal and the way of data presentation. 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 it examines all the pictures before upload.

On the contrary, the Higher Regional Court of Hamburg did not consider the web-portal operator "Sevenload" as content provider.[26] An adoption of the user-generated content was denied. If the content was not examined for accuracy prior to the actual upload, the combination of user-generated with the provider's own editorial and licensed contents as well as the simple arrangement into charts could not result in liability as content provider. When determining adoption of third party content, relevant criteria should be the appearance of the platform logo after upload, the distinction if the user-generated content is a part of the primary or additional offering of the portal, and the license revocation possibility for the user.[27]

[24] *LG Hamburg*, Urt. v. 03.09.2010, Az.: 308 O 27/09 - MMR 2010, 833
[25] *KG Berlin*, Beschl. v. 10.07.2009, Az.: 9 W 119/08 - MMR 2010, 203.
[26] *OLG Hamburg*, Urt. v. 29.09.2010, Az.: 5 U 9/09 – MMR 2011, 49-51 (red. Leitsatz und Gründe) - Sevenload.
[27] *Wenn*, jurisPR - ITR 4/2011.

3. Cases of disturbance liability

a) 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 Higher Regional Court of Hamburg also 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 knowledge through a specific notification the operator had the duty to block the content and to prevent further similar violations.[28]

The web portal operator was deemed to be liable in cases in which he gains a commercial profit from the content (in the case of a website with caricatures).[29] The question about an adoption of the content was left unanswered, because even if the information were considered to be content of a third party, the liability as a disturber was affirmed. Under these circumstances, it was reasonable for the operator to implement controlling actions.

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.[30]

The Regional Court of Berlin prohibited the operator of a web portal to insert links to copyright protected songs of a certain band in MP3 format.[31] The disturbance liability was determined due to the operator's factual and legal capability to prevent the infringement.

b) Web forum operator

A preventive monitoring obligation of the forum operator for the whole content and each single entry does not exist.[32] Only in cases of concrete threads the forum information has to be investigated within a reasonable scope. For example, there is a duty to check single threads, if the operator has provoked foreseeable infringing post by his own behavior. Otherwise a notification of at least one infringing act of some significance is necessary to cause an

[28] *OLG Hamburg*, Urt. v. 29.09.2010, Az.: 5 U 9/09 – MMR 2011, 49-51 (red. Leitsatz und Gründe) - Sevenload; *BGH*, Urt. v. 11.03.2004, Az.: I ZR 304/01 - GRUR 2004, 860, 864 – Internet-Versteigerung I.
[29] *LG Hamburg,* Urt. v. 08.09.2008, Az.: 310 O 332/08 - MMR 2009, 143.
[30] *OLG München*, Urt. v. 09.11.2006, Az.: 6 U 1675/06 - K&R 2007, 104.
[31] *LG Berlin*, Urt. v. 14.06.2005, Az.: 16 O 229/05 - MMR 2005, 718.
[32] *OLG Zweibrücken*, Urt. v. 14.05.2009, Az.: 4 U 139/08 - MMR 2009, 541.

obligation to examine the content.[33] However, the operator is legally obliged to delete the thread immediately after gaining knowledge of a violation.[34]

c) Sharehosting-Services

A host provider can be liable under the theory of disturbance liability due to the fact that he offers memory capacity to an infringer. The liability privilege in § 10 TMG is inapplicable for injunctive reliefs because of § 7 (2) 2 TMG. Host providers have to investigate the content of third parties for possible infringements within the scope of reasonable scrutiny. Based on § 7 (2) 1 TMG, the majority of the courts shares the opinion that liability can arise only after gaining knowledge of a specific infringement by means of a notification. However, the topic which obligations to examine stored information can reasonably be expected after such notification, has been controversially discussed.

According to the opinion of several courts, the hosting-provider has to block and delete the infringing data as well as to take precaution measures in order to prevent further similar violations after a notification of an infringement.[35] The Higher Regional Court of Hamburg sees a proactive obligation for the future to monitor the content of all users who have already uploaded infringing data. Even the examination of the data during its upload was considered as a reasonable duty for the hosting provider.[36]

On the contrary, the Higher Regional Court of Duesseldorf accepts share-hosting as a neutral service which is not simply tolerated by the law, but actually stands within the framework of the legal order.[37] It was 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.[38] Consequently, according to the Higher Regional Court of Duesseldorf after a notification of a certain copyright infringement the hosting provider has to delete the

[33] *OLG Hamburg*, Urt. v. 4.2.2009, Az.: 5 U 167/07 - MMR 2009, 479; as well as *OLG Hamburg*, Urt. v. 04.02.2009, Az.: 5 U 180/07 - ZUM 2009, 417; *AG Leipzig*, Beschl. v. 18.03.2009, Az.: 102 C 10291/08 - MMR 2009, 507.
[34] *LG Düsseldorf*, Urt. v. 25.01.2006, Az.: 12 O 546/05 - CR 2006, 563ff.
[35] *LG Hamburg*, Urt. v. 12.06.2009, Az.: 310 O 93/08 - ZUM 2009, 863, 868.
[36] *OLG Hamburg*, Urt. v. 30.09.2009, Az.: 5 U 111/08 - MMR 2010, 51, 54 – Rapidshare II; similar: *OLG Hamburg*, Urt. v. 02.07.2008, Az.: 5 U 73/07 - MMR 2008, 823 – Rapidshare; *OLG Hamburg,* Urt. *v.* 14.01.2009, Az.: 5 U 113/07 - MMR 2009, 631 – Usenet I; *OLG Hamburg,* Urt. *v.* 28.1.2009, Az.: 5 U 255/07 - MMR 2009, 405 – Alphaload.
[37] *OLG Düsseldorf*, Urt. v. 27.4.2010, Az.: I-20 U 166/09 - MMR 2010, 483, 484; similar: *Rössel*, ITRB 2008, 6, 7; *Breyer*, MMR 2009, 14.
[38] *OLG Düsseldorf*, Urt. v. 27.04.2010, Az.: I-20 U 166/09 - MMR 2010, 483, 485.

infringing content yet there is no further duty to examine stored date in order to prevent similar infringements in the future.

d) 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 §§ 8 – 10 TMG are not applicable, because linking is not an online service according to the TMG. Only if the provider shows solidarity with the content of the inserted link, he becomes a content provider, leading to the application of the general rules of liability.[39]

In the court decision "Paperboy" the Federal Supreme Court denied to classify hyperlinks to copyrighted works, which were accessible on the website of the copyright holder, as a violation of the right to reproduction.[40] The copyright holder himself enables the further use of the copyrighted material by making his protected work publically accessible without technical safeguards. The simple access alleviation, even in form of deep links, therefore cannot represent a copyright infringement.

Liability for inserting a link was affirmed by the Regional Court of Munich[41] and the Higher Regional Court of Munich[42]. Eight music companies filed a suit against a publishing house because of an article about a new software version for copying DVD, which contained, besides the critics towards the producer Slysoft, also a link to the Slysoft's website. The courts considered the link as an adequate causal contribution to an infringement pursuant to § 95a (3) UrhG.[43] The Regional Court of Munich classified this contribution even as a willful act while the appellate court considered it merely as a disturbance.[44] According to the opinion of the judges, only the fact that the user is being directly led to the infringing website was of relevance. The search for the infringing content was significantly alleviated and the risk of an infringement was therefore enormously increased. The freedom of the press granted in Article 5 (1) of the German Constitution (GG) failed to be a justification for inserting a link because

[39] *OLG München*, Urt. v. 06.12.2001, Az.: 21 U 4864/00 - ZUM 2001, 809.
[40] *BGH*, Urt. v. 17.07.2003, Az.: I ZR 259/00 - NJW 2003, 3406*; Hoeren*, GRUR 2004, 1ff.
[41] *LG München I*, Urt. v. 05.12.2003, Az.: 5 U 2546/02 - CR 2005, 460ff. with annotation *Lejeune; LG München I***,** Urt. v. 07.03.2005, Az.: 21 O 3220/05 - MMR 2005, 385ff. with annotation *Hoeren*; similar: *LG München I*, Urt. v. 14.11.2007, Az.: 21 O 6742/07 - MMR 2008, 192ff.
[42] *OLG München*, Urt. v. 28.07.2005, Az.: 29 U 2887/05 = MMR 2005, 768ff.
[43] *LG München I*, Urt. v.07.03.2005, Az.: 21 O 3220/05 - MMR 2005, 385 with annotation *Hoeren*; *OLG München*, Urt. v. 28.7.2005, Az.: 29 U 2887/05 - MMR 2005, 768; similiar: *LG München I,* Urt. v. 11.10.2006, Az.: 21 O 2004/06 - MMR 2007, 128.
[44] *OLG München*, Urt. v. 28.07.2005, Az.: 29 U 2887/05 - MMR 2005, 768ff.

the Copyright Act provisions are effective limitations for the freedom of the press and the latter has to stay behind the legal property interests of the music companies in this case.

e) Usenet Service Provider

The liability of the Usenet service provider is still in discussion. The Regional Court of Hamburg classified this kind of internet service as being comparable to the work of a hosting provider, provided that the information is stored for a long period of time.[45] Therefore in such cases the liability principles developed for online auctioning should be applied. After a specific notification of an infringing content, the Usenet provider is obliged to block the violation.

