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RECHTSANWÄLTE

Platform liability on a European level

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Background/Introduction

In its “Communication on a Digital Single Market Strategy for Europe” of 6th May 2015 the Commission committed to assess the role of online platforms. The Commission seeks the views to better understand the social and economic role of online platforms, market trends, the dynamics of platform development and the various business models underpinning platforms.

A public consultation had been opened from September 24th 2015 until January 6th 2016 (“Consultation”)¹, taking into account the Commission’s Communication “Towards a modern, more European copyright framework”.

The Consultation is entitled “Regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy“. The Consultation itself proposes the following definition for the term “online platform“²:

“Online platform” refers to an undertaking operating in two (or multi)-sided markets, which uses the Internet to enable interactions between two or more distinct but interdependent groups of users so as to generate value for at least one of the groups. Certain platforms also qualify as Intermediary service providers.

Typical examples include general internet search engines (e.g. Google, Bing), specialised search tools (e.g. Google Shopping, Kelkoo, Twenga, Google Local, TripAdvisor, Yelp.), location-based business directories or some maps (e.g. Google or Bing Maps), news aggregators (e.g. Google News), online market places (e.g. Amazon, eBay, Allegro, Booking.com), audio-visual and music platforms (e.g. Deezer, Spotify, Netflix, Canal play, Apple TV), video sharing platforms (e.g. YouTube, Dailymotion), payment systems (e.g. PayPal, Apple Pay), social networks (e.g. Facebook, LinkedIn, Twitter, Tuenti), app stores (e.g. Apple App Store, Google Play) or collaborative economy platforms (e.g. AirBnB, Uber, Taskrabbit, Bla-bla car). Internet access providers fall outside the scope of this definition.

In its recent Communication published on 25th of May 2016³, the Commission took the following position (page 9 of the Communication):

¹ <https://ec.europa.eu/digital-single-market/en/news/public-consultation-regulatory-environment-platforms-online-intermediaries-data-and-cloud>.

² See page 5.

“The Commission will **maintain the existing intermediary liability regime** while implementing a sectorial, problem-driven approach to regulation:

...

Starting still in 2016, the Commission will **further encourage coordinated EU-wide self-regulatory efforts by online platforms**. It will regularly review the effectiveness and comprehensiveness of such voluntary efforts with a view to determining the possible need for additional measures and to ensure that the exercise of users’ fundamental rights is not limited.

The Commission will, during the second half of 2016, explore the need for guidance **on the liability of online platforms when putting in place voluntary, good-faith measures** to fight illegal content online.”

The present report will only discuss the liability of hosting providers in its different modalities. For the time being aspects related to website blocking, that is the liability of access providers, and the liability of search engines will not be included in the analysis.

Hosting providers cover a wide range of activities, from (general and specialized) search engines and news aggregators to online market places, user-generated content platforms, sharehosting (one click hosting, cyberlocker) services, review sites and social networks.

However, most of these services have in common that content is obtained from (often) anonymous sources, that is an (individual or commercial) user. Around the content/product provided by that user the hosting platforms have developed business models with different variations.

Within this context platform activities and services to its users often go far beyond the “typical” technical service provider the European legislature had in mind when it created the legal framework for hosting providers at the beginning of this millennium.

³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Online Platforms and the Digital Single Market Opportunities and Challenges for Europe (Com (2016) 288/2).

The following report outlines in a first part the underlying legal framework (**Part 1**) before it analyzes and visualizes the different discrepancies created by the current legal, economic and technical environment (**Part 2**). Finally different approaches for a possible filling of these discrepancies are presented and discussed (**Part 3**).

In order to focus on the most relevant discrepancies any considerations regarding the definition of “public” within the making available right and the liability for hyperlinks and/or framing have been left aside as well as Europe-wide enforcement issues. Such topics may be subject to a separate, additional analysis.

Part 1. The legal framework

Regarding the legal framework European legislation and decisions of the European Court of Justice (“ECJ”) have to be taken into account. Additionally some pioneering decisions of German Courts have been included in the analysis as the German liability framework is quite excessive and thus a valid starting point in order to identify potential discrepancies⁴.

1. Legislation

For hosting platforms essentially two European directives are relevant: Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (“Directive on electronic commerce”) and Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (henceforth abbreviated as “InfoSoc Directive”).

⁴ Due to the limited time decisions of other Member States could not be taken into account. However the German framework is one of the most extensive ones. If even the German case law does not manage to close liability discrepancies it is a clear indicator that an urgent need for action exists.

Subsequently the principle provisions and relevant recitals of these directives will be described.

1.1 Directive 2000/31/EC (Directive on electronic commerce)

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (henceforth abbreviated as “Directive on electronic commerce”).

Article 5:

General information to be provided

1. In addition to other information requirements established by Community law, Member States shall ensure that the service provider shall render easily, directly and permanently accessible to the recipients of the service and competent authorities, at least the following information:

- (a) the name of the service provider;
- (b) the geographic address at which the service provider is established;
- (c) the details of the service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner;
- (d) where the service provider is registered in a trade or similar public register, the trade register in which the service provider is entered and his registration number, or equivalent means of identification in that register;
- (e) where the activity is subject to an authorisation scheme, the particulars of the relevant supervisory authority;
- (f) as concerns the regulated professions:
 - any professional body or similar institution with which the service provider is registered,
 - the professional title and the Member State where it has been granted,
 - a reference to the applicable professional rules in the Member State of establishment and the means to access them;
- (g) where the service provider undertakes an activity that is subject to VAT, the identification number referred to in Article 22(1) of the sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment.

2. In addition to other information requirements established by Community law, Member States shall at least ensure that, where information society services refer to prices, these are to be indicated clearly and unambiguously and, in particular, must indicate whether they are inclusive of tax and delivery costs.

Article 14:

Hosting

1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.

Article 15:

No general obligation to monitor

1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.

Additionally the following recitals of the Directive on electronic commerce are relevant:

(18) Information society services span a wide range of economic activities which take place on-line; these activities can, in particular, consist of selling goods on-line; activities such as the delivery of goods as such or the provision of services off-line are not covered; information society services are not solely restricted to services giving rise to on-line contracting but also, in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering on-line information or commercial communications, or those providing tools allowing for search, access and retrieval of data; information society services also include services consisting of the transmission of information via a communication network, in providing access to a communication network or in hosting information provided by a recipient of the service; ...

(29) Commercial communications are essential for the financing of information society services and for developing a wide variety of new, charge-free services; in the interests of consumer protection and fair trading, commercial communications, including discounts, promotional offers and promotional competitions or games, must meet a number of transparency requirements; ...

(40) Both existing and emerging disparities in Member States' legislation and case-law concerning liability of service providers acting as intermediaries prevent the smooth functioning of the internal market, in particular by impairing the development of cross-border services and producing distortions of competition; service providers have a duty to act, under certain circumstances, with a view to preventing or stopping illegal activities; this Directive should constitute the appropriate basis for the development of rapid and reliable procedures for removing and disabling access to illegal information; such mechanisms could be developed on the basis of voluntary agreements between all parties concerned and should be encouraged by Member States; it is in the interest of all parties involved in the provision of information society services to adopt and implement such procedures; the provisions of this Directive relating to liability should not preclude the development and effective operation, by the different interested parties, of technical systems of protection and identification and of technical surveillance instruments made possible by digital technology within the limits laid down by Directives 95/46/EC and 97/66/EC.

(42) The exemptions from liability established in this Directive cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored.

(43) A service provider can benefit from the exemptions for "mere conduit" and for "caching" when he is in no way involved with the information transmitted; this requires among other things that he does not modify the information that he transmits; this requirement does not cover manipulations of a technical nature which take place in the

course of the transmission as they do not alter the integrity of the information contained in the transmission.

(44) A service provider who deliberately collaborates with one of the recipients of his service in order to undertake illegal acts goes beyond the activities of "mere conduit" or "caching" and as a result cannot benefit from the liability exemptions established for these activities.

(47) Member States are prevented from imposing a monitoring obligation on service providers only with respect to obligations of a general nature; this does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation.

(50) It is important that the proposed directive on the harmonisation of certain aspects of copyright and related rights in the information society and this Directive come into force within a similar time scale with a view to establishing a clear framework of rules relevant to the issue of liability of intermediaries for copyright and relating rights infringements at Community level.

1.2 Directive 2001/29/EC (InfoSoc Directive)

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society ("InfoSoc Directive"):

Article 3:

Right of communication to the public of works and right of making available to the public other subject-matter

1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

- (a) for performers, of fixations of their performances;
- (b) for phonogram producers, of their phonograms;
- (c) for the producers of the first fixations of films, of the original and copies of their films;

(d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

Article 9:

Continued application of other legal provisions

This Directive shall be without prejudice to provisions concerning in particular patent rights, trade marks, design rights, utility models, topographies of semi-conductor products, type faces, conditional access, access to cable of broadcasting services, protection of national treasures, legal deposit requirements, laws on restrictive practices and unfair competition, trade secrets, security, confidentiality, data protection and privacy, access to public documents, the law of contract.

Furthermore the following recitals of the InfoSoc Directive should be taken into account:

(4) A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors. This will safeguard employment and encourage new job creation.

