

# Liability for Copyright Infringements on the Internet:

## Host Providers (Content Providers) – The German Approach<sup>1</sup>

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**Abstract:** Copyright infringements on the Internet affect all types of media which can be used online: films, computer games, audio books, music, software, etc. For example, according to German studies, 90% of all copyright violations affecting film works take place on the Internet.<sup>2</sup> This storage space is made available to such infringers, as well as to others whose intentions are legal, by hosting providers. To what extent do hosting providers have a duty of

care for their contribution to the copyright infringements of third parties, i.e. their users? What duties of care can be reasonably expected of hosting providers to prevent such infringements? These questions have been heavily debated in Germany, and German courts have developed extensive case law. This article seeks to examine these questions by assessing German jurisprudence against its EU law background.

**Keywords:** E-Commerce Directive; Liability; Host Provider; Copyright; User Generated Content; Duty of Care; Störerhaftung; Telemediengesetz

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### A. Introduction

<sup>1</sup> Internet piracy is not a phenomenon confined to Germany. The reasons are comparable in many countries worldwide and are of a complex nature. A key reason, however, is the nature of the Internet itself. Generally speaking, the infringers are able to commit their infringing acts anonymously. Investigating the identity of the person or persons responsible is a costly, time-consuming process and is often impossible. In addition, the disadvantage of bringing an action against individual infringers is that each infringement has to be prosecuted individually – a process which is also laborious and expensive considering the sheer numbers of infringe-

ments concerned.<sup>3</sup> Therefore, it is logical to consider taking action against suppliers of Internet services who provide infringers with the relevant infrastructure and thus make the copyright violations possible in the first place. Legal action against such providers has a much greater effect than that against individual perpetrators as the German Federal Court of Justice has already recognised.<sup>4</sup> The prosecution of hosting providers and access providers is primarily conceivable;<sup>5</sup> this paper is restricted to addressing the liability of hosting providers. It is limited to German case law and tries to explain it against the relevant EU law background. But, as will be shown in part III below, due to the wide applicability of German law, not only providers located in Germany are affected.

## B. Types of Hosting Providers

- 2 Hosting providers (or content providers or web hosts) make Internet storage space available to others. Hosting providers' users can then save their own content there. Some business models include the hosting provider appropriating this – actually external – content so that one can no longer really call it third-party content. However, these cases are not the subject of this paper.<sup>6</sup> In particular, copyright-protected content within the results list of search engines – such as the thumbnails in Google's image search engine – constitute the content of the search engine operator.<sup>7</sup> Hence this paper will treat search engines as hosting providers only to the extent that results shown in these lists enable copyright-infringing content to be found. Also, sites such as YouTube have been found by German courts to make their own content publicly available when the videos posted by users are made available to the public; in such scenarios, they are directly liable for copyright infringement, which is not the subject of this article.
- 3 Up to now, numerous business models for host providers have been developed, some of which overlap. Several business models will be outlined below:
- 4 "User-generated content" sites (also known as "UGC" sites): These enable users to store their own content on a platform. In order for such content to be found by the public, the hosting provider usually provides a particular structure for the storage, or at least the possibility of searching. Examples of such "user-generated content" sites are Internet auction platforms (e.g. eBay) and platforms for storage and making available of video files (e.g. YouTube), photographs (e.g. Flickr), links (e.g. alluc.org, g-stream.in) and discussion boards or content of social networks (e.g. Facebook). The susceptibility to infringements can be seen from the offer of particular categories such as "current feature films" or "series" (e.g. www.g-stream.in) or "audio books".
- 5 File hosts: Some hosting providers limit themselves to the mere provision of storage space. This is partly realised in return for payment for the storage of any content (e.g. the large German host provider 1&1); others allow the storage of any content free of charge due to advertising revenue (e.g. cyberlockers such as Rapidshare). The key feature of these types of business is that the hosting provider does not offer the customer any structure for the content they store – in particular no categorisation thereof – to make it directly available to the public. Hence further input is required from the user. If someone rents storage space from 1&1 for their own public video portal, they have to decide themselves how to structure it for the public. Advertising-financed file hosts usually at least allow the content stored on their servers to be accessed by way of links; the user can thus make the stored content available to the public through publishing a link.
- 6 Link-sharing sites: Numerous websites have emerged which make links available to files stored with file hosts. Such sites are known as link-sharers (also "linking sites" or "leeching sites"<sup>8</sup>). Such sites offer a categorisation and searching possibility (e.g. alluc.org, kino.to). These are often UGC sites, i.e. the links are posted by the users. Link-sharing sites are usually especially susceptible to infringement. For example, link sharers such as kino.to usually contain links to copies of many current cinema films, which are in turn stored with file hosts.
- 7 Link referrers: Other hosting providers have business models between the previous two mentioned. So-called link referrers encrypt the collections of links (to files stored with file hosts) made available by link sharers, sometimes preparing access to such files in a download-friendly manner. It is thus made more difficult for the rights holder searching for rights infringements to determine the storage location at the file host and in turn to identify the source at the file host. Hence, there is a real danger that an increased encryption of such rights-infringing links could be undertaken.
- 8 Index hosts: There are also host providers who make their servers available for an index to be made available via the Internet. This is designed to make it easier for the user to find particular content. Such indexes are often compiled automatically by a software program. The most well-known index is produced by Google with the hits generated by its search engine; in this case, the index refers to the entire Internet.<sup>9</sup> However, indexes can also refer to smaller networks within the Internet. In particular, so-called eDonkey servers have become known through court proceedings. They make an index available to users of eDonkey file-sharing networks so they can find music and film content – including copyright-infringing music and film content within the network.<sup>10</sup> Providers also regularly make indexes available in the so-called Usenet (more on this below) of files, which includes many copyright-infringing music, film and software files.<sup>11</sup> Piratebay.org is a search engine for locating film and music files within the BitTorrent network, the vast majority of which are illegal.<sup>12</sup>
- 9 Usenet providers: The Usenet is a worldwide network of discussion boards ("newsgroups") which are partly used to exchange copyright-infringing files. Depending on the specific offer, the services of Usenet providers cover access, storage space and software ("Useclient"), including indexing functions. The user of the Usenet provider makes files available to other users via "the user's" Usenet provider (so-called "initial" or "original" Usenet provider). According to the jurisprudence of the Court of Appeals (OLG) of Hamburg, the "original" Usenet provider has

the same liability as a hosting provider.<sup>13</sup> The “non-original” Usenet provider, in contrast, is liable only as an Internet access provider; the latter is only obligated to a low level of due diligence;<sup>14</sup> however, it is technically open, according to the court, what a “non-original” Usenet provider could do.<sup>15</sup> This applies unless the non-original Usenet provider advertises the illegal use of those services. Such a provider is liable as the “original” Usenet provider, i.e. to the (more strict) extent of a hosting provider.<sup>16</sup> In contrast, the *Court of Appeals (OLG) Dusseldorf*<sup>17</sup> classified Usenet providers as so-called cache providers, without differentiating between “original” and “non-original”. Cache providers are those who store files by way of caching in order to speed up data transfer.

### C. Application of German Law (Conflict of Laws)

- 10 The aforementioned German legal approach to duties of care for host providers is likely to be relevant for all hosting sites which are (also) intended for Germany. Pursuant to Article 8, Para. 2 Regulation Rome II, German copyright law is applied to everything that is made available on the Internet which is at least also intended to reach German users.<sup>18</sup> All German-language infringements will meet this requirement, but also other language offers if other elements speak in favour of an intention to reach German users – for example, an English-language movie that is on a German language site or is not yet out in German and hence is also interesting for German speakers. Therefore, it can be expected that the German case law will develop a considerable pull for the behaviour of host providers even if they are located outside Germany.