The Higher Regional Court of Duesseldorf and the Regional Court of Munich share the opinion that providing access to the Usenet is more comparable to caching activities in terms of § 9 TMG.[46] Others have deemed Usenet providers to be similar to access providers because, unlike auctioning websites, the Usenet provider is not able to control the remarkable amount of user-generated content.[47] Also, the injured parties were not able to prove the existence of an adequate and appropriate filtering system.[48] 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 precaution 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.[49]

f) Search engines

Search engines are no intermediaries within the terms of the TMG and their liability is being controversially discussed by the courts. Despite the automatic capture of web offers of third parties and the automatic generation of hitlists, search engine operators had been treated in Germany as normal content providers.[50] The fundamental decision of the European Court of Justice in the case Google France makes this legal perception doubtable. Search engines can

[45] *LG Hamburg*, Urt. v. 19.02.2007, Az.: 308 O 32/07 - MMR 2007, 333, 334.
[46] *OLG Düsseldorf*, Urt. v. 15.01.2008, Az. I 20 U 95/07 - K&R 2008, 183; *LG München I*, Urt. v. 19.04.2007, Az.: 7 O 3950/07 - K&R 2007, 330 - Usenet.
[47] *OLG Hamburg*, Urt. v. 28.01.2009, Az.: 5 U 255/07 MMR 2009, 405 – Alphaload.; *Hoeren*, MMR 2007, 334, 335.
[48] *LG München I*, Urt. v. 19.04.2007, Az.: 7 O 3950/07 - K&R 2007, 330 - Usenet.
[49] *OLG Hamburg*, Urt. v. 28.01.2009, Az.: 5 U 255/07 MMR 2009, 405 – Alphaload.
[50] *Michael Rath*, Recht der Internet-Suchmaschinen (Law of Internet Search Engines), 2005, S. 275 ff.

be privileged liable under Art. 14 E-Commerce-Directive if their provider activity is 'of a mere technical, automatic and passive nature'.[51] In order to classify a search engine as a host provider, it should be necessary to examine whether the role played by it is neutral, pointing to a lack of knowledge or control of the data which it stores.

A copyright infringement by the use of pictures as thumbnails was denied.[52] Making thumbnails public accessible should be an unfree use of the original under German copyright law.[53] The Federal Supreme Court affirmed that a search engine operator is not liable for the use of works of a comic drawer as thumbnails.[54] The public accessibility of the work is unlikely unlawful, because the search engine was allowed to presume that the copyright holder agrees therewith. This due to the fact that the copyright holder made the content of her website accessible for search engines without making use of any of the technical protection measures available.

g) Holder of Unsecured WLAN-Access

The private holder of unsecured WLAN can be held liable, if unauthorized parties use his network access for copyright infringements.[55] The holder enables access to the Internet for everyone and thus makes infringements possible.[56] Even in case that the holder is considered as a service provider in terms of § 2 s. 1 no. 1 TMG[57], he might be liable as a disturber. Consequently, his liability gives no basis for compensation claims.[58] Even private persons are obliged to control and examine the connection they distribute and to prevent the misfeasance of third parties.[59] Providing unsecured access to the Internet is a causal contribution to infringing acts. The Federal Supreme Court considers it as a reasonable effort to examine the security of the own WLAN through appropriate safeguards even without a notification 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

[51] *EuGH*, Urt. v. 23.03.2010, Az.: C-236/08 to C-238/08, *EuGH,* GRUR Int 2010, 395, 396.
[52] AG *Bielefeld*, Urt. v. 18.02.2005, Az.: 42 C 767/04 - CR 2006, 72ff.; similar: *AG Charlottenburg*, Urt. v. 25.02.2005, Az.: 234 C 264/04.
[53] *LG Hamburg*, Urt. v. 05.09.2003, Az.: 308 O 449/03 - MMR 2004, 558-562.
[54] *BGH*, Urt. v. 29.04.2010, Az.: I ZR 69/08 - MMR 2010, 475.
[55] *BGH*, Urt. v. 12.05.2010, Az.: I ZR 121/08; *BGH,* MIR 06/2010.
[56] *OLG Düsseldorf*, Beschl. v. 27.12.2007, Az.: I-20 W 157/07 - MMR 2008, 256; *LG Hamburg*, Urt. v. 26.07.2006, Az.: 308 O 407/06 - MMR 2006, 763 with annotation Mantz*; LG Frankfurt/M.*, Urt. v. 22.02.2007, Az.: 2/3 O 771/06 - ZUM 2007, 406 with annotation Gietl; *LG Mannheim*, Beschl. v. 25.01.2007, Az.: 7 O 65/06 - MMR 2007, 537.
[57] *Weidert/Molle,* Handbuch Urheberrecht und Internet, S. 410, Rn.165; the opposite opinion*: Volkmann*, CR 2008, 232, 237.
[58] *BGH*, Urt. v. 12.05.2010, Az.: I ZR 121/08.
[59] *BGH*, Urt. v. 12.05.2010, Az.: I ZR 121/08.

without any anxiety, anonymously and scot-free.[60] To prevent this from happening, 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.[61]

h) Holder of Internet Access

Besides the cases of unsecured WLAN, there are also situations in which the holder provides his family members or some third parties willingly access to the Internet. Because of the fact that the infringing actions are still taken without his knowledge or direct participation, the holder is not directly liable. According to the Regional Court of Hamburg, 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.[62] Thus, a form of preventive monitoring duty is imposed.

The Higher Regional Court of Duesseldorf sees the unlimited supply of Internet access to the family members as a breach of reasonable duties of examination and control, but lowers the standards (the holder has the duty to at least arrange user accounts).[63] The Regional Court of Munich expects less technical preventions and emphasizes the need of precautionary instructions and the permanent control of their compliance.[64] The Regional Court of Mannheim does not consider monitoring duties as reasonable prior to any specific notification of infringing activities and demands only an instruction of minors depending on their age and comprehension ability.[65] The Higher Regional Court of Frankfurt am Main 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.[66]

An employer should not be liable for infringing participation of his employee in filesharing-services.[67] Examination and safeguarding duties can be expected from the employer only after knowledge of an infringement by means of a specific notification, because there is no common experience, according to which the employer should expect violations of law in his office.

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[60] *LG Düsseldorf,* Urt. v. 16.07.2008 – Az. 12 O 195/08 - MMR 2008, 684.
[61] *BGH*, Urt. v. 12.05.2010,Az.: I ZR 121/08, Rn. 23.; *BGH,* Urt. v. 12.05.2010, Az.: I ZR 121/08 - MIR 06/2010.
[62] *LG Hamburg*, Urt. v. 15.07.2008, Az.: 310 O 144/08 - MMR 2008, 685, 687.
[63] *OLG Düsseldorf*, Beschl. v. 27.12.2007, Az.: I-20 W 157/07 - MMR 2008, 256.
[64] *LG München I*, Urt. v. 19.06.2008, Az.: 7 O 16402/07 - MMR 2008, 619.
[65] *LG Mannheim*, Urt. v. 30.01.2007, Az.: 2 O 71/06, - MMR 2007, 459.
[66] *OLG Frankfurt/M.*, Beschl. v. 22.1.2008, Az.: 6 W 10/08, - MMR 2008, 169, 170.
[67] *LG München I*, Urt. v. 04.10.2007, Az.: 7 O 2827/07, - CR 2008,49; *Mantz*, CR 2008, 52.

