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by Axel Metzger

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Editorial: ACTA Has Changed the European IP Climate

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The rejection of the Anti-Counterfeiting Trade Agreement (“ACTA”) on July 4, 2012, by a vote of 478 to 39 of the European Parliament, was a remarkable historical event. Rejections of international trade agreements negotiated by the European Commission are rare incidences. In February 2010, the first rejection case under the new rules of the Lisbon Treaty concerned the EU-US SWIFT-Agreement on the processing and transfer of financial messaging data from the European Union to the United States – also an information society issue. Now ACTA has turned out to be the second occasion for the European Parliament to flex its legal muscles.

The legal text, as such, is a highly technical instrument. ACTA had been designed to foster intellectual property enforcement on an international scale and to go beyond TRIPS. Although less evident, ACTA turned out to be stricter than the European *acquis communautaire* on a number of specific issues. These *acquis-plus* effects provoked critical remarks from intellectual property scholars from different European jurisdictions, which have been published in JIPITEC.¹ However, the reason to reject the Agreement was the public outcry of Internet users, mainly in East and Central Europe, who organized mass demonstrations and raised their voices against the (initially) intransparent negotiations and some harsh copyright enforcement instruments found in the leaked drafts of the Agreement.

The Commission’s concessions came too late and too hesitantly to finally save the Agreement. ACTA had already become the symbolic battleground for the political project of digital natives, i.e. the generation of young people born during or after the introduction of the Internet who became accustomed to digital technology from an early age. Ultimately, it turned out to be an unwise strategy for the Commission and pro-ACTA activists to postmark the critics as insufficiently informed teenagers who could not distinguish a draft from a final document. Rather, this arrogance of power prepared the ground for the emergence of a new social movement. Indeed, the main concerns with regard to copyright enforcement on the Internet had been allayed in the final text. However, ACTA still represented a one-sided intellectual property policy, which was vigilant to the needs of rightholders and industries, but too easily set aside the fundamental rights of users, such as the right to information and education, the freedom of expression, the right to accessible health care, the right to privacy and protection of personal data, and the right to due process.

In the years to come, the general political claim for a balanced approach to intellectual property, which was hidden behind all ACTA criticism, could provide the basis for an enduring if not permanent role of IP critical fundamentalists. Whether the European and national Pirate Parties have already seen their peak or whether the movement will play a permanent role in European IP policy largely depends on the ability of the European Commission to internalize the legitimate interests of users when undergoing its rulesetting activities. At the end, the most dangerous scenario for rightholders would be an ongoing erosion of the acceptance of intellectual property rights. Against this background, the European Parliament has made a wise decision.

Axel METZGER

1 See <http://www.jipitec.eu/issues/jipitec-2-1-2011/2965>.

Die Auswirkungen der E-Commerce-Regelungen der EU-Richtlinie über Verbraucherrechte auf das BGB

Dr. Kai Purnhagen, LL.M. (Wisconsin)

Akademischer Rat aZ am Lehrstuhl für Bürgerliches Recht, Europäisches und Internationales Wirtschaftsrecht (Prof. Dr. Thomas Ackermann) an der Ludwig-Maximilians-Universität in München¹

Abstract: This article investigates the effect of the Consumer Rights Directive 2011/83/EU on the German BGB. Special emphasis is placed on e-commerce-relevant legislation. The article is based on the argument that European law requires the German legislator, when it transposes Directives intended to create rights for individuals into the BGB, to do so in

best conformity with the BGB's current system. It therefore browses through the BGB's relevant norms and investigates how such a transposition may be achieved. It will conclude that such a transposition is possible, but that the German legislator should devote more time to investigate how such transposition shall be acquired.

Keywords: Consumer Rights Directive; E-Commerce; BGB

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A. Einleitung

1 Mit der Veröffentlichung der Richtlinie 2011/83/EU über die Rechte der Verbraucher² (im Folgenden: RRV) ist ein großes und viel diskutiertes Projekt im EU-Privatrecht zu Ende gebracht. Die RRV führt zwei der acht Richtlinien des Verbrauchersacquis zusammen, darunter auch die hier im Wesentlichen maßgebliche Richtlinie 97/7/EG über den Verbraucherschutz bei Vertragsabschlüssen im Fernabsatz (im Folgenden: FARL).³ Damit ist die RRV ein Teil der von der Kommission groß angelegten „Better Regulation“-Strategie, die mittlerweile unter dem Namen „Smart Regulation“ weitergeführt wird.⁴ Diese Strategie hat vor allem zum

Ziel, den unionsrechtlichen Besitzstand zu systematisieren und zu vereinfachen.⁵ Wie eine solche Systematisierung und Vereinfachung im Rahmen der RRV auszusehen hat, thematisierten seit dem ersten Kommissionsvorschlag KOM (2008) 614 zur RRV zahlreiche Beiträge und Tagungen.⁶ Dass Systematisierung und Vereinfachung des Vertragsrechts niemals ein Selbstzweck ist⁷, wird insbesondere am Beispiel der Vollharmonisierung im Rahmen der hier zu untersuchenden RRV deutlich. Auch wenn die Systematisierung und Vereinfachung vordergründiges Ziel sein mag, so wird mit der Vollharmonisierung faktisch ein auf europäischer Ebene regulierter Binnenmarkt geschaffen, der sich nationalem Einfluss weitgehend entzieht.⁸ In ihrer ursprünglichen Konzeption hätte die RRV unter dem Deckmantel der

Vereinfachung des unionsrechtlichen Besitzstandes weite Bereiche des nationalen Vertragsrechts exklusiv auf die unionsrechtliche Ebene „gezogen“, was nicht nur eine Vereinfachung, sondern eine erhebliche Ausweitung des unionsrechtlichen Besitzstandes zur Folge gehabt hätte. Dass ein solcher systematischer Harmonisierungsansatz nicht ohne Folgen für das nationale Recht bleibt, liegt auf der Hand.⁹