(5) Technological development has multiplied and diversified the vectors for creation, production and exploitation. While no new concepts for the protection of intellectual property are needed, the current law on copyright and related rights should be adapted and supplemented to respond adequately to economic realities such as new forms of exploitation.

(9) Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.

(10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as "on-demand" services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.

(16) Liability for activities in the network environment concerns not only copyright and related rights but also other areas, such as defamation, misleading advertising, or infringement of trademarks, and is addressed horizontally in Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ("Directive on electronic commerce") (4), which clarifies and harmonises various legal issues relating to information society services including electronic commerce. This Directive should be implemented within a timescale similar to that for the implementation of the Directive on electronic commerce, since that Directive provides a harmonised framework of principles and provisions relevant inter alia to important parts of this Directive. This Directive is without prejudice to provisions relating to liability in that Directive.

(23) This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.

(27) The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive.

2. Jurisdiction

2.1 Jurisdiction European Court of Justice ("ECJ")

The following decisions on ECJ level are relevant for internet intermediaries, in particular hosting providers:

Decision	Field of law	Service	Matter of the decision	Relevant (innovative) outcome of the decision
ECJ C-236/08 Google France and Google 23 rd March 2010	Trademarks	Search engine	AdWord advertisement using plaintiff's trademarks refers offers of counterfeits	Active role of a platform may prevent the platform to rely on the liability exemption of Article 14 of the Directive on electronic commerce.
ECJ C-324/09 L'Oréal 12 th July 2011	Trademarks	Online marketplace	Offer of L'Oréal counterfeits on eBay	Active role of a platform may prevent the platform to rely on the liability exemption of Article 14 of the Directive on electronic commerce "Stay-down" obligation that goes beyond

				a mere removal (take-down” of specific infringing content; obligations to take a variety of measures are principally possible.
ECHR 64569/09 Delfi AS v. Estonia 16 th June 2015	Defamation	Social network	Defamatory comments under an article on a news portal	Freedom of the press is not violated by ordering the platform provider to pay compensation for non-pecuniary damage for not acting expeditiously to remove defamatory comments.
ECJ C-360/10 SABAM v Netlog BV 16 th February 2012	Copyright	Social network	Illegal making available of musical and audiovisual works in users’ profiles on a social network	Filtering of the entire content of a network in order to block protected works in general is disproportional and therefore not enforceable. No (general) obligation to monitor .
ECJ C-291/13 Sotiris Papasavvas 11 th September 2014	Defamation	Content provider	Defamation by an article on a newspaper website	Provider of a newspaper website (publisher) is not a service provider that falls under the scope of the hosting privilege.

2.2 Case law of the Member States

In particular in Germany some groundbreaking decisions regarding the liability of online platforms have been rendered in the past – not only related to “Störerhaftung”, but also most recently regarding liability as an accomplice.

The most relevant decisions concerning online platforms are:

Decision	Field of law	Service	Matter of the decision	Relevant (innovative) outcome of the decision:
Higher Regional Court of Hamburg Ref. 5 U 87/12 GEMA ./. YouTube 1 st July 2015	Copyright	User- generated content platform	Liability of YouTube for musical works uploaded by its users	YouTube is not a privileged hosting provider, but a music service. YouTube is not liable as a perpetrator or accomplice for the users’ content. However, YouTube has extensive obligations to protect works made available through its service after a first take-down notice.

Higher Regional Court of Munich Ref. 29 U 2798/15 GEMA ./. YouTube 28 th January 2016	Copyright	User- generated content platform	Liability of YouTube for musical works uploaded by its users	The platform itself is not making works publicly available, but only its (uploading) users YouTube is not responsible as an accomplice as it is lacking actual knowledge of the infringing content
Regional Court of München I Ref. 37 O 6200/14 Bonnier and Others ./. Uploaded.net 18 th March 2016	Copyright	Sharehoster	Liability of a sharehoster for works uploaded by its users	A sharehoster may not rely on the liability exemption after a first take-down notice. From a first take-down notice onwards a risk-prone sharehoster is liable as an accomplice.
Regional Court of Berlin Ref. 16 O 279/14 27 th of January 2015	Trademark	Online marketplace	Liability of an online marketplace for photos published on its marketplace	Amazon makes photographs of products (which appear on the relevant product detail page) available to the public, as it operates an algorithm that automatically chooses from photographs (uploaded by third parties) which photographs are shown on a product detail page and thus controls which photographs are visible for users accessing such pages.

Part 2. Description and analysis of existing discrepancies

The analysis of the legal framework and current case law reveals that the current situation for rightholders is characterized by four different types of discrepancies.

These discrepancies have different backgrounds and natures:

- an information discrepancy,

- a legal discrepancy,
- a value discrepancy and
- an identification discrepancy.

In detail these discrepancies can be described as follows:

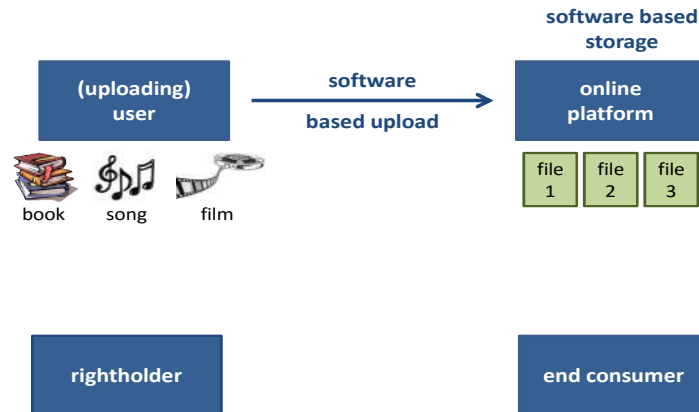
1. Information discrepancy

Whereas uploading users are under normal circumstances perfectly aware of the respective content they are storing and making available via an online platform, due to the common software-based storing and making-available process an online platforms itself generally lacks any specific knowledge of the data/content hosted by it. Even where online platforms, such as YouTube, have developed and apply a highly sophisticated content identification system (in YouTube's case Content-ID⁵), such software-based systems do not impart the platform provider with actual (human) knowledge of specific content (and even less any infringements that may emanate from such content).

Information and knowledge is therefore split between the users of the platform and the platform itself, allowing platform providers to benefit from liability exemptions and/or legal discrepancies (see Part 2.2.2).

⁵ See <https://support.google.com/youtube/answer/2797370?hl=en-GB>

The situation can be visualized as follows:



2. Legal discrepancy

The legal discrepancy has two elements:

2.1 Online platform itself does not make content available

First of all the ECJ as well as the relevant courts of the Member States assume that an online platform itself does not use and/or exploit the hosted copyright protected content, that is an online platform does not make the content available itself.

Neither on a European level, nor on a Member States level decisions exist that online platforms actually use the content they are hosting. According to recital 27 of the InfoSoc Directive “the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive.”

Only under special circumstances the operator of a platform (Amazon) exploits works itself: In a decision of the Berlin Regional Court⁶ – the act of making a work available to the public was seen in selecting certain photographs (uploaded by third parties) by an algorithm that runs without any human intervention, but had been programmed by a human being. Human knowledge of the automatically picked work was not considered to be a necessary condition. The crucial point is that Amazon controls which photographs are visible for users accessing such pages, i.e. made available to the public. Obviously, in such a case Amazon does not merely provide physical facilities for enabling communication to the public, and in effect using an algorithm is equivalent to instructing human employees to determine which photographs are shown on which product detail page – which is the normal situation of a content provider.

Basically the Courts follow an approach that is based on construing the making available as an action rather than the causation of a result (i.e. the infringement of the making available right), focusing solely on the question who (technically) initiated the upload and makes the relevant content available to the public.

The ECJ itself has so far not shed light on the question who makes works available in situations where intermediaries and uploading users act in combination, for example on user-generated content platforms. ECJ case law has been concerned with the question whether the distribution of a signal by means of television sets by a hotel to customers staying in its rooms constitutes communication of the public⁷ and similar questions, including the question whether providing a hyperlink to content already made publicly available on the Internet constitutes communication to the public⁸. ECJ Case law has up to now only dealt with online marketplaces in connection with offers of counterfeit products and claims based on trademark law⁹.

⁶ Regional Court of Berlin of 27th January, 2015, Ref. 16 O 279/14, ZUM-RD 2015, page 741. The same arguments were applied by the same Court in a decision against Google's price comparison platform, Google Shopping; Ref. 16 O 89/14 as of 9th September 2014.

⁷ ECJ Case C-306/05 – SGAE.

⁸ ECJ Case C - 466/12 – Nils Svensson et al.

⁹ ECJ Case C-324/09 – L'Oréal.

From the jurisprudence of the ECJ in such cases no conclusions can be inferred for copyright law.