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.[68]

i) Access Provider

There were some court decisions that did not completely deny the possibility of disturbance liability for access providers.[69] However, the majority of the courts and the scholars do not share this perception.[70] The access provider has a major and decisive role in the functioning of the internet. Filtering and blocking measures would be a violation of the user's secrecy of telecommunication (Art. 10 GG; §§ 3 no. 6, 88 (1) TKG) and there is no statutory restriction that allows such interference with civil liberties.[71] Besides this legal impossibility, access providers also usually fail to have the technical capability to prevent infringements. As a consequence, filtering and blocking of certain user contents are not only unreasonable for the access provider, but also ineffective because of the small effort that has to be made to circumvent such measures.[72] Especially because of the lacking reasonability of blocking-measures (e.g. the technically deficient DNS-Blockade), injunctive reliefs cannot be claimed.[73]

III. Liability under Trademark Law

1. Direct Liability

Pursuant to §§ 14, 15 MarkenG, 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 reliefs under trademark law. This form of liability requires an unauthorized commercial use of the trademark. The DENIC eG is responsible for granting domains in Germany and the mere allocation and administration of domain names is not sufficient to cause liability under the Trademark Act. Also, the Admin-C (administrative contact) is in general not liable in terms of §§ 823, 830 BGB due to lack of a willful

[68] *LG Hamburg*, Beschl. v. 25.11.2010, Az.: 310 O 433/10.
[69] *OLG Hamburg,* Urt. v. 28.4.2005, Az.: 5 U 156/04 - MMR 2005, 45.
[70] *OLG Frankfurt/M*., Urt. v. 16. 5.2007, Az.: 5 U 220/06 - GRUR-RR 2008, 94; *LG Flensburg*, Urt. v. 25. 11. 2005, Az.: 6 O 108/05 - GRUR-RR 2006, 174.
[71] *LG Hamburg*, Urt. v. 12.03.2010, Az.: 308 O 640/08.
[72] *Rehart*, MMR-Aktuell 2010, 303415; *LG Hamburg*, Urt. v. 12.11.2008, Az.: 308 O 548/08 - MMR 2009, 506.
[73] *LG Hamburg*, Urt. v. 12.11.2008, Az.: 308 O 548/08 - ZUM 2009, 587 ff.

infringing use of the trademark. Neither the Tech-C (technical contact), nor the Zone-C (zone contact) make commercial use of the signs which the domain contains. There is also no direct liability of the domain parking operator because commonly, it is neither actively assisting to an unauthorized use by the domain holder, nor has willful intent to violate the trademark.[74] The same principles are applicable to search engine operators as well.[75]

The legal perception of liability, concerning online auctioning is different, however. The Higher Regional Court of Hamburg decided that an online auction house may directly infringe a trademark or contribute to an unauthorized trademark use by forbearance.[76] The principles of tort by omission should be applied, if the focus of the offence lies in the omission or failure to prevent from further similar infringements even after gaining specific notifications. The liability is deemed to depend on the ability and reasonability for the auction house to preclude the infringing offers. The disturbance liability shall not be relevant in this legal situation.[77]

Owner of private accounts at an auction-webpage were also held liable as a direct infringer of trademarks, if a third party (in the case at hand the owner's wife), infringes a trademark by using the owner's account.[78] The account owner's liability arises from the breach of the own duty to keep the account access information secret.

The Regional Court of Cologne assumed that an online auction house can be seen as a content provider under certain circumstances and therefore be held directly liable.[79] At least the titles of each offer are deemed to be adopted content because, from the user's perspective, the contents are mixed and therefore have a common appearance. Hereupon, the Higher Regional Court of Cologne granted the appeal against this decision.[80] The Federal Supreme Court also classified the platform merely as a hosting provider and consequently denied direct liability.[81]

[74] *Luckhaus*, GRUR-RR 2008, 113, 114.
[75] *OLG Hamburg*, Urt. v. 04.05.2006, Az.: 3 U 180/04 - GRUR 2007, 241, 244; *OLG Hamburg, Urt. v. 0*4.05.2006, Az.: 3 U 180/04 - MMR 2006, 754, 757 – Preispiraten; *Schaefer*, MMR 2005, 807, 807.
[76] *OLG Hamburg*, Urt. v. 24.07.2008, Az.: 3 U 216/06 = MMR 2009, 129 with annotation *Witzmann.*
[77] *OLG Hamburg*, Urt. v. 24.07.2008, Az.: 3 U 216/06 = MMR 2009, 129 with annotation *Witzmann.*
[78] *LG Berlin*, Urt. v. 05.11.2001, Az.: 103 O 149/01 = CR 2002, 371 with annotation *Leible/Sosnitza.*
[79] *LG Köln*, Urt. v. 31.10.2000, Az.: 33 O 251/00 = CR 2001, 417 ff.
[80] *OLG Köln*, Urt. v. 2.11.2001, Az.: 6 U 12/01 = MMR 2002, 110 with annotation *Hoeren*; CR 2002, 50 with annotation *Wiebe;* K&R 2002, 93 with annotation *Spindler*; similar: *LG Düsseldorf*, Urt. v. 29.10.2002, Az.: 4a O 464/01 = MMR 2003, 120 with annotation *Leupold*.
[81] *BGH*, Urt. v. 19.04.2007, Az.: I ZR 35/04 = MMR 2007, 507 ff. – Internet-Versteigerung II.

2. Disturbance Liability

a) Online Auction Houses

According to the opinion of the Federal Supreme Court, online auction houses are liable for trademark infringements committed on the platform pursuant to the principles of disturbance liability and thus the injured party can demand injunctions.[82] For this claim, a commercial practice and a reasonable controlling capability of the operator to block trademark infringements are required. 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.[83] Nevertheless, a compensation claim against the operator cannot be asserted.[84] Still a preventive injunctive relief is not being rejected, if, according to the circumstances, the disturber creates a thread of primary infringements.[85] This proactive investigation obligation shall not be unreasonable or challenge the entire business concept. The use of filter software, which will search 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.[86]

The Higher Regional Court Duesseldorf reassured that the liability as a disturber shall arise only out of the breach of examination duties after a specific notification of an infringement and shall contain the obligation to preclude only quintessentially similar violations.[87]

b) Search Engines and Google AdWords

Search engines do not directly infringe the trademark by showing AdWords since they in no way use the trademark directly or commercially. Instead an AdWord only creates the possibility for customers to have their advertisement appearing in listings, which are shown

[82] *BGH*, Urt. v. 11.03.2004, Az.: I ZR 304/01 =MMR 2004, 668 - Internet-Versteigerung I; similar: *BGH*, Urt. v. 10.04.2008, Az.: I ZR 227/05 = NJW 2008, 3714ff. = MMR 2008, 818ff.
[83] *BGH*, Urt. v. 19. 04.2007, Az.: I ZR 35/04 = MMR 2007, 507ff.; *LG Hamburg*, Urt. v. 04.01.2005, Az.: 312 O 753/04 = MMR 2005, 326 with annotation *Rachlock*; similar: *OLG Brandenburg*, Urt. v. 16.11.2005, Az.: 4 U 5/05 = CR 2006, 124.
[84] *BGH*, Urt. v. 11.03.2004, Az.: I ZR 304/01 = MMR 2004, 668ff.
[85] *BGH*, Urt. v. 19.04.2007, Az.: I ZR 35/04 =MMR 2007, 507 - Internet-Versteigerung II; *BGH,* Urt. v. 12.07.2007, Az.: I ZR 18/04 = MMR 2007, 634.
[86] BGH, Urt. v. 22.07.2010, Az.: I ZR 139/08 –Kinderhochstuehle im Internet.
[87] *OLG Düsseldorf*, Urt. v. 24.02.2009, Az.: I-20 U 204/02 - MMR 2009, 402.

next to the search results.[88] Nevertheless, the liability of the operator is only denied if he does not play an active role in the trademark infringement, for example by gaining knowledge of the stored data or by controlling it. Hence, 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 this content or activity, and has not failed to expeditiously remove or disable access to the concerned data.[89] 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.[90]

Affiliates are generally responsible for infringements of trademarks by domain names or meta-tags. Merchants can preclude their own liability as a contributory disturber by handing out a list of relevant trademarks to the affiliates and contractually prohibit the use thereof.[91]

c) DENIC

The criteria for disturbance liability of DENIC are the common ones: the breach of examination duties which's scope is being determined by whether and to what extent an examination of the alleged domain could have been expected in the concrete situation.[92] A proactive examination prior to the domain's actual registration is however unreasonable for DENIC.[93] After the registration, only an examination concerning a specific infringement notification could be required, if the alleged violation of third parties rights is evident and easily detectable.[94] 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.[95] The claims against DENIC has the purpose to delete the registration of the infringing domain. Still, DENIC could not be obliged to keep negative lists of the