- 2 Gegenstand dieses Beitrages ist es jedoch nicht, die Regelungen der RRV in extenso zu analysieren, insbesondere wird hier keine Stellung bezogen zur hinreichend diskutierten Frage der Reichweite, Notwendigkeit und Sinnhaftigkeit des Harmonisierungsgrades der RRV.¹⁰ Da die EU mit der Verabschiedung der RRV nunmehr rechtliche Fakten in dieser Hinsicht zugunsten einer „Halbharmonisierung“¹¹ oder – terminologisch treffender – einer „Gemischten Harmonisierung“¹² geschaffen hat, wird sich die rechtswissenschaftliche Diskussion notwendiger Weise verlagern.¹³
- 3 Offen sind nach wie vor Fragen bezüglich der Einbettung der RRV in das Recht auf europäischer Ebene.¹⁴ Daneben rückt mit der Verabschiedung der RRV eine weitere Schicht des EU-Mehrebenensystems in den Mittelpunkt der rechtswissenschaftlichen Analyse. Die nun verbindlich werdende RRV ist europarechtsfest und systemkonform in mitgliedstaatliches Recht umzusetzen.¹⁵ Wünschenswert ist gerade in Deutschland eine möglichst breite Diskussion unter Einschluss der Wissenschaft im Vorfeld der Umsetzung. Dies zeigt die Erfahrung mit der Umsetzung des Verbraucheracquis in der Vergangenheit.¹⁶ Im Hinblick auf die Europarechtsfestigkeit wird die Notwendigkeit einer breiten Debatte durch zahlreiche Urteile des EuGH offenkundig, in denen die deutsche Umsetzung des Verbraucheracquis zu Recht gerügt worden ist.¹⁷ Hinsichtlich der systemkonformen Umsetzung wird die Notwendigkeit einer wissenschaftlichen Diskussion vor allem durch die vielfach diskutierte unglückliche systematische Verortung einzelner Umsetzungsnormen wie beispielsweise der §§ 13, 14 BGB¹⁸, sowie des § 241a BGB¹⁹ oder die Koppelung von Widerrufs- und Rücktrittsrecht deutlich.²⁰ Um solche Diskussionen zu vermeiden, sollte der deutsche Gesetzgeber sich und der Wissenschaft die notwendige Zeit geben, Lösungsvorschläge zu unterbreiten, zu diskutieren und mögliche Probleme zu antizipieren um seine Entscheidungen später auch erklären zu können.²¹
- 4 Dies ist nicht nur der fromme Wunsch besorgter Juristen²², sondern sowohl ein Erfordernis des nationalen Rechts²³ und des Europarechts.²⁴ Mitgliedstaaten müssen durch die Umsetzung der Richtlinie eine vollständige Anwendung der Richtlinie in hinreichend klarer und bestimmter Weise gewährleisten.²⁵ Dabei sind diejenigen nationalen Umsetzungsformen und Mittel zu wählen, die die praktische Wirksamkeit der Richtlinie am besten gewährleisten.²⁶ Hat

sich der deutsche Gesetzgeber zur Umsetzung der Verbraucherrechtsvorschriften im BGB entschieden, so muss sich die Gewährleistung dieser praktischen Wirksamkeit der Umsetzung auch am BGB messen lassen. In einem System wie dem deutschen Bürgerlichen Recht, dessen Qualität und Effektivität in hohem Maße in der Kohärenz des Normengeflechts und der Stimmigkeit des inhärenten Systems begründet liegt, kann dies nur bedeuten, die Richtlinie auch in einer dem System des BGB entsprechenden Weise umzusetzen.²⁷ Damit sind Europarechtsfestigkeit und Systemkonformität im EU-Privatrecht keine Gegensätze, sondern im Regelfall kompatibel. Um eine für das nationale Recht möglichst passgenaue Umsetzung gewährleisten zu können, gibt der europäische Gesetzgeber dem Mitgliedstaat eine Umsetzungsfrist an die Hand, in der die Umsetzungsmöglichkeiten ausgelotet werden sollen. Wird die Richtlinie jedoch ohne hinreichende Diskussion in Wissenschaft und Praxis zu früh umgesetzt, da der nationale Gesetzgeber sich nicht genug Zeit zur Umsetzungsdiskussion gegeben hat, so läuft der Mitgliedstaat Gefahr, die falschen Umsetzungsmittel zu wählen. Damit steht nach wie vor die Frage im Raum, ob die schnellste Umsetzung auch die effektivste ist.²⁸

- 5 Der Gesetzesentwurf der Bundesregierung zum Entwurf eines Gesetzes zum besseren Schutz der Verbraucherinnen und Verbraucher vor Kostenfallen im elektronischen Geschäftsverkehr (hiernach: Gesetzesentwurf) hatte eine solche besonders eilige Umsetzung forciert.²⁹ Er wurde, obschon er einige Regelungen der RRV betrifft, bereits ins parlamentarische Verfahren eingebracht, bevor die RRV überhaupt veröffentlicht worden ist. Der Wissenschaft wird damit keine Möglichkeit eingeräumt, eine sinnvolle Umsetzung der RRV zu diskutieren. Wie noch zu zeigen sein wird, ist der Vorschlag im Gesetzesentwurf mit dem Gebot systemkonformer Umsetzung nur schwer vereinbar.
- 6 In einzelnen Gebieten des deutschen Privatrechts wird die Diskussion um die Auswirkung der RRV in der Form des ersten Kommissionsvorschlags bereits geführt.³⁰ Diese Analysen betreffen allgemeine Fragen, Möglichkeiten einer konkreten Umsetzung und deren Probleme sind bislang wenig untersucht worden. Da sich die RRV auf viele spezielle Rechtsbereiche des deutschen Rechts mit jeweils eigenen dogmatischen Besonderheiten wie beispielsweise die Fernabsatzvorschriften, den Verbraucherbegriff, sowie die Vorschriften über Haustürgeschäfte auswirken wird, empfiehlt es sich, die Diskussion auch sektoral innerhalb der entsprechenden Rechtsbereiche zu führen. Dieser Beitrag setzt den Schwerpunkt auf den Bereich der Auswirkungen der E-Commerce-Regelungen der RRV auf das BGB, wobei notwendiger Weise auch auf einige allgemeine Vorschriften wie beispielsweise den Verbraucher- und Unternehmerbegriff eingegangen werden wird.

B. Die Auswirkungen der RRV auf Fernabsatzverträge im BGB

- 7 Im Folgenden werden die Umsetzungsmöglichkeiten der RRV anhand der Vorschriften des BGB analysiert. Damit wird dem Ansatz gefolgt werden, die Umsetzung möglichst systemkonform durchzuführen. Daraus ergibt sich eine Einteilung der Auswirkungen der RRV auf Vorschriften des Ersten Buches des BGB (Allgemeiner Teil) (I.), sowie auf das 2. Buch (Recht der Schuldverhältnisse) (II.).

I. Allgemeiner Teil des BGB

1. Verbraucherbegriff des § 13 BGB

- 8 Der Fernabsatzvertrag setzt gem. § 312b Abs. 1 S. 1 BGB das Vorliegen eines Verbrauchergeschäfts voraus. Damit ist für die Anwendung des speziellen Widerrufs- und Rückgaberechts gem. § 312d BGB, sowie der speziellen Informationsvorschriften des § 312c BGB und der Sonderregelung über die Wertersatzverpflichtung in § 312e BGB Voraussetzung, dass der Käufer ein Verbraucher gem. § 13 BGB, der Verkäufer ein Unternehmer gem. § 14 BGB ist. Dies gilt gleichfalls für die Vorschrift über Finanzdienstleistungen in § 312f BGB. Der Verbraucherbegriff eröffnet damit gemeinsam mit dem Unternehmerbegriff den Anwendungsbereich der speziellen Vorschriften über den Fernabsatz. Dem Begriff des Verbrauchers kommt – zusammen mit dem Unternehmerbegriff – damit eine Schlüsselfunktion im Fernabsatzrecht zu.³¹ Hiervon zu trennen sind die in § 312g BGB bestimmten Pflichten im elektronischen Geschäftsverkehr, sowie die Vorschrift des § 312i BGB über abweichende Vereinbarungen, die lediglich an die Unternehmereigenschaft des Verkäufers anknüpfen. Im Folgenden werden daher die fernabsatzspezifischen Änderungen des Verbraucherbegriffes analysiert, auf eine umfassende Untersuchung der Auswirkungen der RRV auf den Verbraucherbegriff wird verzichtet.

a.) Der Verbraucherbegriff in der RRV sowie Harmonisierungsgrad

- 9 Erwägungsgrund 17 RRV geht auf die bislang im Fernabsatzrecht umstrittene Anwendung des Verbraucherbegriffs auf Verträge mit „gemischtem Zweck“ (mixed-purpose contracts)³² ein: Demnach ist Verbraucherhandeln bei einem Vertrag, der „teilweise innerhalb und teilweise außerhalb des Gewerbes der Person abgeschlossen“ wurde immer dann anzunehmen, wenn der gewerbliche Zweck „im Gesamtzusammenhang des Geschäfts nicht vorherrschend ist“. Die negative Formulierung macht

deutlich, dass in Zweifelsfällen bei Verträgen mit gemischtem Zweck Verbraucherhandeln anzunehmen ist.³³ Der EU Gesetzgeber hat sich an der Verbraucherdefinition des I-I:105 (1) DCFR orientiert, hat jedoch die Regelung I-I:105 (3) DCFR über den gemischten Zweck nicht übernommen.