### D. General Remarks on the Liability of Host Providers

- 11 The liability for damages and criminal liability of hosting providers is limited by Article 14 eCommerce Directive,<sup>19</sup> implemented by Sec. 10 German Telemedia Act (*Telemediengesetz, TMG*).<sup>20</sup> However, this has as yet been of little or no interest in copyright law practice. According to case law, liability for damages of hosting providers is redundant even in principle, hence before the exceptions under the TMG apply. Any liability concepts created by the *German Federal Supreme Court* which – for third-party content – could cause liability for damages, may not be applied to hosting providers.
- 12 In addition to the breach of duty of care and delinquent liability of contributors due to a violation of duties of care, a further “general basis for imputability” can be considered. The *German Federal Supreme*

*Court* adopted such a “general basis for imputability” in the *Halzband* case in order to assume a delinquent liability of the holder of an eBay account for copyright infringements which his wife had committed using his account.<sup>21</sup> However, the specific “general basis for imputability” from the *Halzband* decision will usually not be applicable to the liability of hosting providers. This is because the imputability is based on the idea that indirectly responsible persons give the legal appearance of acting themselves.<sup>22</sup> Such a legal appearance is, however, rarely assumed in the case of hosting providers. Another “general basis for imputability” can be considered, though, if a hosting provider “consistently” violates duties of care. The German Federal Court of Justice considers that sufficient to give rise to intentional abetting.<sup>23</sup> It would be better, however, to work with a general basis for imputability which leads to a delinquent liability. This would also not be a problem due to the equality of the participatory and delinquent liability (Sec. 830, Par. 2 German Civil Code, BGB).

- 13 The above-mentioned copyright decision practice of the German Federal Court and its Civil Senate I (competent for copyright law) is to a degree in conflict<sup>24</sup> with the stricter jurisprudence of its Civil Senate Xa (for Patents),<sup>25</sup> which tends to more aggressively assume delinquent liability. One must, however, deal with this reality in copyright law: usually, the grounds for delinquent liability for hosting providers do not apply according to the jurisprudence of the (Copyright) Civil Senate I.
- 14 Thus, only the principle of breach of duty of care remains. It is called the *Stoererhaftung*, which literally translated means “responsibility of the disquieter”. The *Stoererhaftung* is derived from Sec. 1004 BGB.<sup>26</sup> This principle is aimed only at claims for injunctive relief and removal but not claims for damages.<sup>27</sup> Sec. 10 TMG (Art. 14 eCommerce Directive) does not apply for injunctive relief claims against hosting providers based on it.<sup>28</sup>

### E. Requirements for a Breach of Duty of Care (Stoererhaftung)

- 15 A breach of duty of care in respect of third-party content has three requirements:
  1. The *Stoerer* (secondary infringer) has to have contributed to the infringement of the protected right in an adequately causal manner.<sup>29</sup> This is no requirement of culpability.<sup>30</sup>
  2. The *Stoerer* must also have a legal possibility of preventing the principal offense.<sup>31</sup>

3. In order to prevent unlimited extension of the breach of duty of care, case law requires that the *Stoerer* must also have violated a duty of care.<sup>32</sup> The assumption of a violation of such a duty of care requires a comprehensive balancing of interests and an assessment whether the fulfilment of the duty of care was reasonable in the allocation of risks.<sup>33</sup> This normally requires that the copyright violation be recognisable to the indirect *Stoerer*. Therefore, the case must concern either a clearly recognisable act of infringement, or the indirect *Stoerer* has to be made aware of the infringement by the infringing party.<sup>34</sup>

In respect of the question as to the reasonableness of a duty of care, the *German Federal Supreme Court* has considerably eased rights holders' burden of proof and stating the case against the Internet service provider against whom the right holder has brought an action.<sup>35</sup> In principle, the burden of proof and stating the case for what can reasonably be expected of the *Stoerer* lies with the Claimant (and thus with the rights holder).<sup>36</sup> According to the *German Federal Supreme Court*, however, there is a secondary burden of proof and stating the case for the party claimed against. This is based on the fact that only the Internet service provider is in possession of the relevant knowledge of its technical infrastructure. Thus, the party subject to the claim is obligated to state which protection measures that party is able to take and which it is unreasonable to expect.<sup>37</sup>

4. For a liability of the *Stoerer*, however, it is not necessary for the infringer or intentional contributor to the infringement not to be able to be prosecuted.<sup>38</sup> The breach of duty of care is thus not a subsidiary liability.

## F. EU Directive Conformity of the Principle of Breach of Duty of Care

16 According to the German principle of breach of duty of care, the possibility of bringing an action against anyone indirectly responsible or co-responsible who is not liable as a perpetrator or contributor, is imperative in the scope of a directive-conforming interpretation. Article 11, sentence 3 of the Directive 2004/48/EC (so-called "Enforcement Directive") stipulates bindingly that it must be made possible for injunctions to be applied for against "intermediaries". The national legislator is also obligated under Article 8, Para. 3 of the Directive on the harmonisation of certain aspects of copyright and related rights in the information society<sup>39</sup> (Copyright Directive) to provide for blocking claims against "intermediaries" whose services are used for copyright infringements. There is no problem with classifying providers as "intermediaries",<sup>40</sup> so a liability provision must also be made available under German law. Whether the German principle of breach of duty of

care (*Stoererhaftung*) fulfils Article 8, Para. 3 Copyright Directive in particular seems somewhat doubtful. On the almost identical Article 11, sentence 3 of the Enforcement Directive, the *German Federal Supreme Court* stated in the *Internet-Versteigerung II (Internet Auction II)* case that the requirements above which accompany the breach of duty of care principle were compliant with European law on the basis of Recital 23 of the Enforcement Directive, because the regulation of the "conditions and procedures" are to be left to the Member States.<sup>41</sup> Recital 23 (practically identical to Recital 59 of the Copyright Directive on Article 8, Para. 3), however, does not grant *carte blanche* to Member States to set any requirements they wish. Rather, the liability requirements clearly have to be subordinate to delinquent and contributory liability as otherwise the separate provisions of Article 11, sentence 3 Enforcement Directive and Article 8, Para. 3 Copyright Directive would be superfluous. Recital 59 also states expressly that the liability of the "intermediary" must also exist even if the "acts carried out by the intermediary are exempted under Article 5 [Copyright Directive]". In the recent report of the *European Commission* analysing the application of the Enforcement Directive, the European Commission highlighted that neither Article 11, sentence 3 Enforcement Directive nor Article 8, Para. 3 Copyright Directive had any requirement of liability.<sup>42</sup> Hence, it does not seem to be clear that the violation of duties of care, as is made a requirement of breach of duty of care by the *German Federal Supreme Court*, is sufficiently inferior to the requirements of delinquent liability. In particular, the requirement of awareness runs parallel to the requirements for exception under Article 5 Copyright Directive. The *German Federal Supreme Court* would at least have had to submit the *Internetversteigerung II* case to the ECJ in accordance with Article 267 TFEU (formerly Art. 234 EC Treaty).

## G. Concrete Application of Breach of Duty of Care (*Stoererhaftung*) to Hosting Providers in the Case of Copyright Infringements

17 Of all the requirements of breaches of duty of care mentioned above,<sup>43</sup> the infringement of duties of care has been focussed on in both the case law of the courts<sup>44</sup> and in literature.<sup>45</sup> This paper shall therefore examine the concept of German case law in greater detail.

### I. How Duties of Care Arise

18 The existence of duties of care usually requires that the hosting provider be aware of the copyright-infringing third-party content on the host's server.<sup>46</sup>

This knowledge is usually gained by the hosting provider through a so-called “notice-and-takedown letter” (also in German law) sent by the rights holder. In this letter, the rights owner informs the hosting provider of the infringement of the protected right through third-party content on the platform of the hosting provider and requests that the hosting provider prevent such infringement.