[88] *EuGH*, Urt. v. 23.03.2010, Az.: C-236/08 to C-238/08, *EuGH,* GRUR Int 2010, 395, 396.
[89] *EuGH*, Urt. v. 23.03.2010, Az.: C-236/08 to C-238/08, *EuGH,* GRUR Int 2010, 395, 396.
[90] *KG*, Urt. v. 10.2.2006, Az.: 9 U 55/05 - MMR 2006, 393, 394
[91] *OLG München*, Urt. v. 11.09.2008, Az.: 29 U 3629/08 = MMR 2009, 126; *LG Köln*, Urt. v. 06.10.2005, Az.: 31 O 8/05 = CR 2006, 64ff.; similar: *LG Berlin*, Urt. v. 16.08.2005, Az.: 15 O 321/05 = MMR 2006, 118; the opposite opinion: *LG Hamburg*, Urt. v. 03.08.2005, Az.: 315 O 296/05 = CR 2006, 130.
[92] *BGH,* Urt. v. 17.05.2001, Az.: I ZR 251/99 – ambiente.de = MMR 2001, 671, 673.
[93] *BGH,* Urt. v. 17.05.2001, Az.: I ZR 251/99 – ambiente.de = MMR 2001, 671, 674
[94] *BGH,* Urt. v. 17.05.2001, Az.: I ZR 251/99 – ambiente.de = MMR 2001, 671, 674
[95] *BGH,* Urt. v. 17.05.2001, Az.: I ZR 251/99 – ambiente.de = MMR 2001, 671, 675; *OLG Frankfurt/M.,* Urt. v. 17.06.2010, Az.: 16 U 77/09 = MMR 2010, 689 with annotation *Wetzel.*

trademarks or labels, which are blocked for registration.[96] As a result of the high requirements a liability of DENIC occurs rarely.

d) 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 for. The practice of the courts, concerning the liability of the Admin-C, is controversial. A significant aspect, which would speak 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).[97] This due to the fact that the domain holder can alter the content of his website and thus stop the infringing trademark use; the Admin-C on the other hand can prevent the infringement only by deletion of the domain. Though the Admin-C's awareness of a violation can classify him as a disturber, still the scope of examination duties is ambiguous.

According to the Higher Regional Court of Munich, the direct influence of Admin-C on the domain name causes his disturbance liability.[98] The Higher Regional Court of Stuttgart even assumes a liability from the moment of registration without the requirement of a specific notification of an infringement.[99] The Berlin Court of Appeal affirmed, the Admin-C's duty to examine the legality, if the domain holder and operator of a meta-search-engine has failed to delete the search results that violate personal rights or the deletion request, has never had a prospect of success in the first place.[100] The Higher Regional Court of Cologne accepts the obligation of Admin-C to refrain from a trademark infringement since the moment in which it obtains knowledge thereof.[101] The Higher Regional Courts of Duesseldorf and Munich

[96] *BGH,* Urt. v. 19.02.2004, Az.: I ZR 82/01- MMR 2004, 467; with annotation *Hoeren*, LMK 2004, 136; *LG Frankfurt*, Urt. v. 15.04.2009, Az.: 2-06 O 706/08 - MMR 2009, 704 – Lufthansa-Domains.
[97] OLG Stuttgart, Urt. v. 24.09.2009, Az.: 2 U 16/09, *OLG Stuttgart,* GRUR-RR 2010, 12, 14; *Stadler*, CR 2006, 521, 526.
[98] *OLG München*, Urt. v. 20.01.2000, Az.: 29 U 5819/99 = MMR 2000, 277; similar: *OLG Stuttgart*, Beschl. v. 01.08.2003, Az.: 2 W 27/03 = MMR 2004, 38; *LG Stuttgart*, Urt. v. 27.01.2009, Az.: 41 O 149/08.
[99] OLG Stuttgart, Urt. v. 24.09.2009, Az.: 2 U 16/09, *OLG Stuttgart ,Urt. v.* 24.09.2009, Az.: 2 U 16/09 - GRUR-RR 2010, 12, 14; *Stadler*, CR 2006, 521, 526.
[100] *KG*, Beschl. v. 20.03.2006, Az.: 10 W 27/05 = CR 2006, 778; similar: *LG Berlin*, Urt. v. 13.01.2009, Az.: 15 O 957/07 = MMR 2009, 348.
[101] OLG Köln, Urt. v. 15.08.2008, Az.: 6 U 51/08, *OLG Köln, Urt. v.* 15.08.2008, Az. 6 U 51/08 - MMR 2009, 48, 49.

followed this decision and confirmed that the Admin-C has an obligation to examine from the point of registration, but not before obtaining knowledge of the infringement.[102]

However, recently Higher Regional Courts denied any liability of the Admin-C.[103] The reason was that the Admin-C has obligations only in the internal relationship between the holder of the domain and DENIC. These parties conclude the registration contract – under consideration of domain law – without participation of the Admin-C who is just nominated by the domain holder. Thus, the Admin-C cannot be bound to examine the domain concerning violations of third party's rights. Solely the applicant (domain holder) himself is responsible for the legal permissibility of the chosen domain name.

According to the Higher Regional Court of Koblenz[104], the so-called Admin-C is not liable for infringements of trademarks and labels regarding domains. This legal opinion was supported by the Higher Regional Court of Hamburg[105] for violations of personality rights. Thereunder, the Admin-C is just the contact for DENIC, whereas the domain holder is held legally liable for infringements of labels. Also the Higher Regional Court of Stuttgart stated lately that there is no disturbance liability of the Admin-C. Insofar as the infringement is a result of the interaction between the domain and the content of the website, the Admin-C is unable to eliminate the disturbance because his liability cannot go beyond that of the domain holder.[106]

e) Tech-C, Zone-C and Operator of Domain-Name-Servers

The Tech-C is only acting as a technical assistant, thus, he is not legally entitled to prevent infringements of trademarks. After the registration, only the domain holder and the Admin-C have the legitimation to delete the domain.[107] According to the legal opinion of the Regional Court of Bielefeld, the Zone-C is also not liable as a disturber.[108] In fact, its legal position might be comparable to that of DENIC, with the consequence that responsibility arises after a

[102] *OLG Düsseldorf*, Urt. v. 03.02.2009, Az.: 20 U 1/08 = GRUR-RR 2009, 337; *OLG München*, Urt. v. 30.07.2009, Az.: 6 U 3008/08 = GRUR-RR 2010, 203.
[103] *OLG Köln*, Urt. v. 15.08.2008, Az.: 6 U 51/08 = MMR 2009, 48ff.; *OLG Düsseldorf*, Urt. v.03.02.2009, Az.: 20 U 1/08 = MMR 2009, 336.
[104] *OLG Koblenz*, Urt. v. 25.01.2002, Az.: 8 U 1842/00 = MMR 2002, 466ff. with annotation *Ernst/Vallendar*; similar: *OLG Koblenz*, Urt. v. 23.04.2009, Az.: 6 U 730/08 = MMR 2009, 549ff.
[105] *OLG Hamburg*, Urt. v. 22.05.2007, Az.: 7 U 137/06 = MMR 2007, 601ff.
[106] *OLG Stuttgart*, Urt. v. 24.09.2009, Az.: 2 U 16/09 = GRUR-RR 2010, 12.
[107] *Stadler*, CR 2004, 521, 524.
[108] LG Bielefeld, Urt. v. 16.05.2005, Az.: 16 O 44/04 = MMR 2004, 551; similar: *Bücking/Angster*, Domainrecht, Rn. 390.

certain notification of an evident and easily detectable infringement, for example under an existing res judicata title.[109]

The domain-name-server operator has as well no obligations to proactively examine for infringements during the primary connecting. Only restricted duties to check for violations alike in the case of DENIC are conceivable.[110] Thus, the liability is imaginable only in cases of unambiguous infringements and under res judicata titles.[111]

f) Domain Provider and Domain Parking

According to the Higher Regional Court of Hamburg, 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 DENIC and can elsewise be deemed to be a disturber.[112] However, disturbance liability will most commonly lack the reasonable possibility for the domain registrar to monitor the domain contents because of the need of extensive factual and comprehensive legal researches.[113]

The Regional Court of Duesseldorf 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.[114] 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.[115] A general examination duty would unnecessarily challenge the whole business concept of domain parking.[116]

[109] *Strömer*, K&R 2004, 440, 441.
[110] *OLG Hamburg*, Beschl. v. 25.04.2005, Az.: 5 U 117/04 = MMR 2005, 703, 704; *Hoeren* in: Hoeren/Sieber (Hrsg.), Handbuch Multimedia-Recht, Teil 18.2 Rdnr. 168.
[111] *OLG Hamburg*, Beschl. v. 25.4.2005, Az.: 5 U 117/04 - MMR 2005, 703 ,704.
[112] *OLG Hamburg*, Urt. v. 29.3 4.2010, Az.: 3 U 77/09 = MMR 2010,470.
[113] *OLG Hamburg*, Urt. v. 29.04.2010, Az.: 3 U 77/09 = MMR 2010,470.
[114] *LG Düsseldorf*, Urt. v. 15.01.2008, Az.: I 20 U 95/07 = MMR 2008, 254ff.; *LG Hamburg*, Urt. v. 18.07.2008, Az.: 408 O 274/08 = MMR 2009, 218; *LG Berlin*, Urt. v. 03.06.2008, Az.: 103 O 15/08 = MMR 2009, 218; *LG Frankfurt*, Urt. v. 26.02.2009, Az.: 2-03 O 384/08 = MMR 2009, 364.
[115] *BGH*, Urt. v. 30.06.2009, Az.: VI ZR 210/08 - NJW-RR 2009, 1413ff.; *OLG Frankfurt*, Urt. v. 25.02.2010, Az.: 6 U 70/90.
[116] *LG Düsseldorf*, Urt. v. 28.11.2007, Az.: 2a O 176/07 - MMR 2008, 349, 350.