- 10 Im Gegensatz zum Begriff des Gewerbetreibenden in Art. 2 Abs. 2 RRV beinhaltet Art. 2 Abs. 1 RRV keine Regelung über die Zurechnung des Handelns von Dritten. Dabei bleibt leider die Zurechnung der Tätigkeit eines vertragsfremden Dritten auf den Verbraucher als Hintermann unklar.³⁴ Im Fernabsatzrecht wird diese Regelung vor allem bei professionellen Bietagenturen relevant, die für Verbraucher bestimmte Artikel auf einer Plattform anbieten. Da es sich hierbei in aller Regel um den Verkauf durch sogenannte Power-Seller oder vergleichbare Konstellationen handelt, wird zu deren Einordnung auf die entsprechenden Ausführungen im Rahmen des Unternehmensbegriffs verwiesen.
- 11 Gem. Erwägungsgrund 13 RRV ist es den Mitgliedstaaten gestattet, „den Geltungsbereich dieser Richtlinie auf juristische oder natürliche Personen auszudehnen, die keine „Verbraucher“ im Sinne dieser Richtlinie sind“. Damit unterliegt der Verbraucherbegriff minimalharmonisierenden Regelungen. Eine mitgliedstaatliche Ausdehnung des Verbraucherbegriffs auf Personen, die nicht unter Art. 2 Abs. 2 RRV fallen, ist demnach erlaubt.

b.) Auswirkungen auf § 13 BGB

- 12 Auswirkungen auf § 13 BGB ergeben sich durch die Regelungen der RRV nur in sehr eingeschränktem Ausmaß. Im Rahmen der Fernabsatzvorschriften können sich vor allem die Änderungen in Hinsicht auf Verträge mit „gemischtem Zweck“ (mixed-purpose contracts) auswirken. Solche Verträge werden in Deutschland nach der überwiegenden Ansicht von der Unterscheidung von Haupt- und Nebenzweck oder der Feststellung eines überwiegenden Zweckes abhängig gemacht.³⁵ Kann ein solcher Zweck nicht ermittelt werden und handelt eine natürliche Person, so ist im Zweifel Verbraucherhandeln anzunehmen.³⁶ Handelt hingegen ein Kaufmann, so ist nach BGH-Rechtsprechung zumindest beim Verkäufer gem. § 344 HGB grundsätzlich Unternehmerhandeln anzunehmen.³⁷ Diese Rechtsprechung steht bei Verträgen mit gemischtem Zweck nicht mit Erwägungsgrund 17 der RRV im Einklang. Die negative Formulierung des Erwägungsgrundes 17 der RRV statuiert eine Zweifelsregelung zugunsten von Verbraucherhandeln. Praktische Auswirkungen kann diese Regelung im Fernabsatz auch auf die Einordnung von Power-Sellern als Unternehmer haben.

c.) Ergebnis

- 13 Die Regelungen über den Verbraucherbegriff in der RRV führen nur zu marginalen Änderungen beim Verbraucherbegriff im Fernabsatzrecht. Die Anwendung der Zweifelsregelung des § 344 HGB ist im Fall von Verträgen mit gemischtem Zweck nicht möglich.

2. Unternehmerbegriff, § 14 BGB

- 14 Wie bereits dargestellt wurde, eröffnet der Unternehmerbegriff – zusammen mit dem Verbraucherbegriff – den Anwendungsbereich der Vorschriften über den Fernabsatz. Dies trifft im Gegensatz zu den §§ 312b Abs. 1 S. 1, 312d, 312c, 312h und 312f BGB auch auf die §§ 312g und 312i BGB zu, die lediglich ein Unternehmerhandeln des Verkäufers, nicht jedoch ein Verbraucherhandeln des Käufers erfordern. Dem Unternehmerbegriff kommt damit im Fernabsatzrecht eine noch größere Schlüsselfunktion zu als dem Verbraucherbegriff.

a.) Der Unternehmerbegriff in der RRV sowie Harmonisierungsgrad

- 15 Der Begriff des „Unternehmers“ wird von der RRV nicht verwendet. Stattdessen bedient sie sich in Art. 2 Abs. 2 RRV des Begriffs des „Gewerbetreibenden“. Der „Gewerbetreibende“ löst im Fernabsatzrecht den Begriff des „Lieferers“ in Art. 2 Nr. 3 FARL ab. Damit vereinheitlicht er die terminologisch teilweise unterschiedlichen Bezeichnungen in den zwei Richtlinien zugunsten der in der Richtlinie 85/577/EWG betreffend den Verbraucherschutz im Falle von außerhalb von Geschäftsräumen geschlossenen Verträgen (hiernach „Haustürwiderrufsrichtlinie“) gebrauchten Terminologie. Prima vista sind die Unterschiede zwischen dem Begriff des „Gewerbetreibenden“ in Art. 2 Abs. 2 RRV und dem „Lieferer“ in Art. 2 Nr. 3 FARL erheblich, tatsächlich handelt es sich vielfach lediglich um Klarstellungen. Die zahlreichen Änderungen und Satzeinschübe haben Art. 2 Abs. 2 RRV jedoch schwer leserlich gemacht, sodass sich der Inhalt der Norm erst nach mehrmaligem Studium und unter Einschluss der Erwägungsgründe erschließt.
- 16 Im E-Commerce wirken sich insbesondere folgende Änderungen aus: Der Satz „die beim Abschluß von Verträgen im Sinne dieser Richtlinie“ des Art. 2 Nr. 3 FARL wird ersetzt durch „die in Bezug auf von dieser Richtlinie erfasste Verträge (...) zu den Zwecken handelt“. Damit wird der maßgebliche Zeitpunkt der Definition des Unternehmerhandels vom Abschluss des Vertrages auch auf den Zeitraum vorvertraglichen Handelns erweitert. Der EU-Gesetzgeber gleicht den Unternehmerbegriff mithin längst überfällig dem

Begriff des Fernabsatzvertrages an, der grundsätzlich auch vorvertragliches Handeln erfasst.³⁸