- 19 Upon becoming aware of a rights infringement, the hosting provider has a duty of care to prevent rights infringements for which there are specific grounds through checking content. This must be the same as the question as to whether there is a risk of repeated or first offences.<sup>47</sup> Duties of care can then exist in two respects:
- 20 There is a duty of care to prevent the repetition of the specific infringement as described in the notice-and-takedown letter, whereby a distinction can be made as to whether the infringement is “clear” (point *a* below). German courts justify this duty through the risk of repetition.
- 21 Furthermore, based on the risk of first offence and in cases of clear infringements, a duty of care has been recognised to prevent the same type but just as clearly recognisable rights infringements (point 2 below).<sup>48</sup>

## 1. Duty of care to prevent the known specific infringement in future

- 22 All hosting providers – regardless of their business model – are subject to the obligation of preventing a “clear” (point 3 below) rights infringement in the future once they have become aware of it. In this context, the host providers must delete the infringements which they have been made aware of and prevent such content from being stored in their data storage space again. This seems so self-explanatory that the courts in part no longer even examine this in detail, such that the misunderstanding can occur that a hosting provider is not liable at all.<sup>49</sup>
- 23 No cases are known in which the hosting provider was unable to permanently block the rights-infringing content. In order to filter rights-infringing files, so-called hash filters can be used to help identify a file as identical. In the case of file hosts such as *Rapidshare*, such hash filters are known as “MD5 filters”.<sup>50</sup> Other infringements, such as illegal links on link referrer sites or in search engine results, can also be reliably blocked through respective keyword filters. A particular feature applies to the “original” Usenet provider: following a “cancel request” by the rights holder, the Usenet provider is then responsible for deleting the rights-infringing file throughout the entire Usenet (via the so-called “kill command” according to Usenet rules which apply between the

providers).<sup>51</sup> If the hosting provider does not remove the clear infringement that the provider has been made aware of, the provider is liable not only as a *Stoerer* but also as a contributing infringer and thus in German law like the direct infringer itself (Sec. 830 BGB).<sup>52</sup> Against this background, it does not seem convincing that the *District Court (LG) Berlin* was of the opinion that *Google* as the hosting provider for links was only liable for removing a link to an obvious rights infringement if there was no possibility for the infringed party to achieve anything against the operator or host of the actual content.<sup>53</sup> That does not reflect the jurisprudence of the *German Federal Supreme Court*, which obligated *Google*, in the case of “clear” rights infringements, to prevent future infringements.<sup>54</sup>

- 24 However, it seems as yet unclear whether the duty of care for the hosting provider also exists if the provider is made aware of an “unclear” (point 3) rights infringement. It is in part required that the unlawfulness be at least recognisable “from the perspective of an impartial Internet user”.<sup>55</sup> Fundamentally, any requirements of the unlawfulness which limit the duty of care should not be important. Since the *German Federal Supreme Court’s* decision in the *ambiente.de* case, a fundamental limitation of the duty of care to known, clear cases (described as “obvious, easy to recognise by the responsible employee of the Defendant”)<sup>56</sup> only takes place if the provider performs a quasi-state activity, i.e. one which would otherwise have to be performed by a state authority. This reasoning can be ruled out in respect of hosting providers on the principle that mere unlawfulness should be enough to trigger a duty of care. It is up to the risk of the hosting provider whether the provider decides to enter into the dispute between the customer and the rights holder. A (legitimate) business model is generally not seriously threatened by a hosting provider removing individual content which has been objected to.
- 25 The risk is also up to the hosting provider because the provider chose those (file-storing) customers. There is also no subsidiarity (see above E, no. 4). Therefore, it seems to be correct that the *German Federal Supreme Court* obligated the operator of a forum on the Internet to remove a (general) moral right infringement, although the case was not entirely clear; the court also did not check whether the unlawfulness was recognisable to an unbiased Internet user.<sup>57</sup>
- 26 Any privileged treatment for host providers can only be considered in exceptional cases. In particular, this could be the case where there is a lack of specification of the accusation of rights infringement so that a precise check is not possible for the hosting provider.<sup>58</sup> In addition, exceptions are conceivable for neutral search engines not susceptible to infringements such as *Google*. The *German Federal*

Supreme Court considered, in terms of thumbnail images, that *Google*, as an image search engine in the general public interest, is at least liable for “clear” rights infringements.<sup>59</sup> Whether the liability is indeed restricted to that is, however, questionable and requires an examination of each individual case; this seems better attributed to the examination of the violation of a duty of care (more under point 2 below) than to the examination of the development of a duty of care. A justified public interest in copyright-infringing content being transported via *Google* is not always recognisable for infrastructure service providers who also act in the “public interest”. A violation of the duty of care can, however, cease to apply if it is possible, without great difficulty, to take action against the actual infringer and thus safely eradicate the source of the infringement.<sup>60</sup>

## 2. Duty of care to prevent the same type of and just as clearly recognisable infringements when aware of clear rights infringements

- 27** In any case, for “clear” (point c) rights infringements the duty of care of the hosting provider goes beyond the mere blocking of the specific infringement. In this respect, the breach of duty of care exceeds the direct infringers and the contributing infringer liability, which only apply to the specific infringement due to the requirement of intent.<sup>61</sup> According to the case law of the *German Federal Supreme Court*, there is also a duty of care to prevent the same type of as well as clearly recognisable infringements once there is an awareness of clear rights infringements.<sup>62</sup> This was justified by the court through the existing risk of first offence, which in German law is sufficient to establish an injunction claim.
- 28** Several commentators have criticised this case law as going too far and not being in line with Article 15 eCommerce Directive.<sup>63</sup> Article 15 denies a general obligation to monitor for ISPs, including host providers. Although the case law of the *German Federal Supreme Court* “is entitled to the greatest of respect”, the *High Court of Justice Chancery Division* (England and Wales) in the *L’Oréal/Ebay* case referred the issue to the ECJ as question No. 10.<sup>64</sup> In his opinion, the Advocate General particularly refers to Article 3, Para. 2 Enforcement Directive and its principle (“Those measures, procedures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse”). He comes to the conclusion that EU law does not prohibit further duties for host providers other than to filter the specific infringement, but it would also not oblige Member States to provide such claims. Hence, “the conditions and procedures relating to such injunctions are defined in national law.” If the ECJ follows this opinion, the case law of the *German Federal Supreme Court* could live on.
- 29** Anyway, the German case law seems convincing. A general duty of care in the sense of Article 15 eCommerce Directive is not established. Rather, such a duty of care to look for clear infringements of the same type, which are just as clearly recognizable, is limited to illegal scenarios that are likely to occur. Also, the host provider seems to be in principle best placed to stop such future infringements from happening, as it is the provider’s customers on the provider’s infrastructure that will commit the infringements.
- 30** It is, however, a different question as to which copyright scenarios include clear infringements of the same type and which are just as clearly recognisable. Under German law as well, this is an issue which has only been discussed for copyright law to a certain extent by the *German Federal Supreme Court*. The article proposes the following assessment under copyright law:
- 31** a) Infringements are of the same type if the same work is affected and the same copy (in another file) or another just as clearly rights-infringing copy has been used.<sup>65</sup> For example, the same type exists in copyright law if a video portal once more stores and makes available the same cinema film in another file as that in the notice-and-takedown letter. The same type would also be considered applicable if a link referrer made another link to the same film available to the public. A file host would be committing an offence of the same type if the host saved the same work in another file (also available to the public via link referrers).
- 32** b) The duty of care must not be restricted to the same work mentioned in the notice-and-takedown letter. An infringement of other works of the same category can be seen as similar and can be regarded as equivalent, provided they originate from the same perpetrator and do not require a new legal assessment. In such cases, the argument of “repeat offenders” becomes relevant. The *German Federal Supreme Court Jugendgefährdende Medien bei eBay* decision (concerning breaches of German unfair competition law) contains this relevant statement:<sup>66</sup> “It seems likely from life experience that an auctioneer of media which endangers youths should be considered a provider of further media, at least in the same category.” In its *Rapidshare* decisions on copyright law, the *Court of Appeals (OLG) Hamburg* also sees other obvious rights infringements by “repeat offenders” as likely.<sup>67</sup> In the case of such obvious rights infringements by the same persons, no proactive monitoring or investigation is required to which the Internet service provider would not be allowed to be obligated under Article 15 eCommerce Directive. Rather,

the obligation to remove obvious other rights infringements of the infringer conforms with Article 14, Para. 3 and Recital 48 of the Directive 2000/31/EC on electronic commerce.