IV. Liability under Competition Law

1. Direct liability

Pursuant to § 3 UWG unfair commercial practices are illegal, if they are suited to tangible impairment of the interests of competitors, consumers or other market participants. The provisions §§ 4–7 UWG 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 reliefs (§ 8 UWG). Moreover, if somebody intentionally or negligently uses an illegal commercial practice, he is obliged to compensate competitors for the damage arising therefrom (§ 9 UWG).

The courts apply a concept of direct liability in competition law since the decision of the Federal Supreme Court "Jugendgefaehrdende Medien bei Ebay (elucidated above under I.3.). As stated above the dogmatic reasoning for the judgment evolved the criteria for liability under competition law: the breach of competitive due diligence obligations 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 due diligence duties for business conduct committed by an unfair commercial practice of the contributor. The due diligence obligations are being educed from § 3 UWG. They enclose the idea that each party which creates a commercial source of danger have under competition law the obligation to undertake all possible and reasonable precautions, in order to restrict and limit the violation of commercial interests of the competitors.[117] The due diligence duty 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.[118]

In a new decision "Kinderhochstuehle im Internet" the Federal Supreme Court confirmed that the liability as a disturber in competition law is not applicably in cases in which the anticompetitive offence lies in the breach of rules of business conduct.[119] If the platform operator is confronted with a specific indication of an infringement, his due diligence obligation under competition law becomes a concrete obligation to examine the alleged

[117] *BGH*, Urt. v. 12.07.2007, Az.: I ZR 18/04 - GRUR 2007, 890 - Jugendgefährdende Medien bei Ebay.
[118] *BGH*, Urt. v. 12.07.2007, Az.: I ZR 18/04 - GRUR 2007, 890 - Jugendgefährdende Medien bei Ebay.
[119] *BGH*, Urt. v. 22.07.2010, Az.: I ZR 139/08 – Kinderhochstühle im Internet *; BGH*, Urt. v. 15.05.2003, Az.: I ZR 292/00 - GRUR 2003, 969, 970 = WRP 2003, 1350 - Ausschreibung von Vermessungsleistungen; *BGH*, Urt. v. 14.06.2006, Az.: I ZR 249/03 - GRUR 2006, 957 = WRP 2006, 1225 - Stadt Geldern; *BGH*, Urt. v. 12.07.2010, Az.: I ZR 121/08 - GRUR 2010, 633 – Sommer unseres Lebens.

content. Liability as a tortfeasor requires a notification of an unambiguous violation.[120] The service provider (here eBay) is not bound to undertake a comprehensive evaluation, in order to determine if the offer is anticompetitive. This is deemed to be a task which only a legal practitioner can accomplish and is considered unreasonable to execute for every single offer.[121]

The operator of a web portal, for free anonymous classified ads was held directly liable by the Higher Regional Court of Frankfurt on the Main under competition law because he had neglected its due diligence obligation to assure that commercial advertiser on his website follow the duty to state their company information.[122]

The private account owner on an auction platform is also directly liable under competition law.[123] The liability of the account owner arises from the breach of the own duty to keep the account access information secret. The omission to secure the account access information represents, according to the Federal Supreme Court, a distinct reason for responsibility, which exists in addition to the disturbance liability under intellectual property law and the due diligence obligations under competition law.[124] In terms of competition law, there is no anticompetitive commercial practice of the account owner because only the violating use by the third party can be considered as a commercial practice. Still, the actions of the third party can be attributed to the account owner in terms of § 2 (1) No. 1 UWG, because of the security omission.[125]

A definite statement about the complete abandonment of disturbance liability under commercial law has still to be awaited. Some scholars plead for its final and general inapplicability under commercial law[126] and others believe that it can be further made use of, if the violator of competition law does not undertake commercial actions in the terms of § 2 (1) No. 1 UWG.[127] In cases in which the emphasis of the offence lies on the result of the violation, the disturbance liability is still being taken into consideration by the courts.[128]

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[120] *BGH*, Urt. v. 11.03.2004, Az.: I ZR 304/01 – MMR 2004, 668 - Internet-Versteigerung I; *BGH,* Urt. v. 30.04 2008, Az.: I ZR 73/05 - GRUR 2008, 702 – Internet Versteigerung III.
[121] *BGH*, Urt. v. 22.07.2010, Az.: I ZR 139/08 – Kinderhochstühle im Internet.
[122] *OLG Frankfurt/M.*, Urt. v. 23.10.2008, Az.: 6 U 139/08 - K&R 2009, 60f.
[123] *LG Berlin*, Urt. v. 05.11.2001, Az.: 103 O 149/01 - CR 2002, 371 - with annotation *Leible/Sosnitza.*
[124] *BGH*, Urt. v. 11.3.2009, Az.: I ZR 114/06 - K&R 2009, 401, 402 – Halzband.
[125] *BGH*, Urt. v. 11.3.2009, Az.: I ZR 114/06 - K&R 2009, 401, 404 – Halzband.
[126] *Döring,* WRP 2007, 1131 , 1136.
[127] *Leistner/Stang*, WRP 2008, 533, 538, 540.
[128] *BGH*, Urt. v. 30.04 2008, Az.: I ZR 73/05 - GRUR 2008, 702 – Internet-Versteigerung III.

The distinction between disturbance liability and direct liability has a great dogmatic significance. Differences in the result may appear, if a third party participates negligently by forbearance in an anticompetitive commercial practice.[129] 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 reliefs and entitlement for information). For compensation claims however, the filter of the TMG would restrict the responsibility of service provider in the majority of the cases.

2. Case Law Regarding Disturbance Liability:

a) Hyperlinks

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.[130] Further, the court requires that the link was inserted without any intent to unfairly compete and the violation of the law was not evident. A liability arises only for the breach of reasonable examination obligations by inserting or maintaining the link. A link, which is an addition to the editorial content and is not referring to an unambiguously infringing content, has to be seen in the light of Art. 5 (I) GG und does not provoke 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.[131]

c) Optimization of Search Engines

The practice of the courts regarding the permissibility of paid listing inside search engines is controversial. The Regional Court of Hamburg[132] held that a search engine operator is liable for the use of paid listing, while the Regional Court Munich[133] denied in almost identical case the reasonability of an examination duty. However, if a company uses a paid search engine, it

[129] *Spindler*, GRUR 2011, 101, 103, 104.
[130] *BGH*, Urt. v. 1.04.2004, Az.: I ZR 317/01 - CR 2004, 613ff. - Schöner Wetten - with annotation *Dietlein;* similar: *LG Deggendorf*, Urt. v. 12.10.2004, Az.: 1 S 36/04 - CR 2005, 130 ff.
[131] *OLG Hamburg*, Urt. v. 14.07.2004, Az.: 5 U 160/03 - MMR 2004, 822ff.
[132] *LG Hamburg*, Beschl. v. 14.11.2003, Az.: 312 O 887/03.
[133] *LG München I*, Beschl. v. 02.12.2003, Az.: 33 O 21461/03 - MMR 2004, 261f.

is considered liable for violations of competition law.[134] The discrepancy between the price in the search engine results and the actual price inside the online shop is anticompetitive.