- 17 Darüber hinaus enthält Art. 2 Abs. 2 RRV zwei Regelungen über das Handeln von Dritten. Die erste Regel betrifft die Zurechnung des Handelns Dritter zur Bestimmung der Eigenschaft des Hintermannes als Gewerbetreibenden. Die zweite Regel betrifft die Frage, ob der Dritte selbst als Gewerbetreibender angesehen werden kann. Im ersten Fall ist nunmehr klargestellt, dass der Hintermann auch dann als Gewerbetreibender zu qualifizieren ist, wenn ein Dritter im Namen oder im Auftrag des Hintermannes handelt. Ob dieser Dritte nach außen als Verbraucher auftritt, ist unerheblich. Durch diese Regelung wird nun klargestellt, dass die vom EuGH im Urteil Crailsheimer Volksbank für das Haustürwiderrufsrecht gefundene Lösung³⁹ auch im Fernabsatzrecht Gültigkeit erlangt.⁴⁰ Darüber hinaus wird allerdings der Dritte selbst zum Unternehmer, wenn er im Namen oder im Auftrag des Gewerbetreibenden handelt. Diese zweite Regel ist Art. 2 S. 2 aE Haustürwiderrufsrichtlinie nachempfunden. Somit wird in Zukunft auch die diesbezügliche Rechtsprechung des EuGH zum Haustürwiderrufsrecht grundsätzlich auf das Fernabsatzrecht zu übertragen sein. Dem Dritten dürfen durch diese Regelungen jedoch keine rechtlichen Verpflichtungen erwachsen, da die Regelung dieses Bereiches gem. Erwägungsgrund 16 der RRV als Regelungen über die gesetzliche Vertretung Sache der Mitgliedstaaten ist.
- 18 Gem. Erwägungsgrund 13 der RRV ist es den Mitgliedstaaten gestattet, „den Geltungsbereich dieser Richtlinie auf juristische oder natürliche Personen auszudehnen, die keine ‚Verbraucher‘ im Sinne dieser Richtlinie sind“. Demnach unterliegt auch der Unternehmerbegriff minimalharmonisierenden Regelungen. Eine Ausdehnung des Unternehmerbegriffs auf Personen, die nicht unter Art. 2 Abs. 2 RRV fallen, ist demnach möglich.⁴¹

b.) Auswirkungen auf § 14 BGB

- 19 Der Begriff des „Gewerbetreibenden“ wird im deutschen Recht durch den des „Unternehmers“ in § 14 BGB umgesetzt.
- 20 § 14 BGB rekuriert für den Zeitpunkt der Definition des Unternehmerbegriffs auf den Zeitpunkt des „Abschlusses eines Rechtsgeschäfts“. Damit setzt § 14 BGB unter anderem Art. 2 Nr. 3 FARL um, der auf den Zeitpunkt des „Abschlusses eines Vertrages“ abstellt. „Rechtsgeschäft“ iS des § 14 BGB wäre demnach eigentlich im Lichte des § 311 Abs. 1 BGB zu verstehen, der den Vertrag für die Begründung eines Schuldverhältnisses durch Rechtsgeschäft voraussetzt. Gem. § 311 Abs. 2 BGB sind davon jedoch rechtsgeschäftsähnliche Schuldverhältnisse zu unterscheiden, die vor allem im vorvertraglichen Stadium anzusie-

deln sind.⁴² Genau jenes nach deutschem Verständnis „rechtsgeschäftsähnliche Handeln“, so wird nun durch die neue Definition der RRV klargestellt, ist jedoch seit jeher auch vom Unternehmerhandeln gem. § 14 BGB erfasst, obwohl dies eigentlich vom Wortlaut nicht gedeckt ist.⁴³ Sonst würde die Definition der §§ 13 und 14 BGB schon in der ersten Vorschrift § 241a Abs. 1 BGB, die auf die §§ 13 und 14 BGB verweist, keine Anwendung finden, da § 241a BGB gerade ein rechtsgeschäftliches Handeln ausschließt. Da „rechtsgeschäftliches“ und „rechtsgeschäftsähnliches“ Handeln gem. § 311 BGB voneinander zu trennende Begriffe sind, ist eine europarechtskonforme Auslegung des Begriffs „Rechtsgeschäft“ in § 14 BGB im Grunde nicht möglich. Die Neuformulierung der RRV gibt nun die Möglichkeit, diesem Missstand dadurch Abhilfe zu schaffen. Es sollte nicht mehr an das „Rechtsgeschäft“, sondern an die Gegebenheiten angeknüpft werden, die zum Abschluss eines „Vertrages“ führen. Es bietet sich daher an, die Formulierung der Richtlinie zu übernehmen und „bei Abschluss eines Rechtsgeschäfts“ durch „in Bezug auf den Abschluss von Verträgen“ zu ersetzen. In vergleichbarer Weise sollte die Anknüpfung an das „Rechtsgeschäft“ in § 13 BGB angepasst werden. Damit würde auch die Inkonsistenz beseitigt, die zwischen §§ 312b Abs. 2 und 13, 14 BGB besteht. § 312b Abs. 2 BGB erfasst ausdrücklich auch die Anbahnung eines Vertrages,⁴⁴ die §§ 13 und 14 BGB, die den Anwendungsbereich des § 312b Abs. 2 BGB eröffnen, stellen von ihrem Wortlaut her jedoch erst auf das Handeln im Zeitpunkt des Vertragsabschlusses ab.

- 21 Die Regelungen in Art. 2 Abs. 2 RRV schaffen darüber hinaus Klarheit bezüglich der Einordnung des Handelns Dritter. Eine solche Einordnung ist im deutschen Recht außerhalb des Haustürwiderrufrechts ungeklärt. Auch lässt der Wortlaut des § 14 BGB keinerlei Ansatzpunkt erkennen, wie das Handeln Dritter einzuordnen ist. Demnach ist in dieser Hinsicht eine Umsetzung geboten. Um jedoch nicht den § 14 BGB in gleicher Weise wie Art. 2 Abs. 2 zur Unleserlichkeit zu verunstalten, bietet es sich an, einen dritten Absatzes an § 14 BGB anzufügen.
- 22 Maßgebliche Auswirkungen werden die Einführung der Regelungen über das Handeln Dritter vor allem auf Online-Auktionshäuser wie zum Beispiel ebay haben. Nach deutschem Recht fungieren diese Plattformen als Stellvertreter oder Boten für die Willenserklärungen von Käufer- und Verkäufer.⁴⁵ Damit ist nunmehr geklärt, dass diese Plattformen, sofern sie von einem Unternehmer verwendet werden, selbst als Unternehmer auftreten.
- 23 Fraglich bleibt nach der Neuregelung die Einordnung von Nutzern mit einem Zertifikat oder Gütesiegel wie zB. Power-Seller, deren Vergabekriterien den Voraussetzungen des Unternehmerbegriffs entsprechen. In einem solchen Fall wird diesen Nutzern grundsätzlich eine Unternehmereigenschaft

zugespochen.⁴⁶ Dies könnte sich jedoch durch Erwägungsgrund 17 der RRV zumindest in dem Fall ändern, in dem der Power-Seller einen Vertrag mit gemischtem Zweck schließt. Hier ist letztlich jedoch auf die Besonderheit des Fernabsatzgeschäfts hinzuweisen, bei dem es dem Gegenüber gerade nicht möglich ist, die Identität und Intention des Verkäufers zu überprüfen.⁴⁷ Diese Besonderheiten rechtfertigen es daher, den Power-Seller weiterhin auch bei Verträgen mit gemischtem Zweck grundsätzlich als Unternehmer einzustufen.

c.) Ergebnis

- 24 Der Unternehmerbegriff des § 14 BGB ist einigen Modifikationen zu unterziehen, um die Umsetzung der RRV zu gewährleisten. Hier wird vorgeschlagen, in § 14 Abs. 1 BGB die Wörter „bei Abschluss eines Rechtsgeschäfts“ durch „in Bezug auf den Abschluss von Verträgen“ zu ersetzen. Dadurch soll der Tatsache Rechnung getragen werden, dass nunmehr nicht nur rechtsgeschäftliches Handeln, sondern auch rechtsgeschäftsähnliches Handeln für die Bestimmung der Unternehmereigenschaft maßgeblich ist. Darüber hinaus sollte ein neuer Absatz 3 in § 14 BGB eingeführt werden, der die beiden Fälle des Handelns Dritter regelt.