- 33 c) Furthermore, the question remains open whether the duty of care of the hosting provider also refers to other works of other categories which were not contained in the notice-and-takedown letter and do not originate with the initial infringer. There is fundamentally no proactive duty of care, as mentioned above, as per Article 15 eCommerce Directive. However, something else could be the case if the hosting service is especially susceptible to infringements and the hosting provider is aware of that.<sup>68</sup> The *Court of Appeals (OLG) Hamburg* considered a breach of duty of care in the decision on *Long Island Ice Tea* under the condition that Internet discussion boards are related to particular topics and/or uploading of rights-infringing images has already occurred several times in the past.<sup>69</sup> Citing the *German Federal Supreme Court* decision, the *Court of Appeals (OLG) Zweibrücken* requires *Internet-Versteigerung II* as a restriction that a specific danger of infringement must be threatening in order for duties of care to arise.<sup>70</sup> A duty of care can also arise, even without a notice-and-takedown letter, in particular from a hosting provider who is increasing the susceptibility of the provider's hosting services through certain activities; an example would be that the hosting provider advertises the rights-infringing use of the provider's service.<sup>71</sup> Furthermore, a link-sharing site is able to set up categories such as "current cinema films" or "series" (e.g. *g-stream.in*) and thus all but provoke the copyright infringement.<sup>72</sup> Duties of care must, however, also apply if particular categories which are actually "neutral" turn out to have an increased susceptibility to infringements, e.g. predominantly (50%+) infringements; as soon as the host is aware of it, the host is liable for all infringements posted if the category is not immediately blocked. Duties of care can also occur without a categorisation susceptible to infringements. If a non-categorising file host such as *Rapidshare* stores all new theatre releases of a rights holder from the last years and then makes these available via third-party sites (link referrers), then there is a duty of care for the file host to block a film work that is just prior to its premiere. The file host must, however, be informed of the film title and the circumstances of the above-mentioned premiere. The duty of due diligence is violated if the film is hosted by the file host after the premiere and made available to the public from there (via link referrers).<sup>73</sup> For link referrers whose business model is to a great extent suitable for hiding illegal links, the same applies.
- 34 d) In summary, one can ascertain that duties of care to block the same type of infringements which are also clearly recognisable do not only refer to the same work. Rather, an obligation to block can also

exist for other works. The repeat offender argument is particularly relevant here; but even if the service otherwise demonstrates an increased susceptibility to infringement, a duty of care could exist for other works.

### 3. "Clear" infringement

- 35 As we have seen, the scope of the duties of care can depend on whether there is a "clear" rights infringement. What is a "clear" infringement in copyright law? The definition requires the creation of objective criteria. The perspective of an average unbiased Internet user<sup>74</sup> can be ruled out because if this were used, copyright claims would be dependent on the extent to which the German Copyright Act was known in the population. One can also expect a hosting provider to employ staff trained in copyright law. What cannot be expected, however, is for the host provider to employ well-trained lawyers.<sup>75</sup> The making available to the public of identical copies of copyright protected works – be it film works, music works, audio books or photography – would accordingly be a "clear" infringement; they form the vast majority of works illegally made available on the Internet. However, unchanged works are also still "clear" infringements, provided a free use (Sec. 23 German Copyright Act - UrhG) may not be seriously considered. Examples of not "clear" infringements would be borderline cases between adaptation (Sec. 23 UrhG) and free use (Sec. 24 UrhG), where one would need to consult a well-trained lawyer in copyright law to recognise the infringement.<sup>76</sup> Other copyright exemptions (Sec. 44a et seq. UrhG) also do not change anything in terms of a "clear" rights infringement insofar as their application cannot seriously be considered. Particularly in the case of making available to the public on the Internet under Sec. 19a UrhG, no exemptions can be seriously considered<sup>77</sup> – even in the case of privately acting persons – so one can usually assume making available to the public on the Internet constitutes a "clear" rights infringement. As the obviousness of the infringement plays a decisive role, so too should the "clarity" of the right to take action. For a clear infringement of photo rights, the *German Federal Supreme Court* requires that the *Stoerer* have "sufficient clarity on the authorisation of the claimant".<sup>78</sup>
- 36 However, this cannot mean that works with a complicated chain of title can no longer be "clearly" infringed; that would discriminate against older works, e.g. older films which have changed rights owners several times and therefore have a long chain of title. It cannot be the case that works with a complicated chain of title do not trigger a duty of care and their rights holders are therefore unable to take action effectively against copyright infringements on the Internet.

37 The right to sue is “clear” if there are *no justified doubts of the hosting provider* as to such a right. The rights holder can disclose the chain of title by way of substantiation. That is not necessary, however. Justified doubts of the hosting provider are already considered not to exist if the hosting provider can trust the information in the notice-and-takedown letter stating rights ownership. Any declarations which expose the rights holder to the risk of criminal prosecution in the event of provision of false information should suffice. The rights holder can also work with a binding release of the hosting provider. In addition, the rights holder can cite the legal assumptions derived from Article 5 Enforcement Directive (implemented by Sec. 10 UrhG) or actual assumptions, e.g. a mentioning as rights holders in legal copies or even in the illegally hosted copy itself.<sup>79</sup>

## II. Violation of Duties of Care, in Particular Reasonableness

38 However, the question arises in relation to all business models as to whether the above-mentioned duties of care are reasonable to expect of hosting providers when they become aware of rights infringements. One can assume a violation of such duties of care if the hosting provider fails to utilise reasonable controlling measures and thus encourages further infringements. Whether a duty of care of the hosting provider is reasonable has to be decided, after a comprehensive weighing of interests, on a case-by-case basis, namely which of the different rights and causal contributions of the infringer, hosting provider and rights owner should be observed.<sup>80</sup>

39 The following factors are of particular significance:<sup>81</sup> intensity of the risk, commercial advantage of the hosting provider from the infringements, weight of interests of the copyright holder, expense of limiting such risk, and lack of or existing possibilities to neutralise the source of the infringement just as effectively in a different way.<sup>82</sup> This means that the unreasonableness threshold rises more the more hosting providers, through their behaviour, provoke rights infringements by third parties, for example by advertising using illegally hosted content<sup>83</sup> or setting up categories susceptible to infringements.<sup>84</sup> One must also take into account whether the hosting provider receives a commission for the infringing acts<sup>85</sup> or at least indirectly profits through increased advertising revenue due to the illegal acts.<sup>86</sup> An example would be if the income of advertising financed hosting providers such as link referrers, file hosts and link encrypters rises with the number of times the hosted content is illegally accessed. Often the perpetrators are anonymous, meaning efficiently combating them is only possible via the host and not possible if each perpetrator has to be prosecuted individually.<sup>87</sup> When assessing the reasonable-

ness of specific measures, one must not forget that a combination of the individual retaliatory measures could make sense.<sup>88</sup>

### 1. Notice to users to refrain from infringements

40 It seems self-explanatory that hosting providers would make their users aware of the possibility of copyright infringements and forbid them.<sup>89</sup> The precautionary claim for injunctive relief based on the principle of breach of duty of care can also be aimed at the education of individual infringing users prior to their specific copyright infringements. Such general education is included by most hosting providers in the terms and conditions. However, this is not sufficient on its own.<sup>90</sup> Many hosting providers – e.g. *YouTube* – also threaten copyright infringers beyond this with deleting their account. This also makes sense but is insufficient on its own.

### 2. Hash value filters

41 Hash value filters (e.g. MD5 filters) must be used as they at least ensure that the files named in the notice-and-takedown letter are actually blocked.<sup>91</sup> However, hash value filters are not sufficient to block the same type of infringement which is just as clearly apparent, because the hash value changes with every change to the file and infringing files can thus no longer be found.<sup>92</sup>

### 3. Deletion interface

42 However, it is reasonable to expect the hosting provider to make a deletion interface available upon the request of the rights holder, as it can stop the infringements, at least to a certain extent, and thus falls within the duty of care of the host.<sup>93</sup>

43 According to one of the more recent decisions of the *German Federal Supreme Court Kinderhochstuehle im Internet* (Children’s High Chairs on the Internet), it fulfils the duty of care to provide a search function to the rights holder which enables the rights holder to search with the same effort and success as the host provider. In a trademark case regarding *eBay*, offering the rights holder the opportunity to participate in *eBay’s VeRI-Programm* was sufficient for *eBay*.<sup>94</sup> This, however, cannot be applied to host providers who – in contrast to *eBay* – allow users to store illegal content anonymously. In such cases, the rights holder cannot search with the same success as the host provider. Anyway, granting rights holders the possibility to use a deletion interface is also insufficient as it cannot hinder the infringement but sim-

ply provides the rights holder with the means to stop the infringement itself swiftly.<sup>95</sup>