The use of Google AdWords is, in accordance with European Law, anticompetitive 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.[135]

Meta tags can be anticompetitive, if they are used without any comprehensible reason or without the required professional license of the operator (in cases of profession, which need an administrative approbation).[136] Still, according to the Higher Regional Court of Duesseldorf, the use of meta-tags, which have no factual relevance to the information and content of the offered website, is not considered per se as an anticompetitive practice.[137]

c) Admin-C

According to one legal perception, the Admin-C has proactive monitoring obligations and can be held liable for violations of competition law as a tortfeasor even without concrete knowledge of anticompetitive actions.[138] The Regional Court of Dresden decided on the contrary that proactive examination duties should not be imposed on the Admin-C.[139] 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.[140]

V. Liability under Criminal Law

1. General Overview

In terms of criminal law, offences are usually committed by users or content providers. Most frequent offences concerning the use of Internet are the incitement to hatred (§ 130 StGB), the dissemination of depictions of violence (§ 131 StGB), the distribution of pornography (§§ 184

[134] *OLG Stuttgart*, Urt. v. 01.07.2008, Az.: 2 U 12/07 - MMR 2008, 754ff.
[135] *EuGH*, Urt. v. 23.03.2010, Az.: C-236/08 to C-238/08 - GRUR Int 2010, 395, 396.
[136] *Kaufmann*, MMR 2005, 348, 351, 352.
[137] *OLG Düsseldorf*, Urt. v. 01.10.2002, Az.: 20 U 93/02 - WRP 2003, 104.
[138] LG Bonn, Urt. v. 23.02.2005, Az.: 5 S 197/04 - CR 2005, 527; similar: LG Hamburg, Urt. v. 05.04.2007, Az.: 327 O 699/06 - MMR 2007, 608 und LG Hamburg, Urt. v. 15.03.2007, Az.: 327 O 718/06.
[139] LG Dresden, Urt. v. 09.03.2007, Az.: 43 O 128/07 - MMR 2007, 394 = CR 2007, 462 - with annotation *Wimmers/Schulz*.
[140] *Stadler*, CR 2004, 521, 526; *Wimmers/Schulz*, CR 2006, 754, 755, 762f.; *Bücking/Angster*, Domainrecht, Rn. 392 ff.; *Köhler/Arndt/Fetzer*, Recht des Internet, Rn. 801; *Stadler*, Haftung für Informationen im Internet, Rn. 255.

ff. StGB) and defamation offences (§§ 185 ff. StGB). Ever since the case Toeben[141], the Federal Supreme Court considers German criminal law applicable in all cases, in which users in Germany can access incriminated content on foreign servers and therefore the offender's misfeasance is capable to disturb the public peace in Germany. Consequently, it is not required that the action itself causing the criminal offence was commented in Germany. Also there are special criminal provisions under copyright law (§§ 106, 108 UrhG, 33 KunstUrhG), trademark law (§§143ff MarkenG), competition law (§§ 16 ff UWG) and other special provisions.

Generally, access and hosting provider are not liable under criminal law; even if their contribution to the unlawful act can be classified as aiding, their conduct hardly can be proved as intentional. As a result, liability of the hosting provider can in most cased only be caused by omission, if the elimination of incriminated contents is being persistently rejected. Even in this case, however, it needs to be considered that even in the case of liability, the privileges in §§ 8 – 10 TMG are also applicable in criminal law.

Nevertheless, in one court decision the chief executive of a subsidiary of an American service provider was convicted as a joint principal for the distribution of child pornography, which the American parent company was storing in newsgroups.[142] The unlawful act of the parent company was the omission as a web forum operator of newsgroups to prevent the broadcasting of pornography in Germany through an efficient filtering system. However, the court of appeal overruled this decision since there was no proof of intent.[143]

2. Criminal Liability for Hyperlinks

The Local Court of Berlin-Tiergarten[144] was the first German court which decided that the liability of the person who inserts a link depends upon the overall statement made by the hyperlink. The case which the court of Berlin Tiergarten had to decide, dealt with the Bundestag member Angela Marquardt who had placed a link to a Dutch server on which the prohibited magazine "Radical" was located. The federal attorney general had accused the Member of the Bundestag of assisting the formation of terrorist organizations and considered the link to be a crucial contribution by assistance. The Local Court did not follow this view. On the contrary, it regarded only one specific issue of the magazine "Radical" as criminally

[141] *BGH*, Urt. v. 12.12.2000, Az.: 1 StR 184/0 - BGHSt 46, 212.
[142] *AG München,* Urt. v. 28.05.1998, Az.: 8340 Ds 465 Js 173158/95 - MMR 1998, 429-438 – CompuServe.
[143] *LG München*, Urt. v. 17.11.2009, Az.: 20 Ns 465 Js 173158/95 - MMR 2000, 171 f.
[144] *AG Tiergarten*, Urt. v. 30.6.1997 - 260 DS 857/96 - CR 1998, 111.

relevant. It would not have been possible to determine if and most of all when the accused obtained knowledge of the inclusion of the illegal issue. The mere further existence of the link could not justify a responsibility, if it could not be positively ascertained that the accused person knowingly and willingly perpetuated the link with full knowledge of its contents and the existence of the issue. The failure to regularly examine one's own link can only lead to an allegation of negligence, which however was not relevant here. If the solidarity with the illegal content of the link is declared by its insertion, then a liability as a content provider arises.[145] In such cases § 7 (1) TMG is applicable; the person who placed the link is liable according to the general rules. Hence, the privileges in §§ 8 – 10 TMG are not applicable.

A different evaluation is required if the link represents no adoption of the content of third parties. 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 of the webpage by the mere setting of a link. Consequently, 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. The insertion of links to foreign websites with right-wing extremist information is therefore not always accusable.[146] Exculpation is possible, if the link inserter dissociates himself from the content and the link is part of a reporting about past events of the day.

The Regional Court of Hamburg was concerned with the establishment of a link-compilation to so-called "Steinhöfel-Hassseiten".[147] The attorney claimed defamation against the person who placed the link. The Regional Court of Hamburg convicted the defendant because he failed to dissociate himself from the defaming expressions made by third parties in a sufficient way and therefore adopted these as his own by placing the link.

3. 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 Regional Court of

[145] See on this the case of the OLG Munich, in which someone combined links with the naming of names, whereby the linked content contained defamation in the sense of § 186 StGB; decision of 6.July 2001, ZUM 2001, 809.

[146] *LG Stuttgart*, Urt. v. 15.06.2005, Az.: 38 Ns 2 Js 21471/02 - CR 2005, 675ff.; *OLG Stuttgart*, Urt. v. 24.04.2006, Az.: 1 Ss 449/05 - CR 2006, 542 ff. - with annotation *Kaufmann.*

[147] LG Hamburg, Urt. v. 12.05.1998, Az.: 312 O 85/98 - CR 1998, 565; *OLG München*, Urt. v. 6.07.2001, Az.: 21 U 4864/00 - ZUM 2001, 809ff.

Karlsruhe[148], a search warrant is considered justified, in search of someone who has inserted a link to websites with child pornography. The operator of a website is, by the purposeful placement of the link to a site with that kind of content, liable for prosecution, because he adopts the linked information as his own. 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 §§ 106, 108 UrhG can also justify a search warrant in the office of a provider of a file-sharing system.[149]

The Federal Constitutional Court of Germany had to decide if a search warrant against a web forum operator was adequate and proportional, because hyperlinks with copyright infringing content were inserted on the forum website. According to the court's opinion, there can be no strong suspicion of a copyright offence against the forum operator, if it was not primary investigated, if a forum user could have also inserted the link or if the forum operator can at all be responsible for user links (by omission or aiding).[150] It would have been necessary prior to the search warrant to investigate the identity of the ones, who have inserted the alleged links.

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 fileshare system can be found. Such a demand was rejected concerning the sharing of a single song[151] but was allowed in the case that a user shared 620 music titles.[152]

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

A seizure order concerning the whole e-mail content of a user from the mail server of the provider is considered disproportional.[153] On the other hand if a seizure order referring to the

[148] *LG Karlsruhe*, Beschl. v. 26.03.2009, Az.: Qs 45/09 - MMR 2009, 418ff.
[149] *LG Saarbrücken,* Urt. v. 23.04.2009, Az.: 2 Qs 9/09 - MMR 2010, 205-206.
[150] *BVerfG*, Urt. v. 08.04.2009, Az.: 2 BvR 945/08 - K&R 2009, 394ff.
[151] *LG Darmstadt,* Urt. v. 12.12.2008, Az.: 9 Qs 573/08 - K&R 2009, 211f. - with annotation *Sankol.*
[152] *LG Darmstadt,* Urt. v. 09.10.2008, Az.: 9 Qs 410/08 - MMR 2009, 52ff.
[153] *BGH*, Beschl. v. 24.11.2009, Az.: StB 48/09 (a) - K&R 2010, 409-410.

e-mail is granted to the prosecution, the provider does not have the right to examine its legality, but is merely obliged to execute the order.[154]

B. Defenses and Safe Harbors – The Provisions of the Tele Media Act

I. Provisions of the TMG

The liability of online intermediaries is restricted by statutory law. The Tele Media Act (TMG) contains rules for criminal and civil law which are applied like a filter prior to the application of the special rules of liability[155]. The provisions of the TMG represent the national implementation of the E-Commerce Directive 2000/31/EC Section 4 (Liability of intermediary service providers).

According to § 7 (1) TMG, service providers are responsible in accordance with the general rules which apply to the content they provide for use. Legislation and courts[156] share the opinion that providers are not only liable for content which they have created but are also liable for adopted contents according to the general rules of liability. The criteria for the adoption is a controversial issue (vide supra IV. 2.; VII.2.).