3. Form des Rechtsgeschäfts, §§ 125 ff. BGB

- 25 Auch wenn bestimmte Formvorschriften wie die für die elektronische oder Textform gem. §§ 126a und 126b BGB regelmäßig bei Fernabsatzgeschäften relevant werden können, enthält das deutsche Fernabsatzrecht keine speziellen Vorschriften über die Form des Rechtsgeschäfts. Grundsätzlich können Verträge im Fernabsatz unter denselben Voraussetzungen geschlossen werden wie andere Verträge unter Abwesenden.⁴⁸ Damit gilt auch beim Fernabsatz der Grundsatz der Formfreiheit.

a.) Formvorschriften in der RRV sowie Harmonisierungsgrad

- 26 Die RRV statuiert in den Art. 5, 6, und 8 zahlreiche Formvorschriften im Fernabsatzvertrag. Nur ein geringer Teil ist jedoch so allgemein gehalten, dass sich deren Umsetzung im Allgemeinen Teil des BGB anbietet. Insbesondere bei den überwiegend sehr umfangreichen in Art. 5, 6, 8 RRV enthaltenen vorvertraglichen Informationspflichten hat sich der deutsche Gesetzgeber bereits im Rahmen der Umsetzung der FAREL dazu entschieden, diese ausschließlich in den spezielleren Vorschriften zum Fernabsatzvertrag umzusetzen. Allerdings würde es sich anbieten, einige dieser vorvertraglichen Informa-

tionsvorschriften als Formvorschriften des Allgemeinen Teils zu qualifizieren. Da dieser Beitrag auch die Systemkonformität einer Umsetzung überprüft, werden hier alle allgemeinen Formvorschriften der RRV dargestellt, unabhängig davon ob sie bereits im Rahmen der Umsetzung der FARL im Zweiten Buch des BGB umgesetzt wurden.

- 27 Art. 5 Abs. 1; Art. 6 Nr. 1 letzter Hs., sowie Art. 8 Abs. 1 Hs. 2 RRV statuiert, dass bei Fernabsatzverträgen vorgeschriebene Informationen in „klarer und verständlicher Form“ respektive „Sprache“ abgefasst sein müssen. Art. 8 Abs. 1 Hs. 2 RRV verlangt darüber hinaus, dass Informationen „sofern sie auf einem dauerhaften Datenträger bereitgestellt werden, lesbar sein“ müssen. Die Vorschriften der RRV divergieren in dieser Hinsicht nur wenig von der Vorgängernorm in Art. 4 Abs. 2 FARL, die vorsah, dass Informationen „klar und verständlich“ sein müssen. Neu ist lediglich das Adjektiv „lesbar“ in Art. 8 Abs. 1 Hs. 2 RRV hinzugekommen. Damit kann man Art. 8 Abs. 1 Hs. 2 RRV als Einfallstor für die Berücksichtigung der Erkenntnisse der ökonomischen Verhaltenswissenschaft fruchtbar machen,⁴⁹ die seit langem eine Abkehr von einem formellen Ausgleich der Informationsasymmetrie fordert.⁵⁰ Stattdessen soll Regulierung auf den tatsächlichen Ausgleich der Informationsasymmetrie hinwirken, indem ein Verbrauchermodell zugrunde gelegt wird, das an die tatsächliche, soziale Wirklichkeit anknüpft.⁵¹ Die Klarstellung, dass das der RRV zugrundeliegende Verhaltensmodell auch verhaltensbasiert ist, wird insbesondere durch Erwägungsgründe 34, 36 und 39 der RRV deutlich. Für Fernabsatz-Verträge gilt nunmehr gem. Erwägungsgrund 39, dass „sicher gestellt wird“, dass Verbraucher „in der Lage sind, die Hauptbestandteile des Vertrags vor Auslösung ihrer Bestellung vollständig zu lesen und zu verstehen [Hervorhebung durch den Verfasser].“ Diese Formulierung hebt deutlich hervor, dass der EU-Gesetzgeber nicht mehr ausschließlich auf das vielfach umstrittene⁵² hergebrachte EU-Informationsmodell aufbaut,⁵³ sondern die Informationen auf ein tatsächliches Verstehen des Verbrauchers ausrichtet. Erwägungsgrund 34 weist auf einige konkrete Anwendungsfälle hin: Gewerbetreibende sollen bei der Bereitstellung der Information „den besonderen Bedürfnissen von Verbrauchern Rechnung tragen, die aufgrund ihrer geistigen oder körperlichen Behinderung, ihrer psychischen Labilität, ihres Alters oder ihrer Leichtgläubigkeit besonders schutzbedürftig sind.“ Wie dies im gerade durch Anonymität gekennzeichneten Fernabsatz zu bewerkstelligen sein wird, soll hier dahinstehen. Mit diesem Paradigmenwechsel ist es prima vista nur schwer vereinbar, dass die Kommission es grundsätzlich dem Gewerbetreibenden überlassen will, über die Schriftart und -größe zu entscheiden.⁵⁴ Gerade diese Vorgaben entscheiden über das Verständnis vorvertraglicher Informationen.⁵⁵
- 28 Eine Erklärung für diese Vorgehensweise kann Erwägungsgrund 36 bieten. Nach Erwägungsgrund 36 müssen Informationspflichten an die technischen Zwänge angepasst werden, denen bestimmte Medien unterworfen sind. Damit geht der Gesetzgeber insbesondere auf die Besonderheiten des M-Commerce und die damit verbundene Tatsache ein, dass bspw. ein Handydisplay nur einen begrenzten Raum zur Darstellung hat. „Lesbar und verständlich“ ist damit allerdings nicht in Abhängigkeit von dem Medium zu verstehen, mit dem der Fernabsatzvertrag geschlossen wird. „Lesbar und verständlich“ müssen nämlich auch die iS des Erwägungsgrunds 36 reduzierten Informationspflichten sein. Damit beschreibt „klar und verständlich“ ein allgemeines Transparenzgebot, während Erwägungsgrund 36 nur ein davon unabhängiges Gebot der *mediengerechten Information* enthält.⁵⁶
- 29 Das allgemeine Erfordernis, vorvertragliche Informationen „klar und verständlich“ und nunmehr auch „lesbar“ bereitzustellen, ist jedoch keine Besonderheit der in der RRV zusammengefassten Richtlinien. Diese Qualifikation zieht sich vielmehr als generelle Anforderung an Informationspflichten durch das gesamte EU-Vertragsrecht, welches maßgeblich auf dem Grundsatz des „information paradigm“ oder „mandatory disclosure“ aufgebaut ist.⁵⁷ So sieht Erwägungsgrund 31 der Richtlinie 2008/48/EG über Verbraucherkreditverträge (hiernach: Verbraucherkreditrichtlinie) vor, dass „alle notwendigen Informationen über die Rechte und Pflichten, die sich für den Verbraucher aus dem Kreditvertrag ergeben, (...) in klarer, prägnanter Form im Kreditvertrag enthalten sein“ sollen. Art. 5 Abs. 5 der Verbraucherkreditrichtlinie spezifiziert dieses Erfordernis noch einmal explizit für vorvertragliche Informationspflichten. Art. 6 der Richtlinie 2000/31/EG über den elektronischen Geschäftsverkehr statuiert, bei allen dort vorgeschriebenen Informationspflichten, dass diese „klar“ sein müssen. Art. 5 Abs. 1 der Richtlinie 93/13/EWG über mißbräuchliche Klauseln in Verbraucherverträgen fordert, dass schriftliche Klauseln „klar und verständlich“ sein müssen. Die Liste ließe sich mit Rechtsakten aus dem Risikoprodukte- sowie Finanzmarktrecht fortsetzen. Art. 22 Abs. 4 der Richtlinie 2006/123/EG (hiernach: Dienstleistungsrichtlinie) untermauert die Allgemeinheit von „klar und verständlich“. Diese Regelung verlangt, dass „alle Informationen, die der Dienstleister (...) zur Verfügung stellen oder mitteilen muss, klar und unzweideutig [Hervorhebungen durch den Verfasser] sind (...).“ Bei der Dienstleistungsrichtlinie handelt es sich um eine horizontale Richtlinie, die in allen Dienstleistungsbereichen der EU als „Auffangrichtlinie“ Anwendung findet.⁵⁸ Sie gibt damit den Rahmen für jegliches dienstleistungsrechtliche Handeln in der EU vor.⁵⁹ Damit kann man in der Tat von einem allgemeines Erfordernis des EU-Vertragsrecht sprechen, dass bereitzustellende Informatio-