The Regional Court of Munich states in its latest „YouTube Decision“ of 28th January 2016, page 8:

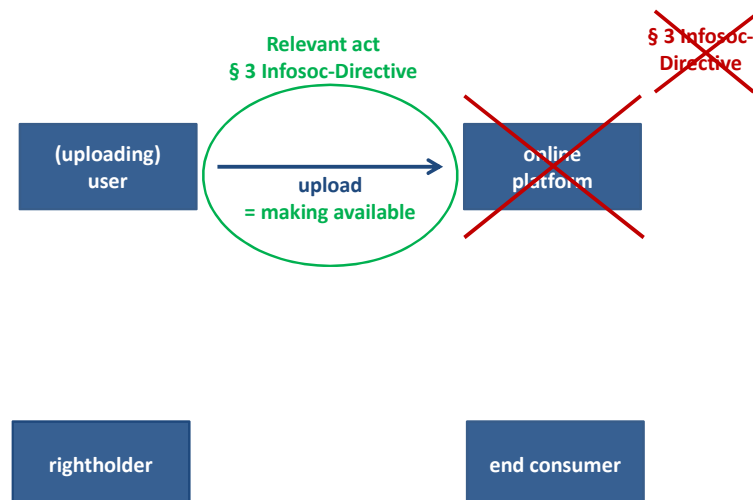
For an infringement of copyright as a perpetrator, the elements of an infringement of an exploitation right, which refer to actions, must be present (cf. Federal Court of Justice. GRUR 2013, 511 – *Morpheus* para. 38 with further references); the fact that a provider which opens a platform for third-party content thereby contributes to infringements of copyright does not suffice to assume its liability as a perpetrator.

See as well Regional Court of Munich I „Uploaded Decision“ of 18th March 2016, page 21:

For an infringement of copyright as a perpetrator, the elements of an infringement of an exploitation right, which refer to actions, must be present.

In the constellation in hand, the perpetrator of a copyright infringement is the person who makes copyrighted content available to the public by publishing the relevant URL, i.e. the user of the one-click hosting services who uploaded the work and published the link leading to that work.

The situation can be visualized as follows:



2.2 Automated processes vs. own conscious action

Secondly platform providers intentionally automatize processes – and are in a way forced to do so due to the huge quantity of data stored and retrieved from their platforms. Such software-based automation processes prevent platform provider from committing a clear exploitation act of their own (and hinders thus a liability as a perpetrator) and from having knowledge of potential infringements taking place within their services. The latter impedes any liability that requires intent (as it is the case for accomplices).

Two aspects must be distinguished in the light of the jurisprudence of the ECJ:

- Firstly, the ECJ denies a provider the exemption from liability right from the start where it has played an “active role” in connection with illegal information.
- Secondly, the question arises, what do the terms “knowledge” and “awareness” used in the exemption from liability mean with a view to automated processes, and more precisely: is software-based knowledge sufficient to not apply the exemption from liability and to assume that the provider aided and abetted with intent a user’s illegal activity?

2.2.1 Rationale of the exemption from liability

Online platforms are not per se privileged and exempted from any liability for infringements committed by its users.

From the very beginning, the legislators of the Directive on electronic commerce had a clear idea of the type of services that should benefit from a privileged position which means exemption from liability: pure infrastructure services.

Recital 18 of the Directive on electronic commerce reads as follows:

“...information society services also include services consisting of the transmission of information via a communication network, in providing access to a communication network or in hosting information provided by a recipient of the service;”

Recitals 42 to 44 of the Directive on electronic commerce read as follows:

(42) The exemptions from liability established in this Directive cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored.

(43) A service provider can benefit from the exemptions for "mere conduit" and for "caching" when he is in no way involved with the information transmitted; this requires among other things that he does not modify the information that he transmits; this requirement does not cover manipulations of a technical nature which take place in the course of the transmission as they do not alter the integrity of the information contained in the transmission.

(44) A service provider who deliberately collaborates with one of the recipients of his service in order to undertake illegal acts goes beyond the activities of "mere conduit" or "caching" and as a result cannot benefit from the liability exemptions established for these activities.

From this reasoning the background and considerations justifying a safe harbor for certain providers are obvious: access providers and hosting providers are limited to the sole transmission of information via a communication network and render mere infrastructural services. They are not involved with and do not control such information and they do not contribute to possible illegal activities of their users except for the provision of a service which is neutral and of a "passive nature".

Any additional activity beyond infrastructure services therefore should not be covered by the exemptions according to Article 12 to 14 of the Directive on electronic commerce.

Governed by this leitmotif the Higher Regional Court of Hamburg in its above mentioned YouTube decision of 1st July 2015 consequently denied YouTube the privilege of a hosting provider¹⁰. The court qualified YouTube as a music service due to the multitude

¹⁰ Higher Regional Court of Hamburg, 1st July 2015, Ref. 5 U 87/12, page 73.

of additional activities and services it offers around the content uploaded by its users. In particular the structure, sorting and filtering of the content is not (only) initiated by the users, but by YouTube itself under its own responsibility.

2.2.2 No exemption for providers which play an „active role

Also ECJ decisions in principle assume that a platform provider may lose its privileged position as a hosting service according to Article 14 Directive on electronic commerce if it plays an “active role” or has knowledge of/control over the data stored by its users.

In Google France SARL and Others ./ Louis Vuitton Malletier SA and Others of 23rd March 2010 (Joined Cases C-236/08 to C-238/08- “Google”) the ECJ states:

112. In order for the storage by a referencing service provider to come within the scope of Article 14 of Directive 2000/31, it is further necessary that the conduct of that service provider should be limited to that of an ‘intermediary service provider’ within the meaning intended by the legislature in the context of Section 4 of that directive.

113 In that regard, it follows from recital 42 in the preamble to Directive 2000/31 that the exemptions from liability established in that directive cover only cases in which the activity of the information society service provider is ‘of a mere technical, automatic and passive nature’, which implies that that service provider ‘has neither knowledge of nor control over the information which is transmitted or stored’.

114 Accordingly, in order to establish whether the liability of a referencing service provider may be limited under Article 14 of Directive 2000/31, it is necessary to examine whether the role played by that service provider is neutral, in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores.

115 With regard to the referencing service at issue in the cases in the main proceedings, it is apparent from the files and from the description in paragraph 23 et seq. of the present judgment that, with the help of software which it has developed, Google processes the data entered by advertisers and the resulting display of the ads is made under conditions which Google controls. Thus, Google determines the order of display according to, inter alia, the remuneration paid by the advertisers.

116 It must be pointed out that the mere facts that the referencing service is subject to payment, that Google sets the payment terms or that it provides general information to its clients cannot have the effect of depriving Google of the exemptions from liability provided for in Directive 2000/31.

117 Likewise, concordance between the keyword selected and the search term entered by an internet user is not sufficient of itself to justify the view that Google has knowledge of, or control over, the data entered into its system by advertisers and stored in memory on its server.

118 By contrast, in the context of the examination referred to in paragraph 114 of the present judgment, the role played by Google in the drafting of the commercial message which accompanies the advertising link or in the establishment or selection of keywords is relevant.

119 It is in the light of the foregoing considerations that the national court, which is best placed to be aware of the actual terms on which the service in the cases in the main proceedings is supplied, must assess whether the role thus played by Google corresponds to that described in paragraph 114 of the present judgment.

120 It follows that the answer to the third question in Case C-236/08, the second question in Case C-237/08 and the third question in Case C-238/08 is that Article 14 of Directive 2000/31 must be interpreted as meaning that the rule laid down therein applies to an internet referencing service provider in the case where that service provider has not played an active role of such a kind as to give it knowledge of, or control over, the data stored. If it has not played such a role, that service provider cannot be held liable for the data which it has stored at the request of an advertiser, unless, having obtained knowledge of the unlawful nature of those data or of that advertiser's activities, it failed to act expeditiously to remove or to disable access to the data concerned.

In the Case C-324/09 “L’Oréal SA and Others vs. eBay International AG and Others” (“L’Oréal”) the ECJ states on 12th July 2011:

112 In that regard, the Court has already stated that, in order for an internet service provider to fall within the scope of Article 14 of Directive 2000/31, it is essential that the provider be an intermediary provider within the meaning intended by the legislature in the context of Section 4 of Chapter II of that directive (see *Google France and Google*, paragraph 112).

113 That is not the case where the service provider, instead of confining itself to providing that service neutrally by a merely technical and automatic processing of the data provided by its customers, plays an active role of such a kind as to give it knowledge of, or control over, those data (*Google France and Google*, paragraphs 114 and 120).

114 It is clear from the documents before the Court and from the description at paragraphs 28 to 31 of this judgment that eBay processes the data entered by its customer-sellers. The sales in which the offers may result take place in accordance with terms set by eBay. In some cases, eBay also provides assistance intended to optimise or promote certain offers for sale.

115 As the United Kingdom Government has rightly observed, the mere fact that the operator of an online marketplace stores offers for sale on its server, sets the terms of its service, is remunerated for that service and provides general information to its customers cannot have the effect of denying it the exemptions from liability provided for by Directive 2000/31 (see, by analogy, *Google France and Google*, paragraph 116).

116 Where, by contrast, the operator has provided assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting those offers, it must be considered not to have taken a neutral position between the customer-seller concerned and potential buyers but to have played an active role of such a kind as to give it knowledge of, or control over, the data relating to those offers for sale. It cannot then rely, in the case of those data, on the exemption from liability referred to in Article 14(1) of Directive 2000/31.

[...]

118 Should the referring court conclude that eBay has not acted in the way described in paragraph 116 of this judgment, it will be for it to ascertain whether, in the circumstances of the case before it, eBay has met the conditions to which entitlement to the exemption from liability is subject under points (a) and (b) of Article 14(1) of Directive 2000/31 (see, by analogy, *Google France and Google*, paragraph 120).