Concerning access-providers, § 8 TMG is applicable which implements Art.12 of the E-Commerce-Directive. 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. Consequently, only passive, automatic procedures are privileged under § 8 TMG. Also, the transmission must not have been initiated and the information selected or modified by the service provider. Moreover, the access provider shall not have selected the recipient of the transmission. Because of the privilege in § 8 (1) TMG, access provider 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 (§ 8 (1) 2 TMG).

[154] *LG Hildesheim,* Beschl. v. 21.04.2010; Az.: 26 Qs 58/10 - MMR 2010, 800.
[155] *BGH*, Urt. v. 23.9.2003, Az.:VI ZR 335/02 - MMR 2004, 166 with annotation *Hoeren.*
[156] BT-Drs. 14/6098, S. 23.

A special provision defines the liability for caching (§ 9 TMG) and reproduces factually Art. 13 of the E-Commerce-Directive. Also, the responsibility for willful collaborative infringements is applicable.

Hosting-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 (§ 10 s.1 No. 1 TMG). In order to prevent to loose 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 twenty-four hours[157] up to one week[158] is required. The criteria "knowledge" and "apparent illegality" have to be proven in court by the plaintiff.[159] Still questionable remains, if the mere knowledge of the concrete action is sufficient to cause liability. The majority of scholars and courts additionally require the actual knowledge of the illegality of this action.[160]

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 online auction houses, sharehosters, web portals and web forum operator act as host providers, unless they adopt the content created by their users.

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

Due to the rule in § 7 (2) 2 TMG, 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 TDG (Tele Services Act), are no longer applicable. Consequently, § 7 (2) 2 TMG could be interpreted as an unrestricted obligation for providers

[157] *AG Winsen*, Beschl. V. 06.06.2005 - 23 C 155/05 - CR 2005, 682.
[158] *Strömer/Grootz*, K&R 2006, 553, 555; *Köster/Jürgens*, K&R 2006, 108, 111.
[159] *BGH*, Urteil vom 23.09.2003, Az.: VI ZR 335/02 -- MMR 2004, 166ff. about § 5 Abs. 2 TDG a.F.
[160] *Eck/Ruess*, MMR 2003, 363, 365; *Sobola/Kohl*, CR 2005, 443, 447; *Hoffmann*, MMR 2002, 284, 288; *Spindler*, NJW 2002, 921, 923f.

to block information due to injunctive reliefs. However, the basic principle „immpossibilium 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 are failing so far. A DNS-blockade for example, can easily be circumvented simply by enlisting a different domain server.

II. Search engines and hyperlinks

The TMG contains no provisions regarding the liability of search engines and the liability for hyperlinking content. Some scholars therefore insist upon a codification in the TMG.[161]

The privileges in §§ 8 – 10 TMG 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 TMG. Hyperlinks are a technical transmission which stands as a compositum mixtum between technical procedure and content performance.[162] Consequently, an analogy to the provisions of the TMG appears to be inappropriate.[163] 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.[164]

The legal situation concerning the liability of search engines is similar. An analogous application of the TMG provisions seems inappropriate because the loophole was intended by the legislator.[165] 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 the Google France decision are being applied by German courts.

III. Reasonability of the examination duty

Within the context of the disturbance liability courts have developed the requirement of reasonability of the examination duty in order to restrict liability. This restriction of liability can be regarded as a kind of "safe harbor"-provision. The scope of examination obligation after gaining knowledge of a violation is based upon an overall view of all relevant circumstances. Of the essence are in particular the infringed rights, the effort of the service provider and the expected result, the factual and economical possibility for prevention of infringements, the profit of the provider, the foreseeability of the risks and the value of the

[161] *Igor Stenzel*, MMR 9/2006, S. V.
[162] *Roggenkamp,* jurisPR-ITR 6/2007.
[163] *Spindler*, CR 2007, 239, 245.
[164] *Igor Stenzel*, MMR 9/2006, S. V.
[165] *Rath*, Das Recht der Suchmaschinen (Law of the Search Engines), S. 276 ff.; *KG Berlin*, Beschl. v. 20.03.2006, Az.: 10 W 27/05.

service and the basic rights, which are relevant in the concrete case have to be ascertained.[166] At last liability shall not disrupt the entire business concept of a service provider.[167] Still these criteria are applied diversely by the courts, and create no legal certainty and security.

IV. Redrafting of the TMG

A new version of the TMG was planned[168] but unfortunately did not pass legislation due to the principle of discontinuance in German constitutional law. The draft stated that service providers are generally not liable for contents of third parties. They would have been obliged to remove or block contents only as ultima ratio after a check of reasonability (§ 7 (2) TMG-E). In order to stimulate their participation in the prevention of infringements, due diligence obligations could have been imposed on service providers (§ 7 (4) TMG-E). Moreover, for the liability of search engines (§ 8a TMG-E) and for hyperlinks (§ 10a TMG-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.

C. Remedies

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 one hand, and the fault-based compensation claims on the other hand. The penalties under criminal law are imprisonment and monetary fine. As a result of the provision, § 7 (2) 2 TMG which leaves injunction reliefs unaffected by the privileges for service provider, injunctions have the greatest factual relevance. Their requirements are dominated by case law and therefore merely unitary specified (in detail vide supra). Compensation claims can be filed against intermediaries only in cases in which they fail to gain advantage of statutory liability privileges. The entitlement for information pursuant to § 101 UrhG also plays a significant role as a remedy.

In the course of implementation of the InfoSoc-Directive 2001/29/EC claims for injunctions against intermediaries were not adopted in German statutory law. Within this context the Bundesrat criticized the drafts of the government since there was no opportunity to create a

[166] *BGH*, Urt. v. 11.03.2004, Az.: I ZR 304/01; *OLG Düsseldorf*, Urt. v. 07.06.2006,Az.: I-15 U 21/06; *LG Köln*, Urt. v. 21.03.2007,Az.: 28 O 19/07; *Steinle*, MMR 2006, 180, 181.
[167] *BGH*, Urt. v. 11.03.2004, Az.: I ZR 304/01.
[168] http://dip21.bundestag.de/dip21/btd/16/111/1611173 - last visited on the 26.04.2011.

regulation which allows the blockage of infringing contents.[169] This criticism was countered with the statement that the present law already allows injunctive reliefs against service providers thus there was no need for an additional regulation.[170]

In implementation of the Enforcement-Directive 2004/48 the provision of § 101 UrhG was created. As stated above, this rule entitles right owners to receive information in order to assert claims towards copyright infringers. This claim is applicable in the area of copyright law only and does not require any form fault. According to § 102 (2), not only the direct infringer, but also a third (non-infringing) party are possible defendants the claim. In cases of apparent illegality the entitlement can be filed by an action of an injunction (§ 101 (7) UrhG). Before this regulation was passed, information about the infringer could only be gained by reporting a criminal offence. In this case prosecutors had to investigate the name of the infringer. In most cases the right owner could receive this information by demanding access to the prosecution records and use it to fail damage claims against the infringer.

The entitlement for information requires an apparent infringement which is being carried out on a commercial scale. For the general term "on a commercial scale" a clear legal definition is missing. There is only a hint (§ 101 (1) 2 UrhG) that it can depend on the amount of singular infringements or on the severity thereof. Because of the vagueness of the provision there are doubts whether the rule is consistent with constitutional rights.[171] The term "on a commercial scale" has to be seen in the light of Art. 14 Enforcement-Directive. The synchronization with European law was the main intention of the legislator when using this term.[172] According to the Directive, acts on a commercial scale are those carried out for direct or indirect economic or commercial advantage; this would normally exclude acts carried out by consumers acting in good faith. According to a German pre-legislative substantiation, the term contains quantitative as well as qualitative characteristic thus, for example a complete music album which is still unreleased or is just being released on the German market would be sufficient for an infringement on a commercial scale.[173] Numerous courts have adopted this legal view.[174] Relevant shall be in particular the period of time having passed since the release date

[169] BT-Drucks. 15/38 S. 35.
[170] BT-Drucks. 15/38 S. 39.
[171] *Braun*, jurisPR-ITR 17/2008 Anm. 4.
[172] BT-Dr. 16/8783, S.50.
[173] BT-Dr. 16/8783, S.50.
[174] *OLG Köln*, Beschl. v. 21.10.2008, Az.: 6 Wx 2/08 - MMR 2008, 820, 822; *OLG Frankfurt*, Beschl. v. 12.05.2009, Az.: 11 W 21/09 - MMR 2009, 542, 543; *LG Frankfurt,* Beschl. 18.09.2008, Az.: 2-06 O 534/08 MMR 2008, 829.