nen „klar, verständlich“ und mittlerweile auch „lesbar“ sein müssen.⁶⁰

- 30 Art. 8 Abs. 2 UAbs. 2 RRV führt eine Bestätigungsverpflichtung durch den Verbraucher zu dessen Schutz für alle im elektronischen Fernabsatz geschlossenen Verträge ein. Wenn zum Vertragsabschluss „die Aktivierung einer Schaltfläche oder eine ähnliche Funktion“ vonnöten ist, muss diese „gut leserlich“ und „ausschließlich“ mit dem Satz „Bestellung mit Zahlungsverpflichtung“ oder „einer entsprechenden eindeutigen Formulierung“ gekennzeichnet sein, die den „Verbraucher darauf hinweist, dass die Bestellung mit einer Zahlungsverpflichtung gegenüber dem Gewerbetreibenden verbunden ist“. Da im E- und M-Commerce eine solche Aktivierung einer Schaltfläche zur Abgabe einer Willenserklärung stets vonnöten ist, sind sämtliche im E- und M-Commerce abgeschlossenen Verträge von dieser Regelung umfasst. Sinn und Zweck dieser Regelung ist es gem. Erwägungsgrund 39 der RRV, dass die Verbraucher „den Zeitpunkt erkennen, zu dem sie (...) eine Zahlungsverpflichtung eingehen. Damit sollen sogenannte „Abo-Fallen“ verhindert werden.⁶¹ Dieser „Button“-Lösung kommt damit eine Hinweis- und Warnfunktion zu, die den Verbraucher vor dem Abschluss eines unbedachten Rechtsgeschäfts schützen soll. Ein Vertrag, der ohne die Aktivierung des „Buttons“ geschlossen wurde, ist der Verbraucher gem. Art. 8 Abs. 2 UAbs. 2 letzter Hs. RRV nicht an den Vertrag gebunden. Mit anderen Worten: Der Vertrag ist nichtig.
- 31 Die Formvorschriften sind mangels entgegenstehender Regelungen vollharmonisierend.

b.) Auswirkungen auf §§ 125 ff. BGB

- 32 Das Erfordernis, die vom EU-Fernabsatzrecht geforderten Informationen „klar und verständlich“ mitzuteilen, ist bislang in § 312g Abs. 1 Nr. 2 BGB geregelt. Zur Umsetzung der Vorschriften der RRV sieht der Regierungsentwurf (S. 12) die Einfügung eines Absatz 2 in § 312g BGB vor.⁶² Angesichts des allgemeinen Charakters „klar und verständlich“ und neu: „lesbar“, der diesen Wörtern als Adjektive für Informationspflichten im EU-Vertragsrecht zukommen, drängt sich allerdings die Frage auf, ob sich nicht auch eine Umsetzung im Allgemeinen Teil des BGB eher anbietet als im speziellen Fernabsatzrecht. Aufgrund just dieses allgemeinen Charakters recurriert das BGB dort, wo es Vorgaben der EU umgesetzt hat, auch darauf, dass diese „klar und verständlich“ sein müssen. So findet sich diese Formulierung nunmehr im bürgerlichen Recht jeweils in den §§ 307 Abs. 1 S. 2;⁶³ 482 Abs. 1 S. 2 BGB; sowie in Art. 246 § 1 Abs. 1 und Art. 247 § 6 Abs. 1 EGBGB. Sofern Informationspflichten statuiert werden, so findet man auch außerhalb des bürgerlichen Rechts gleiche oder ähnliche Attribute, siehe beispielsweise § 7 Abs. 1 S. 2 VVG

„klar und verständlich“; § 11 Abs. 1 S. 1 AMG „allgemein verständlich“ und § 5 Abs. 3 GefStoffVO „allgemein verständlich“. Daher dürfte wohl nun deutlich geworden sein, dass „klar und verständlich“ ebenso wie nun neu „lesbar“ allgemeine Anforderungen an die Form von Informationen darstellen. Ebenso wie die Informationsphilosophie des EU-Vertragsrechts als „information paradigm“ oder „mandatory disclosure“ ein allgemeines Strukturmerkmal darstellt, spiegeln sich inhaltlich die gleichen Anforderungen im deutschen Recht als „Transparenzgebot“ wider.⁶⁴ Dabei handelt es sich nicht um ein isoliertes Phänomen des AGB-Rechts, sondern um ein allgemeines Prinzip der Informationsgewährleistung im Zivilrecht.⁶⁵ Dass Inhalt und Anforderung des Transparenzgebots im Zivilrecht variieren kann, ist kein Argument gegen die Allgemeinheit des Transparenzgebots.⁶⁶ Die Notwendigkeit einer funktionalen, sektorspezifischen Auslegung von „klar und verständlich“ steht der Allgemeinheit dieser Begriffe nicht entgegen. Auch innerhalb des Fernabsatzrechts wird „klar und verständlich“ als *spezifisches Transparenzgebot* je nach Vertragsschlussphase unterschiedlich ausgelegt.⁶⁷ Um eine systemkonforme Umsetzung zu gewährleisten, sollten daher diese Anforderungen auch in den allgemeinen Teil aufgenommen werden. Denkbar wäre das Einfügen eines § 127c BGB „Transparenzgebot“, der regelt: „Sofern durch Gesetz die Bereitstellung von Informationen erforderlich ist, so müssen diese klar, verständlich und lesbar sein.“