#### 4. Keyword filters and other text-based due diligence measures

- 44 A suitable filter tool for fulfilling the duty of due diligence could be keyword filters for text-based filters. These are, however, only efficient if the specific infringement and further infringements of the same type can be identified via text. This is not the case for files whose names do not say anything about the content, as with film files which do not contain the film title. Hence, keyword filters can be more susceptible to failing when it comes to file hosts; this is because the respective users often – although not always – save the files without using the title of the work.<sup>96</sup> However, as such filters are associated with a low cost of implementation, it is reasonable for file hosts to employ them even if the level of success is low.<sup>97</sup>
- 45 In contrast, for host providers who make text-based search tools available to their users, the keyword filter appears highly efficient. That applies, for example, for link referrers, user-generated content sites, search engines and Usenet providers in relation to the filtering of the index. The search term to be selected should at least be the title of the work; in the case of music, the performing artist's name is also given. Analogous to the principles of protectability of trade marks, search terms are fundamentally unsuitable if they have no distinctive character. For example, when filtering for the music title "Ey DJ" by the band *Culcha Candela*, the word "Culcha" was suitable for filtering illegal downloads.<sup>98</sup> A possibly unsuitable term would have been merely the word "DJ".<sup>99</sup> This matches with the case law of the *German Federal Supreme Court* that *eBay* did not have to employ a filter in case only 0.5% of the filtering results turned out to be illegal.<sup>100</sup>
- 46 For file hosts and other hosts for whom keyword filters have only limited effectiveness, the combination with other measures is a good option. In the case of file hosts (e.g. *Rapidshare*), a making available to the public of the film, music, audio book and software files stored there occurs on third-party sites. The link with which the file stored at the file host can be accessed is made available to the public there.<sup>101</sup> Thereafter, there exists a duty of care of the file host to check such third-party sites with collections of links.<sup>102</sup> The same applies for link encrypters. The duty of care covers all links published there which constitute the same type of and just as clearly recognisable infringements. As link referrers make text-based searches available to their users, an automated - keyword-based - check is conceivable. In itself that is not sufficient as this measure only helps uncover

infringements which have already happened and does not prevent infringements from happening in the first place.<sup>103</sup>

- 47 Furthermore, independent of work title, other search terms can also produce fruitful results. Very often, for example, films are stored at file-hosting sites not under the title of the film but under another "suspicious" name such as "Part1", "Part2", etc. In combination with other suspicious indications for a pirated copy – e.g. the type of file, size of file, particular file meta data or file saved by anonymous user – a duty of care can exist to subject such files to a further check using other methods (manual checks, contact with customer who has stored file, etc.).

#### 5. Audio and audio-visual filter

- 48 Filter systems which recognise the content of audio files or audiovisual files (content filters) are also conceivable. These are offered by a number of manufacturers and constantly improved. If the hosting provider wants to claim that these are not sufficiently effective to justify the cost of implementation, the burden of proof and stating the case lies with the hosting provider, according to the jurisprudence of the *German Federal Supreme Court*.<sup>104</sup>

#### 6. Manual controls

- 49 Insofar as automatic filter procedures have gaps and cannot rule out rights infringements, these must be dealt with by hand.<sup>105</sup> An extension of the controlling personnel is not necessarily unreasonable.<sup>106</sup> However, it would be disproportionate to expect the host provider to check manually every offer that carries a certain element, in case such a manual control would endanger the (legal) business model of the host provider due to the staff expenditure. For example, in a trade mark case *eBay* did not have to check every offer that used a certain trade mark, as this – taking claims of other trade mark owners into account – would have jeopardized *eBay's* business model.<sup>107</sup>
- 50 The *Court of Appeals (OLG) Dusseldorf* took a far more provider-friendly approach recently in its *Rapidshare* decision on breach of duty of care of the hosting provider.<sup>108</sup> According to this, the manual checking of data on the basis of keywords is, "on the basis of the huge number of files and the multiple meanings of the individual terms, as well as the ease of circumvention, disproportionate to the success achieved". Manual checking would therefore not be a suitable method for preventing third-party infringements. It is not clear from this decision that the *Court of Appeals (OLG) Dusseldorf* observed the secondary burden of proof and stating the case because the more general considerations were sufficient to reject a reasonableness of manual checking obligations for *Rapidshare*.

In particular, it is not mentioned anywhere why specifically a manual checking obligation should be unreasonable and jeopardize the whole business model of *Rapidshare*. *Rapidshare* – and other file hosts – is commercially an extremely successful company that could in theory afford additional checking personnel. For example, *Rapidshare* also employs manual checking staff in an “abuse department”. In that case it would have been up to *Rapidshare* to prove credibly why the whole business model would fail if manual checking obligations were imposed.

## 7. De-anonymising infringing users

51 To anticipate repeat offenders, case law demands, in part, the de-anonymisation of rights-infringing users, such that these can also be filtered, where necessary also manually. It has not yet been clarified, however, whether this requires a mandatory registration under a clear name or if other measures could suffice, e.g. protocol of the IP address.<sup>109</sup> Especially on *Rapidshare*, the *Court of Appeals (OLG) Hamburg* decided on the basis of the *German Federal Supreme Court Jugendgefährdende Medien bei eBay* decision that a business model which leads to mass copyright infringements and which provides for a fully anonymous upload procedure is not approved by the law and as a consequence cannot cite unreasonableness of duties of care.<sup>110</sup>

## 8. Altering the business model

52 Even a legitimate business model of the hosting provider does not enjoy protection from any changes.<sup>111</sup> The *German Federal Supreme Court* has always merely stressed that the hosting provider is protected from having “requirements placed upon him which would jeopardise his business model which is approved under the legal system or make his activity disproportionately more difficult”.<sup>112</sup> In cases of increased susceptibility to infringements, however, the *German Federal Supreme Court* has repeatedly demanded alterations to business models, e.g. the court advised *eBay* to remove whole categories which have a higher risk of infringements.<sup>113</sup> Hence it seems unfounded for the *Court of Appeals (OLG) Dusseldorf* to want to protect the essentially “neutral” business model from any alterations by way of duties of care to prevent rights infringements.<sup>114</sup> Rather, the *Court of Appeals (OLG) Hamburg*<sup>115</sup> is correct when it says that reasonable changes to the business model may be demanded. If the business model of the hosting provider demonstrates an increased risk of infringements, then increased counter-measures as duties of care are reasonable. Hence, it does not seem convincing, according to the current business models of hosting providers, to create a matrix of who has what duties of care.<sup>116</sup> The business models, as “flexible sys-

tems”,<sup>117</sup> are subject to changes, in particular if they have a higher susceptibility to infringements. The limit of reasonableness is only reached if the hosts credibly prove and provide evidence for their having to abandon their business entirely if particular obligations were applied. However, only hosting providers whose business model is not based to a considerable degree on rights infringements can cite this principle.

## H. Summary

53 In German law, the principle of breach of duty of care remains in the focus of approaches of rights holders against hosting providers for copyright infringements committed by the hosting provider’s customers. Other delinquent liability models have not as yet been applied to copyright infringements of hosting providers. There are different types of hosting providers<sup>118</sup> with differing degrees of susceptibility that make them subject to different duties of care.

54 Whether the German breach of duty of care conforms with European law is questionable in light of Article 11, sentence 3 Enforcement Directive and Article 8, Para. 3 Copyright Directive, and this question should be clarified through reference to the ECJ. Under German case law, duties of care not only exist in relation to preventing further clear infringements of a particular infringed work, but also in relation to preventing just as clearly recognisable infringements, after having been informed of specific rights infringements. This extension of the duty of care to future similar infringements is currently before the ECJ, but should not be held contrary to EU law. Rather, it should be in line with Article 15 eCommerce Directive. The duties of care under German law not only create duties of care for the hosting provider to combat repeat offenders. Rather, particularly susceptible categories have to be constantly checked. The extent to which further duties of care can be expected of a hosting provider must be determined with a weighing up of the interests of rights holders, providers and users. Often, hosting providers will only avoid a breach of duty of care if they can undertake several due diligence measures simultaneously. Due to the rules on conflict of laws, the German concept of duties of care will also be applied extensively to hosting providers outside Germany.

1 The article was written relying on a talk the author gave to several district groups of the German Association for the Protection of Intellectual Property (GRUR). Parts of this article were published in German in 2010 *Computer & Recht* 653.