on the market. A three months old computer game[175] or a six months old movie[176] however, is unlikely to be deemed as acting on a commercial scale. On the contrary according to the Higher Regional Court of Oldenburg and the Regional Court of Kiel even a single brand new music album is insufficient.[177] Nevertheless, a four years old software, which current version costs four-hundred euro, might lead as a result of its high value to a case of commercial acting.[178]

The entitlement for information against third parties also requires apparent illegality. This means that an infringement should be evident and can be related to a specific IP-address.[179] The identity of the infringer might naturally still be unknown. The information of the third party that needs to be indulged includes the name and the address of the direct infringer. Pursuant to § 101 (9) UrhG for data, which falls under the Tele Communication Act (this is most likely in the case that intermediaries are respondents of the entitlement), a court's decision is needed to enforce the entitlement for information.[180]

D. Analysis and Assessment

Legislaton in Germany implemented the basic principles of the E-Commerce-Directive 2000/31/EC. However, it failed to create a regulation which corresponds to the notice-and-take-down procedure. Moreover, by the general application of disturbance liability and overexpansion of injunction relief the Federal Supreme Court misconceives the main goals which national and European legislators[181] have pursued when drafting the Tele Media Act and the E-Commerce-Directive. As a consequence legal security or certainty for service providers is missing. General, unambiguous, and binding liability standards, which the TMG 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. In particular it remains uncertain which precautions have to be undertaken by service providers in order to prevent liability. As a result, it is still

[175] *OLG Zweibrücken*, Beschl. v. 27.10.2008, Az.: 3 W 184/08 = MMR 2009, 43, 45.
[176] *LG Köln*, Beschl. v. 30.04.2009, Az.: 9 OH 388/09 - MMR 2009, 645.
[177] *OLG Oldenburg*, Beschl. v. 01.12.2008, Az.: 1 W 76/08 - MMR 2009, 188, 189; *LG Kiel*, Beschl. v. 06.05.2009, Az.: 2 O 112/09 - MMR 2009, 643, 644.

[178] *OLG Zweibrücken*, Beschl. v. 02.02.2008, Az.: 3 W 195/08 - MMR 2009, 702.
[179] *OLG Köln*, Beschl. v. 21.10.2008 - 6 Wx 2/0 - MMR 2008, 820, 822.
[180] *Weidert/Molle,* Handbuch Urheberrecht und Internet, S. 503, Rn. 381.
[181] *Hoeren*, MMR 2004, 672.

undetermined, to what extent future infringements have to be prevented. The term "quintessentially similar" and criteria for "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 the users will find a technical possibility to circumvent this system.[182] 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 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 can adopt the contents of third parties, becoming 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 statement that service providers are liable under the general rules for information, which has not been made available by third parties, is redundant and therefore missing in the directive.[183] Despite this fact, § 7 (1) TMG makes exactly that statement. Therefore, an interpretation of this provision according to the directive should have no meaning except the inapplicability of the privileges §§ 8 – 10 TMG on intermediaries.[184] Hence, the 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 in contradiction to the directive interpretation.[185] This court practice seems rather questionable and needs to be altered.

II. Proactive Examination Obligations

Pursuant to § 7 (2) 1 TMG (the national implementation of Art. 15 E-Commerce-Directive) service providers neither have an obligation to monitor the information which they transmit or

[182] *Berger/Janal*, CR 2004, 917, 923.
[183] *Sieber/Höfinger*, Handbuch Multimedia Recht, 18.1.40.
[184] *Sieber/Höfinger*, Handbuch Multimedia Recht, 18.1.42.
[185] For example *BGH*, Urt. v. 12.11.2009, Az.: I ZR 166/07 – marions-kochbuch.de.

store, nor are the obliged to actively seek for circumstances indicating an illegal activity.[186] This implicates that any socially adequate provider activity is merely considered as a source of danger that needs a preventive control mechanism in order to be handled. Art. 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.[187] 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 general nature.[188] However, according to the Federal Supreme Court platforms for online auctions are deemed to be obliged to undertake all technically possible and reasonable measures to prevent further similar trademark infringements.[189] If they fail to prevent future similar violations, auction houses are even considered to be direct infringer by forbearance.[190] According to this opinion, an auction house is obliged to award damages from the point of gaining knowledge of the illegal activity; injunctive reliefs against the intermediary on the other hand could be asserted even if the provider is not aware of the illegal activity. However, for the auction house injunctions are no less severe legal consequences, if they lead to the result that expensive filtering technology has to be installed by the provider. A breach against this obligation might have even a much bigger financial impact on intermediary than any compensatory claims.[191]

According to the opinion of advocate general Jääskinen in the case L'Oréal v. eBay in European law, there is no requirement for the platform operator to prevent further infringements which might take place in the future.[192] An appropriate limit for the scope of injunctions might be the requirement of double identity: an injunction is granted against an

[186] Commission, Proposal for a European Parliament and Council Directive, COM (1998)586; similar *Volkmann*, CR 2003, 440, 443.
[187] *Hoeren*, Handbuch Multimedia Recht, 18.2.102.
[188] *Hoeren*, Handbuch Multimedia Recht, 18.2.102f; *Berger/Janal*, CR 2004, 917, 919; *Rücker*, CR 2005, 347, 353; *Volkmann*, CR 2003, 440, 442.
[189] *BGH*, Urt. v. 19.04.2007, Az.: I ZR 35/04 – MMR 2007, S. 507 ff.; *LG Hamburg*, Urt. v. 4.01.2005, Az. 312 O 753/04 – MMR 2005, 326 with annotation *Rachlock*; similar *OLG Brandenburg*, Urt. v. 16. 11.2005, Az.: 4 U 5/05 – CR 2006, 124.
[190] *OLG Hamburg*, Urt. v. 24.07.2008, Az. 3 U 216/06 – MMR 2009, 129 with annotation *Witzmann*.
[191] *Hoeren*, MMR 2004, 672.
[192] Opinion of advocate general Jääskinen in the case L'Oréal v. eBay, 9.12.2010, C-324/09.

intermediary only to prevent continuation or repetition of infringements of a certain trademark by a certain user.[193]

Thus, the imposition of proactive monitoring obligations is not only dogmatically unsustainable, but disregards the statutory privileges of host providers as well as the guidelines of the E-Commerce-Directive.[194]

III. Disturbance Liability

The further development of the court practice concerning disturbance liability needs to be awaited. At least in competition law, the liability for intermediaries will have its legal foundation in due diligence obligations 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 § 8 (3) Nr. 2 UWG) and makes the analogy to § 1004 BGB obsolete.[195] The direct liability under competition law has an impact on the possibilities to claim damages according to §§ 9, 10 UWG. That represents an essential divergence in comparison to disturbance liability which can be a legal basis only for injunctions. The concept of disturbance liability is still applied in copyright and trademark law. As a result, dogmatic inconsistencies may occur, if the BGH continues to apply different rules for intellectual property rights and unfair competition: under copyright and trademark law, only injunctions can 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 slight negligently.[196] However, this dogmatic inconsistence should not have an impact on the liability of service providers, since the provisions of the TMG restricts claims for compensation.

Meanwhile the Federal Supreme Court also makes attempts to find another basis for liability of intermediaries under copyright law.[197] 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.

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[193] Opinion of advocate general Jääskinen in the case L'Oréal v. eBay, 9.12.2010, C-324/09.

[194] *Hoeren,* online script Internet Law, http://www.uni-muenster.de/Jura.itm/hoeren/lehre/materialien, last visited 27.04.2011

[195] *Döring*, WRP 2007, 1131, 1137.

[196] *Döring*, WRP 2007, 1131, 1137.

[197] *BGH*, Urt. v. 12.11.2009, Az.: I ZR 166/07 - marions-kochbuch.de – MMR 2010, 556 with annotation *Engels*; CR 2010, 471 with annotation *Hoeren/Plattner*; K&R 2010,496 with annotation *Roggenkamp.*

IV. Résumée

The German court practice regarding in particular the doctrine of disturbance liability, the proactive obligations to examine contents and the adoption of contents pursuant to § 7 (1) 1 TMG need to be replaced by liability criteria in accordance with the E-Commerce-Directive. The directive should as well be regarded as the main reference point for the national courts by the interpretation of the liability privileges in the TMG. A statutory regulation for the responsibility of search engines and links appears recommendable as well. Within this context the failed redrafting of the TMG seemed to be a step in the right direction. A holistic regulation of liability privileges which has also an impact on injunction claims might be advisable. Moreover, a procedure alike the American notice-and-take-down is necessary to prevent misuse and to give guidelines for courts and practitioners. Also, unitary requirements for liability should be established in order to reduce the amount of contradicting court decisions and to secure a legal environment for service providers.