[...]

120 As the case in the main proceedings may result in an order to pay damages, it is for the referring court to consider whether eBay has, in relation to the offers for sale at issue and to the extent that the latter have infringed L'Oréal's trade marks, been 'aware of facts or circumstances from which the illegal activity or information is apparent'. In the last-mentioned respect, it is sufficient, in order for the provider of an information society service to be denied entitlement to the exemption from liability provided for in Article 14 of Directive 2000/31, for it to have been aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality in question and acted in accordance with Article 14(1)(b) of Directive 2000/31.

Privileged providers thus act as mere intermediaries (L'Oréal, para. 112). Intermediaries however are characterized by a sole technical and automatic processing of the data provided by its customers (L'Oréal, para. 113). In contrast an active role exists in case the platform provides assistance to its users regarding content (L'Oréal, para. 116).

Whereas the simple fact that a platform's activity is against payment and the platform sets the legal and economic terms of its usage on a unilateral basis or provides its clients with general information shall not deprive the platform from its privileged position as a

hosting provider, any activity that provides assistance to third party offers/content must be considered to constitute an “active role” that does not match with the legislators’ original concept of a “mere technical hosting provider”.

Such assistance may include – but is not limited to

- the drafting of the commercial message which accompanies the advertising link or the establishment or selection of keywords in case of search engines and (Google, para. 118)
- an optimization of the presentation of offers for sale or promotion of those offers in case of online market places (L’Oréal, para 116).

2.2.3 Actual knowledge/awareness

If a provider did not play an active role, the exemption from liability must be considered. The crucial element is the condition set out in Article 14(1)(a) of the Directive on electronic commerce that “the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent”.

In this context the question arises whether actual knowledge is the equivalent of human knowledge or software-based and software-mediated knowledge may be considered as sufficient in this context.

The rationale for the condition that the provider “does not have actual knowledge of illegal activity or information” is the fact that providers should have “no obligation to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity” according to Article 15(1) of the Directive on electronic commerce. The general knowledge that an information society service might be used for illegal activity is not sufficient to deny the exemption from liability because this would in effect impose an obligation to proactively monitor information. The knowledge element is therefore a necessary consequence of the exclusion of a general obligation to monitor information. It does, however, not prevent

national legislation from imposing on service providers an obligation to monitor information in specific cases, namely in order to prevent repeated infringements after the provider has obtained knowledge of an infringement.

It is also obvious that the fact that the computer system in which information is stored (as it were) “knows” that information cannot constitute actual knowledge. If any information stored in the computer system would be considered to be “known” by the computer system and such software-based “knowledge” was imputed to the operator of the computer system, this would render the exemption from liability void. As long as a provider limits itself to the mere technical, automatic and passive provision of its service, i.e. storing information, it cannot be considered to have knowledge.

It does, however, not follow conclusively from this background of the exemption from liability that “actual” knowledge must have a human substrate, i.e. that only information present in the mind of a natural person (for instance an employee of the provider) constitutes actual knowledge. There is no reason why a service provider which analyzes information stored in its computer systems using a software rather than having employees inspect that information should not have actual knowledge of that information. The situation where a provider analyzes information rather than just storing it is not the situation for which the exemption from liability was intended, since such a provider no longer limits itself to a passive role. A provider which is interested in stored information no longer provides a neutral service, but actively processes information, which gives it control over the information.

It is accepted in German case law (however outside of media law) that human knowledge can be substituted by computer systems for example if an accounting system processes the information that a certain creditor is insolvent.

Also the EJC does not seem to take the view that computer-based knowledge automatically preserves the exemption from liability. In para. 118 et seqq. of the L’Oréal decision, the ECJ discusses in detail whether eBay had knowledge and postulates the criterion of the behavior that can be expected from a “diligent economic operator”. In the light of the vast amount of offers for sale uploaded by users every second an operator of a marketplace like eBay can only have knowledge mediated by computer software. Still the

EJC formulated a test for denying eBay the exemption from liability; it did not rule out knowledge with the argument that eBay could never have knowledge just because it relies on fully automated processes.

This view is not shared by the Higher Regional Court of Hamburg in its “YouTube-Decision”¹¹ where it makes clear that a software based knowledge has no impact on the liability exemption according to Article 14 of the Directive on electronic commerce.

Although it is perfectly arguable that actual knowledge does not require any human knowledge, the term is ambiguous and obscure. The German Courts’ interpretation makes clear that the indistinct wording of the Directive on electronic commerce opens the path for divergent results. Jurisdiction from the ECJ that provides certainty does not exist so far. Therefore a need for action exists.

The challenge regarding software-based services on the one hand and the requirement of (actual) knowledge on the other may be overcome by assuming an awareness at least upon receipt of a first take-down notice regarding specific infringements that are taking place within a platform. This approach was taken in a recent decision by German Courts. In the latest German Regional Court decision of 18th March 2016 the Regional Court of Munich I argued that the sharehoster Uploaded had lost its privileged role as a hosting provider after the receipt of a first take-down notice. Such notification provides the platform provider with sufficient awareness according to Article 14(1)(b) of the Directive on electronic commerce due to the specific design and configuration of the platform. In this specific case the Court assumed that the sharehoster Uploaded has to be regarded as a source of danger, as it is particularly risk-prone¹². This risk-proneness results from the specific design of the service which, according to the Court’s assessment, massively enhances the risk of infringing usage. The characteristics of such risk-enhancing design are, among others¹³

- the anonymous structure of the service

¹¹ Higher Regional Court of Hamburg, 1st July 2015, Ref. 5 U 87/12, in particular on pages 40, 43.

¹² Regional Court of Munich of 18th March 2016, Ref. 37 O 6200/14, page 28.

¹³ Regional Court of Munich of 18th March 2016, Ref. 37 O 6200/14, page 30.

- the remuneration system for uploading attractive content
- the deletion of inactive content
- the offer of premium accounts against payment for rapid downloads of large amounts of data
- the large number of take down-notices received.

However, the aspect of actual knowledge brings uncertainty to the question if a hosting provider may be deprived of its privileged position according to Article 14 of Directive on electronic commerce.

2.2.4 Active role does not qualify an online platform as perpetrator/accomplice

A discrepancy occurs as an online platform may be deprived on the one hand of its privileged position as a hosting provider according to Article 14 of the Directive on electronic commerce for its active role due to the assistance provided to its users. On the other hand such assistance does not result in an “automatic” liability of the online platform for any illegal content uploaded by its users as perpetrator or accomplice.

So far the courts have established high hurdles when it comes to the mens rea (mental element) of liability, that is the question if a platform provider acts deliberately or is at least aware of specific facts or circumstances regarding any infringements taking place on its platform. Once again the crucial point is that a platform provider lacks sufficient actual knowledge of the content stored within its domain. Therefore the Higher Regional Court of Munich¹⁴ and the Higher Regional Court of Hamburg¹⁵ both rejected YouTube’s liability for its users’ content as an accomplice due to the lack of actual knowledge of the hosted content. The Higher Regional Court of Hamburg expressly stated that the infringing videos had been uploaded in an automatized procedure that does not provide the platform provider with any knowledge of the content¹⁶.

¹⁴ Higher Regional Court of Munich of 28th January 2016, Ref. 29 U 2798/15, page 15 et seqq.

¹⁵ Higher Regional Court of Hamburg of 1st July 2015, Ref. 5 U 87/12, page 75.

¹⁶ Higher Regional Court of Hamburg of 1st July 2015, Ref. 5 U 87/12, page 75.

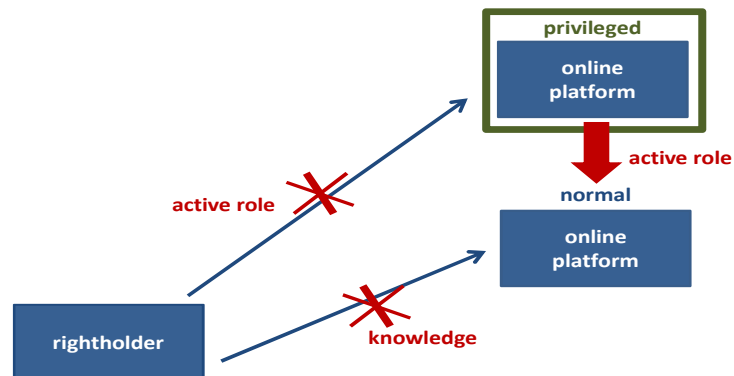
The only existing decision that somehow overcomes that lacking knowledge and thus the absence of liability is the latest Uploaded decision handed down by the Regional Court of Munich I¹⁷. The Court argues that, from the receipt of a takedown notice onwards, the service had the double intent of an accomplice (intent regarding the perpetrator's act and intent regarding the fact that it aids and abets the perpetrator), as from the time of the take-down notice onwards, the sharehoster "had to be aware" that there was a definite possibility of further infringements relating to the notified works, that the service was very attractive for copyright infringements (apparent from the large number of take-down notices in the past) and that the measures taken until then did not suffice to prevent these infringements. The Court assumed this to be the case, *inter alia*, because the defendant itself had submitted that deleting illegal content constantly re-uploaded by its users was "a game of cat-and-mouse, which it could not win". Nevertheless, the defendant had "essentially not taken any action".