2 See *Gesellschaft zur Verfolgung von Urheberrechtsverletzungen (GVU)*, the German anti-piracy organization for films and games, Annual Report 2007, p. 5, available on <http://www.gvu.de/media/pdf/408.pdf>.

- 3 There are similar difficulties regarding trademark piracy on the Internet: Rösler (2006) IIC 771, 785.
- 4 German Federal Supreme Court (2007) GRUR, 890, 894 note 40 – *Jugendgefährdende Medien bei eBay*.
- 5 District Court (LG) Hamburg, decision of 3 September 2010, published in (2010) MMR 833; an example of another opinion is the Spanish Mercantile Court No. 7, Madrid, decision 289/2010, 22 September 2010.
- 6 See German Federal Supreme Court (2010) GRUR, 616 notes 22 et seq. – *marions-kochbuch.de*; Court of Appeals (OLG) Hamburg, (2009) ZUM, 642, 644 – *Gitarrist im Nebel*.
- 7 German Federal Supreme Court (2010) GRUR, 628 note 20 – *Vorschaubilder*.
- 8 Wilmer, (2008) NJW, 1845, 1846.
- 9 Google regarded as a host provider by EuGH, decision of 23 March 2010, C.236/08, C-238/08, notes 109 et seq.; referring to that decision, German Federal Supreme Court (2010) GRUR, 628 note 39 – *Vorschaubilder*.
- 10 Court of Appeals (OLG) Dusseldorf (2008) MMR, 675; District Court (LG) Frankfurt (2009) MMR, 70.
- 11 Court of Appeals (OLG) Hamburg (2009) ZUM-RD, 246, 263 et seq. – *Usenet I*.
- 12 See [http://en.wikipedia.org/wiki/The\\_Pirate\\_Bay](http://en.wikipedia.org/wiki/The_Pirate_Bay).
- 13 Court of Appeals (OLG) Hamburg (2009) ZUM-RD, 246, 264 et seq. – *Usenet I*.
- 14 Court of Appeals (OLG) Hamburg (2009) ZUM-RD, 246, 261 – *Usenet I*.
- 15 Court of Appeals (OLG) Hamburg (2009) ZUM-RD, 246, 263 et seq. – *Usenet I*; Court of Appeals (OLG) Hamburg, (2009) ZUM-RD, 439 – *Usenet II*.
- 16 Court of Appeals (OLG) Hamburg (2009) ZUM-RD, 246 – *Usenet I*; Court of Appeals (OLG) Hamburg (2009) ZUM-RD, 439 – *Usenet II*.
- 17 Court of Appeals (OLG) Dusseldorf (2008) ZUM, 332, 334.
- 18 See German Federal Supreme Court (2007) GRUR, 871, 872 *Wagenfeld-Leuchte*; Jan Bernd Nordemann, in: Fromm/Nordemann, Urheberrecht [German Copyright Law], 10th ed. 2008, Sec. 105 UrhG note 10 and Nordemann-Schiffel, in: Fromm/Nordemann, Urheberrecht [German Copyright Law], 10th ed. 2008, before Sec. 120 notes 96 et seq.
- 19 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').
- 20 See Dreier, in: Dreier/Schulze, Urheberrechtsgesetz [German Copyright Law], 3rd ed. 2008, Sec. 97 note 36; Jan Bernd Nordemann, in: Fromm/Nordemann, Urheberrecht [German Copyright Law], 10th ed. 2008, Sec. 97 note 185 with further references.
- 21 German Federal Supreme Court (2009) GRUR 597 – *Halzband*.
- 22 German Federal Supreme Court (2010) GRUR, 633 note 14 – *Sommer unseres Lebens*; also see German Federal Supreme Court (2009) GRUR, 597 note 19 – *Halzband*.
- 23 German Federal Supreme Court (2007) GRUR, 708 note 32 – *Internet-Versteigerung II*; German Federal Supreme Court (2004) GRUR, 860 – *Internet-Versteigerung I*.
- 24 Same opinion Schaefer (2010) ZUM, 699, 700; Stang/Hühner (2010) GRUR, 636, 637, commenting the decision German Federal Supreme Court (2010) GRUR, 633 – *Sommer unseres Lebens*.
- 25 See German Federal Supreme Court (2009) GRUR, 1142, 1144 et seq. notes 30 et seq. – *MP3-Player-Import*.
- 26 Jan Bernd Nordemann, in: Fromm/Nordemann, Urheberrecht [German Copyright Law], 10th ed. 2008, Sec. 97 note 154; critical on the deduction from Sec. 1004 German Civil Code (BGB): Ahrens, (2007) WRP, 1281, 1284.
- 27 German Federal Supreme Court (2004) GRUR, 860, 864 – *Internetversteigerung I*; German Federal Supreme Court (2002) GRUR, 618, 619 – *Meißner Dekor*; Dreier, in: Dreier/Schulze, Urheberrechtsgesetz [German Copyright Law], 3rd ed. 2008, Sec. 97 note 33; Jan Bernd Nordemann, in: Fromm/Nordemann, Urheberrecht [German Copyright Law], 10th ed. 2008, Sec. 97 note 154.
- 28 German Federal Supreme Court (2007) GRUR, 708, 710 note 19 – *Internet-Versteigerung II*; German Federal Supreme Court (2007) GRUR, 724, 725 note 7 – *Meinungsforum*.
- 29 German Federal Supreme Court (2008) GRUR, 702, 706 note 50 – *Internetversteigerung III*; German Federal Supreme Court (2007) GRUR, 708, 711 note 40 – *Internetversteigerung II*; German Federal Supreme Court (2004) GRUR, 860, 864 – *Internetversteigerung I*; Dreier, in: Dreier/Schulze, Urheberrechtsgesetz [German Copyright Law], 3rd ed. 2008, Sec. 97 note 33; Jan Bernd Nordemann, in: Fromm/Nordemann, Urheberrecht [German Copyright Law], 10th ed. 2008, Sec. 97 notes 156 et seq.
- 30 Jan Bernd Nordemann, in: Fromm/Nordemann, Urheberrecht [German Copyright Law], 10th ed. 2008, Sec. 97 note 156; Spindler/Volkman, (2003) WRP, 1, 2; v. Wolff, in: Wandtke/Bullinger, Urheberrechtsgesetz [German Copyright Law], 3rd ed. 2008, Sec. 97 note 15.
- 31 German Federal Supreme Court (1999) GRUR, 518, 519 – *Möbelklassiker*.
- 32 German Federal Supreme Court (2007) GRUR, 708, 711 note 40 – *Internetversteigerung II*; German Federal Supreme Court (2004) GRUR, 860, 864 – *Internetversteigerung I*, in-depth Haedicke, GRUR 1999, 397.
- 33 Jan Bernd Nordemann, in: Fromm/Nordemann, Urheberrecht [German Copyright Law], 10th ed. 2008, Sec. 97 note 158.
- 34 German Federal Supreme Court (1999) GRUR, 418, 420 – *Möbelklassiker*; German Federal Supreme Court (1984) GRUR, 54, 55 – *Kopierläden*.
- 35 German Federal Supreme Court (2008) GRUR, 1097 notes 19 et seq. – *Namensklau im Internet*.
- 36 German Federal Supreme Court (2008) GRUR, 1097 notes 19 – *Namensklau im Internet*; regarding Sec. 5 TDG earlier version German Federal Supreme Court (2004) GRUR, 74, 75 – *rassistische Hetze*.
- 37 German Federal Supreme Court (2008) GRUR, 1097 notes 19 et seq. – *Namensklau im Internet*; Jan Bernd Nordemann, in: Fromm/Nordemann, Urheberrecht [German Copyright Law], 10th ed. 2008, Sec. 97 note 162.
- 38 German Federal Supreme Court (2007) GRUR, 724, 726 note 13 – *Meinungsforum*; German Federal Supreme Court (2007) GRUR, 890, 894 note 40 – *Jugendgefährdende Medien bei eBay*; Jan Bernd Nordemann, in: Fromm/Nordemann, Urheberrecht [German Copyright Law], 10th ed. 2008, Sec. 97 note 158.
- 39 Directive 2001/29/EC of May 22, 2001.
- 40 See Reinbothe, (2001) GRUR Int., 733, 743; Spindler, (2002) GRUR, 105, 119.
- 41 German Federal Supreme Court (2007) GRUR, 708, 711 note 36 – *Internetversteigerung II*.
- 42 European Commission, Analysis of the application of the Directive 2004/48/EC, of the European Parliament and the Council of 29 April 2004 on the enforcement of intellectual property rights in the Member States, SEC(2010) 1589 final, p. 16 and 17 (December 22, 2010).
- 43 See IV.
- 44 German Federal Supreme Court (2009) GRUR, 841, 843 notes 19 et seq. – *Cybersky*; concerning trademark law German Federal Supreme Court (2008) GRUR, 702, 706 notes 50 et seq. – *Internetversteigerung III* and recently German Federal Supreme Court of 22 July 2010, File No. I ZR 139/08 notes 38 et seq..
- 45 E.g. Gabriel/Albrecht, (2010) ZUM, 392; Breyer, (2009) MMR, 14; Wilmer, (2008) NJW, 1845; Lehment, (2005) GRUR, 210, 213;