- 33 Die „Button“-Lösung soll nach dem Regierungsentwurf in § 312g Abs. 3 BGB eingefügt werden. Damit wählt der Gesetzgeber eine Lösung im Fernabsatzrecht des BGB, ohne sich hinreichend Gedanken über die systematisch korrekte Verortung zu machen. Wie bereits dargestellt wurde, bezweckt die „Button“-Lösung, den Verbraucher auf ein unbedachtes Rechtsgeschäft hinzuweisen und ihn vor den Folgen zu warnen. Wird der „Button“ nicht betätigt, so ist der Vertrag nichtig. Zwar ist die Notwendigkeit der Betätigung eines „Buttons“ zum Wirksamwerden einer Willenserklärung neu für das BGB, nicht neu ist jedoch der Sinn und Zweck sowie die Rechtsnatur dieser Regelung. Das BGB sieht bereits bei zahlreichen Verträgen, die besonders weitreichende Rechtsfolgen für die Vertragspartner nach sich ziehen, solche Warninstanzen vor, die auch allesamt eine Nichtigkeitsfolge der Willenserklärung bzw. des Vertrages nach sich ziehen⁶⁸: So muss gem. § 925 Abs. 1 S. 1 BGB die Auffassung „bei gleichzeitiger Anwesenheit beider Teile vor einer zuständigen Stelle erklärt werden.“ Gem. § 311b Abs. 1 BGB bedarf jeder Vertrag, durch den sich der eine Teil verpflichtet, das Eigentum an einem Grundstück zu übertragen oder zu erwerben, der notariellen Beurkundung. Ein Schenkungsversprechen muss gem. § 518 Abs. 1 BGB notariell beurkundet werden. All diese Vorschriften haben im Wesentlichen zum Ziel, die Beteiligten vor Übereilung zu schützen.⁶⁹ Aufgrund ihrer Nichtigkeitsfolge und der Allgemeinheit im Ziel

finden daher auch all jene Vorschriften ihre Ausgestaltung in den §§ 125 ff. BGB. Da auch die „Button“-Lösung diesen Zweck bei gleicher Rechtsfolge verfolgt, erscheint es systematisch sehr befremdlich, diese nicht auch in den §§ 125 ff. BGB zu regeln. Die „Button“-Lösung ist nichts weiter als ein moderner elektronischer Notar ohne Beratungsfunktion. Daher würde sich auch eine Regelung in unmittelbarer Nähe zur notariellen Beurkundung in § 128 BGB anbieten.

c.) Ergebnis

34 Die Formvorschriften des allgemeinen Teils des BGB sind nach derzeitigem Erkenntnisstand nicht von den offiziellen Umsetzungsbemühungen der RRV erfasst. Wünschenswert wäre dies allerdings, da die Anforderungen an die Form von Informationen allgemeinen Charakter haben. Darüber hinaus ist eine Umsetzung der „Button“-Lösung in den Formvorschriften des Allgemeinen Teils wünschenswert, da sie die gleiche Warnfunktion erfüllen wie die sonstigen Formvorschriften.

4. Vertragsschluss bei Versteigerungen, § 156 BGB

35 Art. 2 Abs. 13 RRV enthält im Gegensatz zur FARL eine Definition der „öffentlichen Versteigerung“. § 156 BGB regelt nicht die einzelnen Elemente einer Versteigerung, jedoch setzt § 156 BGB eine Versteigerung iS des Art. 2 Abs. 13 RRV voraus.⁷⁰ Nach geltendem deutschem Recht sind „Internetauktionen“ auf Plattformen wie bspw. ebay nicht von § 156 BGB erfasst.⁷¹ Dies ist nunmehr ausdrücklich in Erwägungsgrund 24 der RRV festgehalten. Eine Umsetzung ist daher grundsätzlich nicht erforderlich.

36 Fraglich ist die Einordnung echter „Live-Auktionen“, bei denen Bieter und Auktionator unmittelbar miteinander kommunizieren können. Solche Auktionen wurden bislang als Versteigerungen von der Vorschrift des § 156 BGB erfasst, da der Gesetzgeber den Ausschluss des Widerrufsrechts nach § 312d Abs. 4 Nr. 5 BGB nur bei solchen Internet-Auktionen anwendet, bei denen „der Abschluss im unmittelbaren Anschluss an die Abgabe der Gebote durch virtuellen Zuschlag erfolgt“.⁷² Erwägungsgrund 24 RRV könnte nun dahin ausgelegt werden, dass er angesichts seines weiten Wortlauts auch solcherlei Versteigerungen erfasst.⁷³ Die besseren Argumente sprechen jedoch dafür, solche Auktionen wie schon bisher als „Versteigerungen“ anzusehen, da sie nicht wie bspw. ebay ausschließlich als „Plattform“ iS des Erwägungsgrunds 24 dienen, sondern darüber hinaus ein „persönliches Beiwohnen“ der Beteiligten am Auktionsverfahren im Sinne des Art. 2 Abs. 13 RRV

erfordert. Damit bleiben sie weiterhin „Versteigerungen“ gem. § 156 BGB.

5. Vertretung, § 164 BGB

37 Die Regeln über Stellvertretung verbleiben gem. Erwägungsgrund 16 der RRV im alleinigen Verantwortungsbereich der Mitgliedstaaten. Damit bleiben die §§ 164 ff. BGB von der RRV unberührt. Insbesondere können aus der Zurechnungsregel des Art. 2 Abs. 2 RRV keine materiellen Anforderungen an die Stellvertretung gestellt werden. Vor allem werden damit auch weiterhin die problematischen Fälle der Rechtsscheinhaftung beispielsweise bei der Benutzung eines fremden Mitgliedskontos nach den Regeln des nationalen Rechts bestimmt.⁷⁴

6. Lieferung unbestellter Sachen, § 241a BGB

a.) Vorschriften über die Lieferung unbestellter Waren oder Dienstleistungen in der RRV sowie Harmonisierungsgrad

38 Art. 27 RRV enthält wie auch schon Art. 9 FARL eine Regelung über die Behandlung unbestellter Waren oder Dienstleistungen. Die Rechtsfolge ist im Vergleich zur FARL gleich geblieben: Verbraucher brauchen erstens keine Gegenleistung zu erbringen, wenn sie unbestellte Waren und Dienstleistungen erhalten. Zweitens darf in diesen Fällen ein Schweigen nicht als Zustimmung gewertet werden. Allerdings hat sich der Tatbestand geändert: Rechtlich marginal aber dennoch notwendig ist die Klarstellung, dass auch Wasser, Gas, Strom, Fernwärme sowie digitaler Inhalt „Waren“ sind. Problematisch ist hingegen eine weitere Neuerung: Die Rechtsfolge wird an einen Verstoß gegen Art. 5 Abs. 5 iVm Anhang I Nr. 29 der Richtlinie 2005/29/EG über unlautere Geschäftspraktiken geknüpft. Diese Regelung erfordert, dass der Verbraucher zur sofortigen oder späteren Bezahlung oder zur Rücksendung oder Verwahrung der Ware aufgefordert werden muss. Würde man bei diesem Wortlaut bleiben, so wäre der Verbraucher nur dann nicht zur Erbringung einer Gegenleistung verpflichtet, wenn der Gewerbetreibende ihn dazu aufgefordert hat. Fehlt eine solche Aufforderung, so könnte man argumentieren, kann der Verbraucher verpflichtet werden. Da bei der Lieferung unbestellter Waren das Eigentum nicht übergeht,⁷⁵ wären in einem solchen Fall daher insbesondere Ansprüche des Unternehmers gegen den Verbraucher aus §§ 812 ff. und 985 ff. BGB denkbar,⁷⁶ da diese Ansprüche gerade keine Aufforderung erfordern. Selbst wenn man dies mit dem Hinweis darauf verneinen wollte, dass die Geltendmachung dieser Ansprüche ohne

Aufforderung zur Rücksendung nicht denkbar sei, so könnte dieses Argument nicht für Ansprüche aus gesetzlichem Eigentumsübergang geltend gemacht werden. Vermischt sich die unbestellte Sache gem. § 948 BGB, so würden dann nämlich Entschädigungsansprüche nach § 951 BGB möglich sein.