In the absence of further decisions overcoming the fact of automated data processing a legal discrepancy exists as such actual, human knowledge required by the courts for the mental element of aiding and abetting is not compatible with the automated processes on which platforms typically rely.

Even platforms that play an "active role" by providing assistance to copyright infringements may thus not be automatically liable for that infringing content due to the automated data processing within the platforms.

¹⁷ Regional Court of Munich I of 18th March 2016, Ref. 37 O 6200/14, page 36 et seqq.

The situation can be visualized as follows:



3. Value discrepancy

Another discrepancy that is commonly referred to in the actual discussion is the so called „value gap“. The value gap puts in a nutshell the current situation that internet intermediaries somehow dictate on a unilateral basis the economic and legal framework for the usage of copyright protected content on their platforms, having as a direct effect revenues from exploitation of the copyrighted works without any or with inadequate remuneration of the actual rightholders.

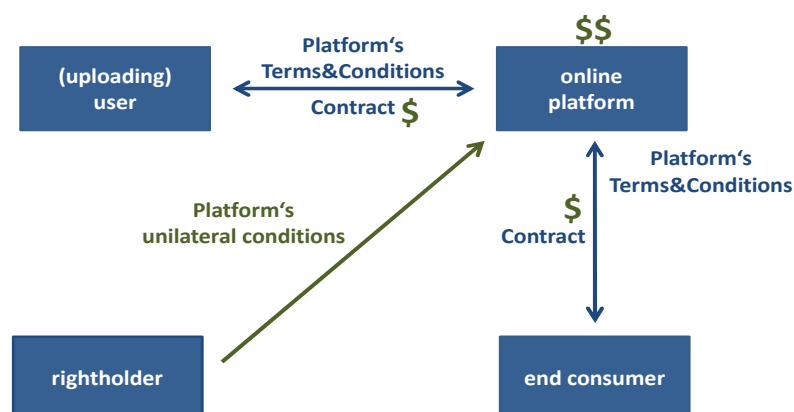
On closer contemplation this value discrepancy has two different aspects:

3.1 Online Platforms earn money in a legal discrepancy

First of all online platforms make money benefiting from the above mentioned legal gap. The platforms monetize content they are not authorised to exploit on their own behalf – without even being liable for such exploitation by their users (!) – having as a direct effect that the rightholders themselves are excluded from direct access to exactly such revenues generated with the exploitation of their works.

In this context monetization may be achieved by selling (faster) access to the copyright protected content (as it is often the case with sharehoster) and/or creating an ad-supported environment around the copyright protected content, in particular by advertisements that are directly added to the content itself (such as pre-roll videos, overlapping banner ads, etc.). Furthermore any exploitation of the (personal and/or usage) data gathered within the usage of the platform from its users represents an important value that may be converted into income by the platforms.

The situation can be visualized as follows:



3.2 Online platforms earn money in a time discrepancy

Secondly such platforms highly benefit from a time-related discrepancy. In order to provide rightholders with an instrument to delete illegal content from the online platforms and due to the European legal framework in Article 14(1)(b) of the Directive on electronic commerce online platforms (have to) offer and implement notice and take down procedures.

Such notice and take down procedures give a platform provider a chance to earn money with the copyright protected content – unchallenged and without any legal risk – until it receives a take-down notice. Even the German legal institute of *Stoererhaftung*¹⁸ does not enable a rightholder to close this time discrepancy as any obligations which might be imposed on a platform provider only apply upon a first act of notification of infringements which have already resulted in damage on the part of the rightholders and revenues on the part of the platform provider.

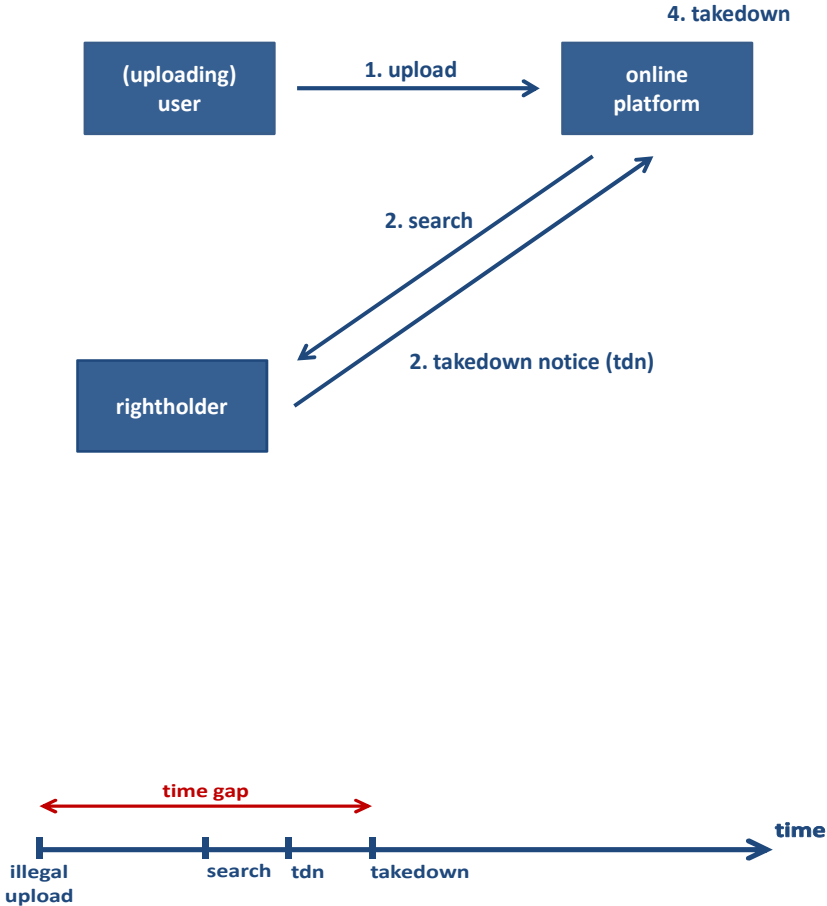
Exactly this time discrepancy from the (illegal) publication of the copyright protected content on a platform until the actual take-down grants platform provider income without taking any relevant legal risk.

The situation even intensifies if rightholders are not in a position to identify all infringing titles made available within an online platform and are thus unable to provide the online platform with a take-down notice. This is for example the case if download links to works hosted illegally on sharehosting services which might be published in unknown or unpopular link resources or are distributed via closed social networks or files with infringing content are stored under misleading file names and/or abbreviations in order to avoid that they are traceable using filter technologies.

Platform provider thus make their money in this time discrepancy.

¹⁸ For further details regarding the *Stoererhaftung* see Part 3.3

The situation can be visualized as follows:



4. Identification discrepancy

Finally online platforms suffer from an “identification discrepancy”.

Article 5 of the Directive on electronic commerce imposes a general obligation on commercial users of a service, who are information society services providers themselves (e.g. maintaining a website hosted by a web space provider, maintaining a page on a platform like Facebook etc.) to provide a minimum set of information.

However online platforms often grant their anonymous users the possibility to upload/publish any content, including infringing content, on the platform; content that the same platform monetizes in a second step.

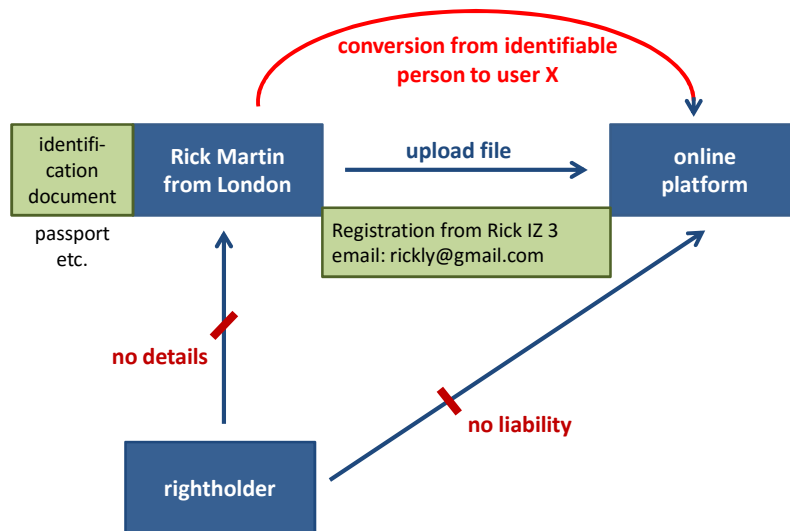
Whereas in most cases platforms have a registration procedure for their users, no proper verification of a user’s identity takes place. A user may register with a random name/nickname and any (recently created) email address. Consequently the suspension of user accounts is a dead end as a user may at any time re-register using another name/nickname and email address in order to continue using the service.

By commercializing such user content (regardless if it is by selling access to the content, advertisements, exploitation of data and/or other means) provided by anonymous users, online platforms create an identification discrepancy: whereas the platforms deliberately anonymise their users, at the same time they deny any liability for content delivered by these anonymous users.

As a consequence rightholders cannot take hold of the initial infringer (that is the anonymous user) due to the absence of verification procedures on the platform. At the same time rightholders do not have any direct remedy against the platform itself due to its lack of (direct) liability for the user content.

This results in the non-enforceability of copyrights.