- Sobola/Kohl, (2005) CR, 443, 449; Berger/Janal (2004) CR, 917, 922; Leible/Sosnitza, (2004) NJW, 3225, 3226; Wild in Schricker/Loewenheim, Urheberrecht [German Copyright Law], 4th ed. 2010, Sec. 97 Rn. 93. In English language: Rösler (2006) IIC 771.
- 46 German Federal Supreme Court (2008) GRUR, 702, 703 et seq. note 19 – *Internetversteigerung III*; Court of Appeals (OLG) Köln (2008) GRUR-RR, 35, 37 – *Rapidshare*.
- 47 Loschelder/Dörre (2010) WRP, 822, 824; Köhler, in: Köhler/Bornkamm, Gesetz gegen den unlauteren Wettbewerb [German Unfair Competition Law], 28th ed. 2010, Sec. 8 UWG note 2.5b; also see German Federal Supreme Court (2007) GRUR, 708 note 44 – *Internet-Versteigerung II*, where the risk of first offence is deduced from the duties of care (and not the other way around).
- 48 Concerning trademark law German Federal Supreme Court (2008) GRUR, 702, 706 note 51 – *Internetversteigerung III*; German Federal Supreme Court (2007) GRUR, 708, 712 note 45 – *Internetversteigerung II*; see for further – also criticising references – below fn. 62.
- 49 See e.g. Court of Appeals (OLG) Dusseldorf (2010) ZUM, 600 – *Rapidshare* with comment by Jan Bernd Nordemann (2010) ZUM, 604.
- 50 Court of Appeals (OLG) Hamburg (2008) ZUM-RD, 527, 537. – *Rapidshare I*; Court of Appeals (OLG) Hamburg (2010) MMR, 51, 54 – *Rapidshare II*.
- 51 Court of Appeals (OLG) Hamburg (2009) ZUM-RD, 246, 248 – *Usenet I*; Court of Appeals (OLG) Hamburg (2009) ZUM-RD, 439, 441 – *Usenet II*.
- 52 See German Federal Supreme Court (2004) GRUR, 860, 864 – *Internet-Versteigerung I*.
- 53 District Court (LG) Berlin decision of 1 September 2009, file No. 16 O 293/08, p. 6 et seq., unpublished.
- 54 German Federal Supreme Court (2010) GRUR, 628 note 39 – *Vorschaubilder*.
- 55 District Court (LG) Köln (2010) ZUM-RD, 90, 93 on unlawfulness in General Personality Law.
- 56 German Federal Supreme Court (2001) GRUR, 1038, 1040 – *ambiente.de*.
- 57 German Federal Supreme Court (2007) GRUR, 724 note 3 – *Meinungsforum*; see the discussion on the justification of a statement – this should rule out a “clear” case.
- 58 District Court (LG) Köln (2010) ZUM-RD, 90, 93 on General Personality Law.
- 59 German Federal Supreme Court (2010) GRUR, 628 note 39 – *Vorschaubilder*.
- 60 Also see Leistner (2010) GRUR addendum, 1, 32 fn. 341.
- 61 Jan Bernd Nordemann, in: Fromm/Nordemann, Urheberrecht [German Copyright Law], 10th ed. 2008, Sec. 97 note 159; also see Court of Appeals (OLG) Hamburg (2009) ZUM, 642, 647 – *Gitarist im Nebel*.
- 62 On trademark law German Federal Supreme Court (2008) GRUR, 702, 706 note 51 – *Internetversteigerung III*; German Federal Supreme Court (2007) GRUR, 708, 712 note 45 – *Internetversteigerung II*; other opinion Breyer, (2009) MMR, 14, 15, who states that all preventive duties of care of providers are not compatible with Sec. 7, Par. 2, sentence 1 German Telemedia Act (TMG).
- 63 Breyer, (2009) MMR, 14, 15, who states that all preventive duties of care of providers are not compatible with Art. 15 eCommerce Directive; further Sobola/Kohl, (2005) CR, 443, 449; Berger/Janal (2004) CR, 917, 922; Wild, in: Schricker/Loewenheim, Urheberrecht [German Copyright Law], 4th ed. 2010, Sec. 97 note 93. In favour of the case law of German Federal Supreme Court: Leible/Sosnitza, (2004) NJW, 3225, 3226 (but requesting reference to ECJ due to Art. 267 TFEU); Lehment (2005) GRUR, 210, 213; Jan Bernd Nordemann, in: Fromm/Nordemann, Urheberrecht [German Copyright Law], 10th ed. 2008, Sec. 97 note 159.
- 64 See Decision of 22 May 2009, Case No. HC07C01978, note 326.
- 65 On trademark law German Federal Supreme Court (2007) GRUR, 708, 712 note 47 – *Internetversteigerung II*.
- 66 German Federal Supreme Court (2007) GRUR, 890, 895 note 44 – *Jugendgefährdende Medien bei eBay*.
- 67 Court of Appeals (OLG) Hamburg (2008) ZUM-RD, 527, 543 – *Rapidshare I*; Court of Appeals (OLG) Hamburg (2010) MMR, 51, 54 – *Rapidshare II*.
- 68 On increased duties of care, when the hosting service is especially susceptible to infringements: Leistner (2010) GRUR addendum, 1, 32.
- 69 Court of Appeals (OLG) Hamburg (2009) NJOZ, 2835, 2840 – *Long Island Ice Tea*.
- 70 Court of Appeals (OLG) Zweibrücken (2009) MMR, 541, 542.
- 71 See German Federal Supreme Court (2009) GRUR, 841, 843 notes 21 et seq. – *Cybersky*; Wilmer, (2008) NJW 1845, 1849.
- 72 See Wilmer, (2008) NJW, 1845, 1849.
- 73 District Court (LG) München I, decision of 24 August 2009, File No. 21 O 1592509, unpublished.
- 74 District Court (LG) Köln (2010) ZUM-RD, 90, 93, though this case concerned General Personality Law, which is not entirely comparable with Copyright Law.
- 75 See German Federal Supreme Court, Decision of 22 July 2010, file No. I ZR 139/08, note 48 – *Kinderhochstuehle im Internet*.
- 76 See German Federal Supreme Court, Decision of 22 July 2010, file No. I ZR 139/08, note 48 – *Kinderhochstuehle im Internet*.
- 77 Jan Bernd Nordemann/Dustmann (2004) CR, 380, 381; further Dustmann, in: Fromm/Nordemann, Urheberrecht [German Copyright Law], 10th ed. 2008, Sec. 19a note 30; Dreier in: Dreier/Schulze, Urheberrechtsgesetz [German Copyright Law], 3rd ed. 2008, Sec. 19a note 4.
- 78 German Federal Supreme Court (2010) GRUR, 628 note 39 – *Vorschaubilder*.
- 79 Schulze in: Dreier/Schulze, Urheberrechtsgesetz [German Copyright Law], 3rd ed. 2008, Sec. 10 UrhG notes 36 et seq.; A. Nordemann, in: Fromm/Nordemann, Urheberrecht [German Copyright Law], 10th ed. 2008, Sec. 10 UrhG notes 55 et seq.; Thum, in: Wandtke/Bullinger, Urheberrechtsgesetz [German Copyright Law], 3rd ed. 2008, Sec. 10 UrhG notes 50 et seq..
- 80 Court of Appeals (OLG) Hamburg (2008) ZUM-RD, 527, 537 et seq. – *Rapidshare I*; Court of Appeals (OLG) Hamburg (2010) MMR, 51, 53 – *Rapidshare II*; Jan Bernd Nordemann, in: Fromm/Nordemann, Urheberrecht [German Copyright Law], 10th ed. 2008, Sec. 97 note 162.
- 81 Leistner, (2010) GRUR addendum, 1, 32; Loschelder/Dörre, (2010) WRP, 822, 824 et seq.
- 82 But no general subsidiarity, see above V. 4.
- 83 Gabriel/Albrecht, (2010) ZUM, 392, 394; Wilmer, (2008) NJW, 1845, 1849; also see German Federal Supreme Court, (2009) MMR, 625, 626 et seq. – *Cybersky*; Court of Appeals (OLG) Hamburg (2009) ZUM-RD, 246 – *Usenet I*; Court of Appeals (OLG) Hamburg (2009) ZUM-RD, 439 – *Usenet II*.
- 84 Wilmer, (2008) NJW, 1845, 1849.
- 85 German Federal Supreme Court (2004) MMR, 668, 671 – *Internetversteigerung I*; Gabriel/Albrecht, 2010 (ZUM), 392, 394.
- 86 Wilmer, (2008) NJW, 1845, 1849.
- 87 German Federal Supreme Court (2007) GRUR, 890 note 40 – *Jugendgefährdende Medien bei eBay*.
- 88 Jan Bernd Nordemann (2010) ZUM, 604, 605, contrary to Court of Appeals (OLG) Dusseldorf (2010) ZUM, 600 – *Rapidshare*.
- 89 See German Federal Supreme Court (1960) GRUR, 340, 343 – *Mag-nettonbandgeräte*; German Federal Supreme Court (1984) GRUR, 54,