The situation can be visualized as follows:



Additionally rightholder suffer from another lack of (technical) identification: online platforms somehow represent „black boxes“ for them and it is extremely complicated to understand and reconstruct the – often highly dynamic – technical procedures within such a platform from outside. This fact additionally weakens the rightholders` position.

Part 3. Filling the discrepancies

In order to fill the existing discrepancies a bundle of measures may be taken. From a mere expository approach (see Part 3.1), over a legislative approach (see Part 3.2) to the expansion of the German institute of *Stoererhaftung*, created by case law (see Part 3.3).

1. Interpretive approach

A simple approach to close the existing discrepancies would be to apply an overall view to determine the person/entity that is exploiting the content and thus making it available.

The crucial point is who is making use of whom:

the user of the platform or the platform of the user?

Criteria for such an overall view should be in particular:

- Who has the end-consumer (that is the user consuming the content made available via a platform) relationships when it comes to the sale/making available of the content by the platform
- Money flow: from end-consumer to (uploading user) or from end-consumer to platform?
- Rights flow: does the platform acquire any making available rights regarding the content from uploading users or does it act as a mere technical infrastructure provider?
- Any additional services of the platform that somehow enrich the content uploaded by the users, such as recommendation services, personalization of content, structuring, sorting, filtering, data mining of content or usage of the service that goes beyond a mere storage.

Up to now neither the ECJ nor Courts of the Member States have followed such an approach.

In its decisions the ECJ – apart from the introduction of the construct of the “active role” – has never taken any specific position regarding the distribution of roles and the concept of shared liabilities between online platforms and their users.

Even the – in general quite expansive – German courts explicitly rejected such a judicial approach in both YouTube decisions¹⁹.

Hence the information, legal and value discrepancies have to be tackled by adding clarifications within the wording of the InfoSoc Directive itself (Legislative approach, see Part 3.2) or an alternative approach (see Part 3.3).

2. Legislative approach

A legislative approach would involve the amendment of the current legal framework that is the InfoSoc Directive (to be more precise Articles 3(2) and 9bis of the InfoSoc Directive) in order to create a primary liability of structural infringing hosting platforms by extending the definition of the “right of making available”.

2.1 Article 3(2) of the InfoSoc Directive: clarification of „making available“

For that approach Article 3(2) of the InfoSoc Directive should be amplified by adding a second clause just before the (then) following enumeration of the different rightholders:

1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

¹⁹ Higher Regional Court of Hamburg and Higher Regional Court of Munich, see above.

A work is also made available to the public by the operator of a platform who, in relation to the works exploited by a third party within the meaning of sentence 1 above, makes access by the public subject to payment of a fee, combines such access with advertisements, or otherwise directly or indirectly generates revenue or other benefits from the third-party's exploitation activities.

- (a) for performers, of fixations of their performances;
- (b) for phonogram producers, of their phonograms;
- (c) for the producers of the first fixations of films, of the original and copies of their films;
- (d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

Comment:

The Commission itself emphasizes in its Communication²⁰ under the headline “4. Achieving a well-functioning marketplace for copyright” that from a copyright perspective, an important aspect is the definition of the rights of communication to the public and making available:

„These rights govern the use of copyright-protected content in digital transmissions. Their definition therefore determines what constitutes an act on the internet or which creators and the creative industries can claim rights and can negotiate licenses and remuneration. There are continuous grey areas and uncertainty about the way these concepts are defined in EU law, in particular about which online acts are considered ‘communication to the public’ (and therefore require authorisation by rights holders), and under what conditions”²¹

The Commission therefore sets as a future task:

“In this context the Commission will examine whether action is needed on the definition of the rights of ‘communication to the public’ and of ‘making available.’”²²

²⁰ Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions „Towards a modern, more European copyright framework“ of 9th December 2015 doc COM (2015) 626 final.

²¹ Communication, page 9.

²² Communication, page 10.

Additionally in particular in recitals 4, 9 and 10 InfoSoc Directive the Commission already highlights the high level of copyright protection and the necessity of adequate legal protection of intellectual property rights.

At the same time the ECJ and national Courts of the Member States consider the upload of content to a hosting service as the legally relevant act and thus evaluate only the upload itself as the act of making available.

The making available right thus has to be explicitly extended to include acts that are not committed by an online platform itself (that is the upload) but take up on a preexisting upload or even provoke such upload by incentives or other acts beyond mere technical hosting services.

At present users and platforms may start an implied collaboration, the user providing the content and having knowledge of the content, the platform provider storing and offering the content, operating the end consumer relationship and (in many cases) giving the uploading user a share in the income in order to benefit from future uploads and make sure that the uploader continues “restocking” the platform with attractive content²³. Such collaboration thus has to be tackled by an expanded making available right.

Any implied collaboration between users and platforms that up to now due to the information and legal discrepancy ended with a lack of liability of the platforms may be covered by that new clause.

By the additional clause any commercial activities that rely on the making available of a third party and result in a direct or indirect benefit of the platform provider shall be covered by the making available right:

Two typical scenarios are specifically enumerated: firstly the sale of general and/or faster access to content stored on its servers, as it is the case for sharehoster; secondly income that is generated through an advertising environment that is not related to a

²³ Just like it occurs for example with YouTube and its monetization system and many sharehoster, for example Uploaded, by offering bonuses for attractive content, that is content downloaded on a large scale.

website/service in general, such as banner ads on landing pages, but is related to the specific (often copyright protected) content uploaded by third parties, such as pre-rolls and/or banner ads overlapping the relevant content. The third alternative is intended to serve as a residual clause for other situations where a hosting service takes financial advantage of content made available by a third party, such as, but not limited to sale and/or other exploitation of personal/usage data.

2.2 **Article 9bis of the InfoSoc Directive: clarification of the hosting provider privilege**

The mere clarification that online platforms do act as users of the right of making available suggested above still faces the challenge that according to Article 14 of the Directive on electronic commerce hosting services benefit from a privileged situation regarding liability.

Strictly speaking EU legislators had a pretty clear idea that the host provider privilege should only apply to infrastructure services, see Part 2.2.2. Therefore the actual legal discrepancy primarily is not created by the Directive on electronic commerce itself but results from the incorrect application of the Directive on electronic commerce by the ECJ and national Courts of the Member States. The Courts tend not to differentiate with sufficient precision the different types and activities of hosting services. As a result services that go far beyond mere technical services are still in a position to benefit from the exemption of liability contained in Article 14 of the Directive on electronic commerce.

In order to correct that inaccurate application of the Directive and to make sure that this hosting privilege will not hinder a liability of online platforms that go beyond a mere technical activity, the following amendment of Article 9 InfoSoc Directive is suggested:

Article 9bis

Without prejudice to Articles 12 and 13 of the Directive on electronic commerce, the conditional non-liability regime provided for by Article 14 of that same directive shall not apply to the activities of a information society service provider whose activity is not restricted to neutral and passive provision of technical infrastructure in the process of making protected works and/or other subject matter available to the public.

Comment:

It seems to be the simpler approach to focus on modifications within the InfoSoc Directive. The EU Commission itself identified a need for action to re-discuss this Directive in general, in particular in the light of the outstanding copyright reforms and the right of making available in concrete (see above, Part 3.2).

Additionally with regard to chronological order the InfoSoc Directive had been adopted after the Directive on electronic commerce. Although the Directive on electronic commerce follows a horizontal approach when it comes to the liability of internet intermediaries²⁴, a clarification of the (earlier adopted) InfoSoc Directive should be able to modify that horizontal approach. Such modification consists in the above mentioned limitation of the host provider privilege of Article 14 on electronic commerce.

The term “information society services” shall refer to the term as it is defined in Article 2 (a) Directive on electronic commerce.

With respect to the licensing responsibility/hierarchy it shall be the service providers’ prior obligation to obtain the authorisation of the concerned rightholders for the rights mentioned in Articles 2 and 3 of the InfoSoc Directive which they carry out, alone or jointly with the users of their services for the protected works and/or other subject matter which have been uploaded by the users. In the latter situation, the authorisation granted to these service providers shall cover the liability of their users.

In order to reduce its liability an online platforms may properly identify its users and have recourse against infringing users.

24 “The limitations on liability provided for by the Directive are established in a horizontal manner, meaning that they cover liability, both civil and criminal, for all types of illegal activities initiated by third parties.” (Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee - First Report on the application of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), 21 November 2013, COM(2013) 702 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52003DC0702&from=EN>).

3. **Alternative approach: Expansion of the German institute of “Stoererhaftung”**

The InfoSoc Directive requires EU Member States in Article 8(3)²⁵ and Recital 59²⁶ to ensure that rightholders are in a position to apply for injunctions against intermediaries, which might be best placed to stop infringements, notwithstanding liability limitations contained in the Directive on electronic commerce. The Directive on electronic commerce precludes Member States from imposing on service providers a “general obligation to monitor” or a “general obligation actively to seek facts or circumstances indicating illegal activity” when providing their services²⁷.

While the InfoSoc Directive mandates the availability of injunctive relief, the Directive on electronic commerce, in Recital 45, dictates the type of relief that should be available:

“(45) The limitations of the liability of intermediary service providers established in this Directive do not affect the possibility of injunctions of different kinds; such injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it.”

The Directive on electronic commerce thus broadly provides for “the possibility of injunctions of different kinds”, ranging from court orders to orders by administrative authorities and including not only the removal of infringing content (“take down”), but also preventive measures, without naming any specific methods and thus without limitation.

²⁵ Article 8(3) InfoSoc Directive reads: “Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right” and

²⁶ Recital 59 InfoSoc Directive reads: “In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end. Therefore, without prejudice to any other sanctions and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary who carries a third party's infringement of a protected work or other subject-matter in a network. This possibility should be available even where the acts carried out by the intermediary are exempted under Article 5. The conditions and modalities relating to such injunctions should be left to the national law of the Member States.”.

²⁷ Article 15 Directive on electronic commerce.

Even though establishing injunctive relief and detailing the conditions for imposing injunctions are left to Member State national laws, the Member States do not have a “carte blanche” to set any requirements they wish. Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (“Enforcement Directive”) requires that injunctive relief be “effective, proportionate and dissuasive”²⁸. Case law of the ECJ states that the remedies should “avoid the creation of barriers to legitimate trade”²⁹.

While Article 8(3) of the InfoSoc Directive augments the Member States’ scope of action, it does not impose any obligation on Member States in order to create appropriate remedies for the protection of the rightholders’ position.

Governed by the above mentioned parameters, but starting even before the implementation of the Directives in German law, German courts have established an approach in order to tackle the challenge of intermediary liability by applying the doctrine of “Stoererhaftung”, which literally translated means “responsibility of the disquieter”, also described as a “principle of breach of duty of care”.

3.1 Legal fundament of the Stoererhaftung

This concept of indirect liability was developed as an extension by analogy of the provision of injunctive relief against infringements of physical property contained in Sec. 1004 of German Civil Code (BGB). Originally injunctive relief was granted for all rights enumerated in Sec. 823(1), the central provision of German tort law, along with physical property (life, body, health, personal freedom), over time courts however extended the application of the injunctive relief to any other erga omnes right, i.e. personality rights and intellectual property rights.

Sec. 1004 of the German Civil Code provides:

²⁸ Article 3 (2) Enforcement Directive.

²⁹ See the EJC’s guidance in *L’Oreal v. eBay*, C-324/09 above, at 144.

“Where property is interfered with by means other than removal or retention of possession, the owner may require the disturber to remove the interference. If further interferences are to be feared, the owner may seek a prohibitory injunction.”

As a result, claims for removal of interference and injunctions can be granted for all infringements of erga omnes rights including intellectual property rights.

This principle is aimed only at claims for injunctive relief (and removal/termination of an ongoing infringement), but not claims for damages³⁰. As the extension of the *Stoererhaftung* relies on an analogy³¹, only the scope of application was extended from physical property to intellectual property.

The legal consequence remains limited to ceasing and desisting. It comprises, however, not only direct infringements, but also any act or failure to act contributing as a proximate cause to an infringement committed by a third person that is fully responsible. Therefore it covers all possible forms of indirect infringement even if the contribution does not amount to joint perpetration, aiding and abetting or incitement due to the absence of *mens rea*, which always is a prerequisite for criminal and tort liability under German law. Injunctive relief against indirect infringers based on the *Stoererhaftung* is limited by the principle of proportionality. In more recent case law this limitation has been achieved through the requirement that the *Stoerer* must have acted in breach of a duty of care which could be reasonably expected by him.

Since the *Stoererhaftung* can be applied to all personality and intellectual property rights and in principle covers any proximate cause of an infringement it has been a longstanding concept in case law. It had already been used in the past to extend liability to (physical) intermediaries that facilitate infringements (without necessarily deliberately supporting them) like publishers and other media outlets which distribute infringing content, trade show organizers, shipping contractors and bookstores which help distribute infringing

³⁰ See inter alia German Federal Court of Justice, GRUR 2004, 860, 864 – *Internetversteigerung I*.

³¹ i.e. the similarity between ownership of physical property and other erga omnes rights, which warrant equal protection, against the backdrop of the lack of any remedies for infringements in the Civil Code, which entered into force in 1900 and has never been amended in that respect.

goods. The infringements in question can be defamatory speech, infringements of privacy by press coverage or infringements of intellectual property rights such as copyright, trademarks, designs or patents. When widespread commercial use of the internet emerged in the 1990's, this concept had been applied to internet intermediaries as well.

According to German courts the “Save Harbour Provision”, that is Article 14 of the Directive on electronic commerce³² (there the provisions regarding “Hosting”), does not apply to injunctive relief claims against hosting providers like those based on the doctrine of *Stoererhaftung*³³. The exemption clauses on termination and prevention of infringements in Article 8(3) of the InfoSoc Directive and Article 14(3) of the E-Commerce Directive as well as the call for injunctive relief against intermediaries contained in Article 11(3) of the Enforcement Directive were never transposed into German law through legislation creating new specific provision like in most other EU member states. Instead German lawmakers relied on existing case law related to *Stoererhaftung*, which already provided an appropriate instrument to protect intellectual property rights and a fine adjustable balance between the interests of rightholders and internet service providers. The task of the courts was simply to further develop their jurisprudence along already existing lines and apply it to new technical phenomena.

3.2 (General) Requirements of the *Stoererhaftung*

The *Stoererhaftung*, when applied to indirect infringements, basically has three requirements³⁴:

- (1) The (indirect) *Stoerer* (indirect infringer) must have contributed to the infringement of the protected right by creating a proximate cause. There is no requirement of culpability.

³² Implemented to German law as Article 10 of the *Telemediengesetz*.

³³ See inter alia German Federal Court of Justice GRUR 2007, 708, 710 at 19 – *Internetversteigerung II* and, Decision as of 1st March 2016, Ref. VI ZR 34/15, at 19 subsequent.

³⁴ German Federal Court of Justice, GRUR 1999, 518, 519 – *Möbelklassiker*; German Federal Court of Justice, GRUR 2007, 708, 711 – *Internetversteigerung II* and others.

- (2) The Stoerer must have a (legal and factual) possibility of preventing the principal infringement.
- (3) In order to prevent unlimited extension of injunctive relief to third parties, case law requires that the Stoerer must also have violated a duty of care which could be reasonable expected by him. In order to determine if such a duty of care exists courts have to reach, on a case-by-case basis, a comprehensive balancing of interests and an assessment whether the fulfilment of the duty of care was reasonable in the allocation of risks.

In order to obtain injunctive relief against the Stoerer, however, it is not necessary that the direct infringer or an intentional contributor to the infringement cannot be prosecuted³⁵. The breach of duty of care is thus – as a general concept – not a form of subsidiary liability, but an extension of possible defendants for a lawsuit. It is up to the plaintiff to decide based on reasons of practicality (like the availability of evidence, domicile or financial capacity) against whom he opts to take legal action.

3.3 Application of the Stoererhaftung to hosting providers in the case of copyright infringements

The existence of duties of care for a Stoerer usually³⁶ requires that the hosting provider is aware of specific third-party content on its server that infringes copyright. This requirement was developed by the courts as a consequent continuation of the established principle that an intermediary cannot be reasonably expected to apply strict scrutiny to third-party content it only distributes like advertisements in a newspaper³⁷.

³⁵ German Federal Court of Justice, GRUR 2007, 724, 726 – Meinungsforum.

³⁶ German case law requires for hosting provider that infringing content is either obvious or that the hosting provider is actually aware of infringing content. The generalized knowledge that it is not unlikely that users might offer counterfeited goods on an online marketplace, upload copyrighted material on a user-generated platform or post defamatory speech on a message board does not suffice. A hosting provider must be actually aware of infringing content or circumstances pointing to such content with regard to specific content.

³⁷ The landmark decision by the German Federal Court of Justice, GRUR 1999, 518, 519 – Möbelklassiker dealt with an advertisement of an Italian manufacturer of Le Corbusier furniture the distribution (including advertising) of which infringed Le Corbusier's copyright in Germany.

Normally a hosting provider gains such knowledge through a notice and take down letter sent by the affected rightholders. In this letter the rightholders inform the hosting platform that an infringement of copyright is taking place through content that third parties have uploaded on the service's server and at the same time request that the hosting provider deletes the specific infringing content and prevents future infringement.

The specific measures a hosting provider has to apply in order to prevent future infringements depend on the nature and configuration of the respective service. Thus the specific extent of the duties of care that can be imposed on a service and thus its potential liability as a *Stoerer* varies.

In particular for hosting platforms German court decisions have developed in the past years on a case-by-case basis some relevant parameters that have an impact on the level of duty of a hosting provider.

These parameters are the following:

- the “intensity of the risk”,
- the commercial advantage of the hosting provider from the infringement,
- the weighing of interests of copyright holder and host provider,
- the expenses for limiting the risk of infringement,
- the lack of or existing possibilities to prevent infringements,
- the level of inducement of copyright infringements a hosting service provides, such as the provision of anonymity for its users, the establishment of a reward system for uploading (popular and therefore most likely) infringing content.

The threshold of what is “adequate and proportionate” rises the more that a hosting platform's behavior encourages its users' infringements.

In *Walther de Gruyter GmbH & Co. vs. RapidShare*, the German Federal Court of Justice³⁸ upheld injunctive relief requiring the hosting provider RapidShare to prevent

³⁸ German Federal Court of Justice ZUM 2013, 874 – File-Hosting-Dienst.

specific, previously identified, infringing works from reappearing on its servers through a combination of targeted searching and filtering techniques.