- 55 – *Kopierläden*; The Federal Constitutional Court (BVerfG) concludes that there is a duty of care to give notice to users, to refrain from infringements, (1997) GRUR, 124, 125 – *Kopierläden II*; Jan Bernd Nordemann, in: Fromm/Nordemann, Urheberrecht [German Copyright Law], 10th ed. 2008, Sec. 97 note 173; Spindler, (2006) MMR, 403, 404; Leistner, (2006) GRUR, 801, 810.
- 90 *Court of Appeals (OLG) Hamburg* (2010) MMR, 51, 54 – *Rapidshare II*, *Court of Appeals (OLG) Hamburg* (2008) MMR, 823, 825 et seq. – *Rapidshare I*.
- 91 See above VII. 1.a).
- 92 *District Court (LG) Dusseldorf* (2008) ZUM, 338, 341; also see Breyer, (2009) MMR, 14, 17, who concludes that the lack of efficiency of hash filters excludes them from measures applicable due to duties of care.
- 93 Jan Bernd Nordemann, (2010) ZUM, 604, 605; other opinion Breyer, (2009) MMR, 14, 18.
- 94 See *German Federal Supreme Court*, Decision of 22 July 2010, file No. I ZR 139/08, note 43 – *Kinderhochstuehle im Internet*.
- 95 *Court of Appeals (OLG) Hamburg* (2010) MMR, 51, note 82 in juris edition – *Rapidshare II*; *Court of Appeals (OLG) Hamburg* (2008) MMR, 823, 826 – *Rapidshare I*; also see Gabriel/Albrecht, (2010) ZUM, 392, 396; Wilmer, (2008) NJW, 1845, 1847.
- 96 *Court of Appeals (OLG) Dusseldorf* (2010) ZUM, 600, 603 – *Rapidshare*.
- 97 Other opinion *Court of Appeals (OLG) Dusseldorf* (2010) ZUM, 600, 603; also other opinion Breyer, (2009) MMR, 14, 17, who declines such duties of care due to the great effort and threat to freedom of speech.
- 98 *District Court (LG) Berlin* Decision of 10 June 2008, File No. 15 O 144/08, p. 11; Jan Bernd Nordemann, in: Fromm/Nordemann, Urheberrecht [German Copyright Law], 10th ed. 2008, Sec. 97 note 163.
- 99 Jan Bernd Nordemann, in: Fromm/Nordemann, Urheberrecht [German Copyright Law], 10th ed. 2008, Sec. 97 note 163.
- 100 *German Federal Supreme Court*, Decision of 22 July 2010, file No. I ZR 139/08, note 41 – *Kinderhochstuehle im Internet*.
- 101 See above II. 3.
- 102 *Court of Appeals (OLG) Hamburg* (2010) ZUM-RD, 527, 541 et seq. – *Rapidshare I*; *Court of Appeals (OLG) Hamburg* (2010) MMR, 51, 54 – *Rapidshare II*; Jan Bernd Nordemann, (2010) ZUM, 604, 605; Wilmer, (2008) NJW, 1845, 1851, who presumably sees this duty of care under the condition of earlier infringements, see (2008) NJW, 1845, 1848; other opinion *Court of Appeals (OLG) Dusseldorf* (2010) ZUM, 600 – *Rapidshare*; Breyer, (2009) MMR, 14, 17.
- 103 *Court of Appeals (OLG) Hamburg* (2008) ZUM-RD, 527, 542. – *Rapidshare I*; *Court of Appeals (OLG) Hamburg* (2010) MMR, 51, 54 – *Rapidshare II*.
- 104 *Court of Appeals (OLG) Hamburg* (2009) MMR, 631, 635 – *Usenet I*; also see *German Federal Supreme Court* (2008) GRUR, 1097 – *Namensklaue im Internet*.
- 105 *German Federal Supreme Court* (2007) GRUR, 708 note 47 – *Internet-Versteigerung II*; also see *Court of Appeals Berlin (KG)* (2010) GRUR-RR, 7, 8; Jan Bernd Nordemann, in: Fromm/Nordemann, Urheberrecht [German Copyright Law], 10th ed. 2008, Sec. 97 note 162.
- 106 *Court of Appeals (OLG) Köln* (2008) GRUR-RR, 35, 37 – *Rapidshare*; expecting less of the host provider *Court of Appeals (OLG) Dusseldorf* (2008) ZUM, 866, 868 – *eDonkey-Server*, according to which it is unreasonable for a host provider to control 300 hits of 17 filtered titles manually.
- 107 See *German Federal Supreme Court*, Decision of 22 July 2010, file No. I ZR 139/08, note 41 – *Kinderhochstuehle im Internet*.
- 108 *Court of Appeals (OLG) Dusseldorf*, (2010) ZUM, 600, 603 – *Rapidshare*.
- 109 *Court of Appeals (OLG) Hamburg* (2010) MMR, 51, notes 91 et seq. in juris edition – *Rapidshare II*; also see *Court of Appeals (OLG) Hamburg* (2008) ZUM-RD, 527, 543 – *Rapidshare I*; against the possibility of identification via IP addresses *Court of Appeals (OLG) Dusseldorf* (2010) ZUM, 600, 603 – *Rapidshare*.
- 110 *Court of Appeals (OLG) Hamburg* (2010) MMR, 51 note 109 in juris edition – *Rapidshare II*; explicitly against that *Court of Appeals (OLG) Dusseldorf* (2010) ZUM, 600, 603 – *Rapidshare*.
- 111 Jan Bernd Nordemann, (2010) ZUM, 604, 605.
- 112 *German Federal Supreme Court* (2007) GRUR, 890, 894 note 39 – *Jugendgefährdende Medien bei eBay*.
- 113 *German Federal Supreme Court* (2007) GRUR, 890, 895 note 49 – *Jugendgefährdende Medien bei eBay*.
- 114 *Court of Appeals (OLG) Dusseldorf* (2010) ZUM, 600, 601 – *Rapidshare*. It is doubtful whether *Rapidshare* can really be regarded as “neutral” and not infringement-provoking, see *District Court (LG) München I* Decision of 24 August 2009, File No. 21 O 15925/09, quoted by Jan Bernd Nordemann (2010) ZUM, 604, 605.
- 115 *Court of Appeals (OLG) Hamburg* (2008) ZUM-RD, 527, 549 – *Rapidshare I*.
- 116 Other opinion Wilmer, (2009) NJW, 1845, 1850.
- 117 Leistner, (2010) GRUR addendum, 1, 32.
- 118 See above II.