In assessing what could reasonably be required of RapidShare (and is adequate and proportional under the EU parameters), the court held that since RapidShare's business structure and practices significantly increased the risk of copyright infringements, it could be required to do more to prevent the infringements than for example the German .de domain registrar DENIC, which provides an infrastructural service which is in the public interest and operates on a not-for-profit basis³⁹. The court noted that, unlike cloud computing services, RapidShare did not charge for storage space but rather, under its innovative business model, was exclusively dependent on the sale of premium accounts that were salable largely because popular copyrighted content created the demand for the benefits provided by such accounts⁴⁰. The court likewise held that rewarding users who uploaded files based on the download frequency of the files by other users encouraged infringements because attractive copyrighted content increased downloads⁴¹. These incentivizing practices and policies, along with the anonymous usage of the service, supported the conclusion that much more could reasonably be required of RapidShare to prevent infringements compared to "traditional" hosting providers like online market platforms or message boards⁴².

As a consequence the Federal Court of Justice required RapidShare:

- (i) to use hash and word filtering of the content of files and file names to check stored files and to prevent the upload of new files containing the notified works;
- (ii) to search not only known link resources which are used by uploaders of a file hosting service to distribute the download links of uploaded files (including even manual search) for links to the works resolving back to its servers, but also
- (iii) to watch the illegal market to identify relevant new link resources as well as
- (iv) to use major search engines such as Google and even social networks such as Facebook to search for such links to infringing content; and

³⁹ German Federal Court of Justice ZUM 2013, 874, at 45 – File-Hosting-Dienst.

⁴⁰ German Federal Court of Justice ZUM 2013, 874, at 37 – File-Hosting-Dienst.

⁴¹ German Federal Court of Justice ZUM 2013, 874, at 41 – File-Hosting-Dienst.

⁴² German Federal Court of Justice ZUM 2013, 874, at 31 and 45 – File-Hosting-Dienst.

- (v) to implement web crawlers to determine further infringing links and link resources concerning the works.

The Federal Court of Justice held that these forms of injunctive relief imposed against RapidShare did not “go beyond the limits of that which is reasonable” and complied with the standards for injunctive relief established by the ECJ⁴³. Regarding the E-Commerce Directive ban on “generalized” monitoring (as implemented under German law), the Federal Court of Justice court found that monitoring in *specific* cases to prevent *certain unlawful activities*, such as to prevent the recurrence of the same and similar infringements for which there had been previous notices, was permitted⁴⁴.

An important aspect of this decision is that the decision converts the initial notice and **take down** obligation of hosting platforms to a notice and **stay down** obligation regarding all works that had previously been notified to the platform. This approach and broadening of the notice and take down obligation significantly disencumbers the rightholders, as for example re-uploads do not require an additional notice to the platform provider (and research for infringing content at the rightholders’ expense) but are already captured by the first notice and the burden to research for infringing content (and bear the cost of it) has now shifted to the hosting provider for every work which was ever contained in a take-down notice.

3.4 Conformity of the Stoererhaftung with EU-Law

3.4.1 Directive on electronic commerce

The application of the doctrine of Stoererhaftung to hosting providers is in line with the legal framework the Directive on electronic commerce created for service providers.

⁴³ German Federal Court of Justice ZUM 2013, 874 – File-Hosting-Dienst.

⁴⁴ German Federal Court of Justice ZUM 2013, 874 at 43 – File-Hosting-Dienst.

Where an infringement is not obvious an indiscriminant monitoring of all content uploaded by users would be the only solution to identify infringing content.

Article 15(1) Directive on electronic commerce, however, rules out any

“general obligation on providers [...] to monitor the information which they transmit or store“

as well as

„a general obligation actively to seek facts or circumstances indicating illegal activity“.

On the other hand, Article 14(3) of the Directive

„shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement“.

Recital 47 explains how the tension between these two demands has to be solved: The exclusion of obligations to monitor applies

“only with respect to obligations of a general nature; this does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation.“

As described above, the duty of care arises only after the hosting provider has been notified of infringements of a specific copyrighted work and related only to this specific work. Such (in this sense limited) duty of care accurately respects the delimitation of general monitoring obligations.

The criterion of obvious infringements (which includes, a fortiori, infringement the service provider has positive knowledge based on notifications) easily translates to the limitations of liability of a hosting provider set out in Article 14(1) of the Directive on electronic commerce, namely that there is no liability for damages as long as the hosting provider

“does not have actual knowledge of illegal activity or information and [...] is not aware of facts or circumstances from which the illegal activity or information is apparent“.

Therefore, after a take-down notice the hosting provider must (1) act expeditiously to remove or block infringing content in order to avoid liability for damages and (2) take

measures to prevent future infringements of the same right (i.e. the right to a specific trademark or a specific copyrighted work, for instance).

3.4.2 European Court of Justice/German Federal Court of Justice

As mentioned above Article 8(3) of the InfoSoc Directive enables Member States based on their national principles to ensure that rightholders apply for an injunction against intermediaries whose services are used by a third party to infringe copyright or related rights. In its judgement in case C-324/09 “L’Oréal SA and Others vs. eBay International AG and Others” issued on 12th July 2011 the ECJ replied to several questions that the High Court of England and Wales had referred to the ECJ for preliminary decision. The judgment affirms the liability of an online market place for infringements of trademarks committed by users offering counterfeited products and develops a test for the awareness of “acts or circumstances from which the illegal activity or information is apparent“.

As the German Federal Court of Justice pointed out in its first decision on hosting providers after the ECJ had handed down its decision in the “L’Oréal” case⁴⁵, its jurisprudence relying on the doctrine of Stoererhaftung is in full compliance with the principles of EU law pointed out by the ECJ in the “L’Oréal” decision.

3.4.3 Communication as of 25th May 2016

An expansion of the principle of the Stoererhaftung to a broader European level seems also in line with the latest statements of the European Commission regarding platform liability.

In its Communication of 25th May 2016 the Commission encourages coordinated EU-wide self-regulatory efforts by online platforms and the putting in place of voluntary, good faith measures to fight illegal content online⁴⁶. Necessary and reasonable measures

⁴⁵ German Federal Court of Justice, GRUR 2011, 1038 at para. 22 – Stiftparfüm.

⁴⁶ Page 9 of the Communication.

adopted by hosting providers within the scope of Stoererhaftung to prevent future (repeated) infringements may eventually not qualify as “voluntary, good-faith measures to fight illegal content online”, but could provide an alternative on a case by case basis, which can be adjusted to the various situations of platforms.

4. Summary: Overview

Different forms of hosting platforms could thus legally be approach as follows:

Form of platform	Legal approach
Neutral platform	Stoererhaftung, low exigencies of appropriate measures to be taken by the platform
Non-neutral platform that are taking benefits from the usage of copyright protected content	Primary infringer according a broadened right of making available; Alternatively: Stoererhaftung, higher exigencies of appropriate measures to be taken by the platform
Structurally infringing platforms	Primary infringer according a broadened right of making available; Alternatively: Stoererhaftung, high exigencies of appropriate measures to be taken by the platform
“Egregious” platforms	Primary infringer/contributor

5. Conclusion

A broader primary liability of hosting platforms that are either structurally infringing or not neutral and at the same time benefit from the exploitation of copyright protected works would be the most effective approach from the rightholders’ perspective. This aim could be achieved by extending the making available right to such platforms as proposed in Part 3 Para 2 of this report.

However the complicated current (political) framework conditions and the Commission’s latest position (as it was published in the Communication of 25th May 2016) seem to

make it unlikely that at the time given the Commission seriously considers rewording and extending the scope of the making available right.

An alternative approach could thus be a broader application of the German institute of the *Stoererhaftung* on a European level.

Such approach would provide rightholders with a flexible form of injunctive relief on a case-by-case basis under widely settled equitable principles. Thus, hosting platforms with reasonable practices toward the prevention of infringements (in particular such platforms that put sufficient voluntary, good-faith measures in place) can remain secure in their safe harbor protection, while structurally infringing hosting platforms will be subject to closer judicial scrutiny and possible injunctive relief.

However, a strong handicap of this approach is that the *Stoererhaftung* in its basic form⁴⁷ is limited to injunctive relief and does not provide rightholders with an effective instrument to claim damages from structural infringing platforms.

⁴⁷ Damages may only be based on the argument that a *Stoerer* is infringing its obligations to prevent future infringements and is thus acting as a contributor to such infringements. However this approach requires – under German law – that a platform is at least a structurally infringing one. Otherwise the necessary intent required for a liability as a contributor cannot be established; mere recklessness, which would in principle constitute culpable aiding and abetting, is not sufficient where the indirect infringer contributes to infringements by the operation of a service which is legally neutral and not prone to facilitate or encourage infringing use. In such a case the established jurisprudence of the criminal law courts (which is used as a guidance in tort law) requires that the aider and abettor was either aware that he helps a potential perpetrator who is inclined to use the services rendered to commit a criminal act or that the aider and abettor's *mens rea* is not only recklessness, but direct intent (the aider and abettor wants the principal perpetrator to commit the act) or indirect intent (the aider and abettor foresees the commitment of the criminal act as a certain consequence of some other aim he desires).