39 Dies kann freilich nicht mit dem Verweis von Art. 27 RRV auf die Richtlinie über unlautere Geschäftspraktiken gemeint sein. Eine Begründung der unterschiedlichen Behandlung dieser Fälle ist schlechthin nicht ersichtlich. Vielmehr ist davon auszugehen, dass der Gesetzgeber nur eine systematische Gleichstellung der Vorschriften beider Richtlinien erreichen wollte, ohne in bestimmten Fällen den Verbraucher an die Lieferung unbestellter Waren zu binden. Damit ergibt sich, abgesehen von der Klarstellung des Warenbegriffs, im Gegensatz zur Regelung in der FARE keine substantielle Neuerung.

40 Art. 5 Abs. 5 iVm Anhang I Nr. 29 der Richtlinie 2005/29/EG über unlautere Geschäftspraktiken verweist ferner auf Art. 7 Abs. 3 FARE als Ausnahme. Art. 7 Abs. 3 FARE ermächtigt Mitgliedstaaten, Lieferanten die Lieferung einer nicht bestellten, jedoch qualitativ und preislich gleichwertigen Ware oder Dienstleistung (hiernach Aliud-Lieferung) zu ermöglichen, wenn diese Möglichkeit vor Vertragsabschluss oder in dem Vertrag vorgesehen wurde. Damit könnten unbestellte Aliud-Lieferungen Verpflichtungen für den Verbraucher begründen. Allerdings wird die FARE durch Art. 31 UAbs. 1 RRV aufgehoben, sodass der Verweis in der Richtlinie 2005/29/EG ins Leere läuft. Gem. Art. 31 UAbs. 2 RRV ist daher Art. 7 FARE durch die Norm der RRV zu ersetzen, die in der Entsprechungstabelle in Anhang III RRV genannt ist. Art. 7 FARE ist in dieser Tabelle jedoch nicht genannt. Unabhängig davon enthält auch die RRV sonst keine Regelung dieses Inhalts. Darüber hinaus wird die Richtlinie 2005/29/EG über unlautere Geschäftspraktiken auch nicht durch Art. 31, 32 RRV aufgehoben oder geändert. Damit ist fraglich, ob eine solche Aliud-Lieferung nach wie vor Rechtsfolgen für den Verbraucher auslösen können soll. Der ausdrückliche Verweis in Art. 5 Abs. 5 iVm Anhang I Nr. 29 der Richtlinie 2005/29/EG über unlautere Geschäftspraktiken auf Art. 7 Abs. 3 FARE lässt annehmen, dass der Gesetzgeber den gesamten Regelungsgehalt des Art. 5 Abs. 5 iVm Anhang I Nr. 29 der Richtlinie 2005/29/EG über unlautere Geschäftspraktiken erhalten wollte. Er hat es nicht einmal in Erwägung gezogen, den Verweis im Rahmen der Entsprechungstabelle oder durch Änderung der Richtlinie 2005/29/EG über unlautere Geschäftspraktiken zu korrigieren. Damit bleibt es wohl dabei, dass Aliud-Lieferungen weiterhin Rechtsfolgen für den Verbraucher auslösen können. Bleiben die Regelungen so, kann dies jedoch im Streitfall nur durch eine Vorlage an den EuGH geklärt werden. Vorzugswürdig wäre jedoch eine klarstellende Regelung durch den EU-Gesetzgeber.

41 Mangels anderer Angaben sind die Vorschriften vollharmonisierend.

b.) Auswirkungen auf § 241a BGB

42 Da § 241a BGB der Umsetzung von Art. 9 FARE dient, die durch die neue Regelung nicht wesentlich geändert wird, hat lediglich die klarstellende Definition der „Ware“ Auswirkungen. Sollte der hier vertretenen Auffassung zur Behandlung von Aliud-Lieferungen nicht gefolgt werden, so wäre § 241a Abs. 3 BGB zu streichen. Angesichts der unklaren Rechtslage ist jedoch die Herbeiführung eines EuGH-Urteils oder eine politische Einflussnahme, um eine Klarstellung zu erwirken, wünschenswert.

7. Leistungsort beim Widerruf, § 269 BGB

a.) Vorschriften über den Leistungsort in der RRV sowie Harmonisierungsgrad

43 Art. 14 Abs. 1 UAbs. 3 RRV statuiert eine Abholpflicht des Gewerbetreibenden für Waren, die nicht per Post zurückgesandt werden können und aufgrund eines Vertrags, der außerhalb von Geschäftsräumen geschlossen wurde, zur Wohnung des Verbrauchers geliefert worden sind. Ferner dürfen dem Verbraucher dadurch keine Kosten entstehen. Diese Regelung steht im Einklang mit der Auslegung des Art. 3 der Richtlinie 1999/44/EG durch den EuGH in der Sache Weber/Putz, der letztlich auch eine Abholverpflichtung des Gewerbetreibenden für ein mangelhaftes Verbrauchsgut angenommen hatte.⁷⁷

44 Die Regelung über den Leistungsort ist vollharmonisierend.

b.) Auswirkungen auf § 269 BGB

45 § 269 BGB ist durch die Regelung insoweit beeinträchtigt, als nunmehr im Fall der Rückabwicklung des Widerrufs ein Leistungsort „bestimmt“ ist gem. § 269 Abs. 1 BGB, sofern die Kaufsache nicht per Post versendet werden kann. Der Leistungsort der an den Widerruf anknüpfenden Rückabwicklungsverpflichtung ist letztlich nach denselben Gesichtspunkten zu bestimmen wie der Leistungsort beim Rücktritt, da gem. § 357 Abs. 1 S. 1 BGB grundsätzlich die Vorschriften über den Rücktritt entsprechende Anwendung finden. Prinzipiell richtet sich der Leistungsort des Rücktritts zwar gem. § 269 Abs. 1 BGB nach der vertraglichen Vereinbarung,⁷⁸ nunmehr ist allerdings eine anderslautende Verpflichtung durch Art. 14 Abs. 1 UAbs. 3 RRV bestimmt. Eine solche „Bestimmung“ hätte man jedoch bereits arg. e. contrario aus § 357 Abs. 2 S. 2 BGB herauslesen können, der den

Verbraucher nur dann zur Rücksendung verpflichtet, „wenn die Sache durch Paket versandt werden kann.“ Letztlich wäre es demnach auch wünschenswert, die neue Abholverpflichtung ebenfalls in § 357 Abs. 2 BGB zu verorten.

8. Bestimmung einer Leistungszeit, § 271 BGB

a.) Vorschriften über die Leistungszeit in der RRV sowie Harmonisierungsgrad

- 46 Die RRV bestimmt in Art. 18 Abs. 1, dass der Gewerbetreibende dem Verbraucher den Besitz an den oder die Kontrolle über die Ware unverzüglich, jedoch spätestens 30 Tage nach Abschluss des Vertrages überträgt. Damit konkretisiert Art. 18 Abs. 1 RRV die Regelung des Art. 7 Abs. 1 FARL, die terminologisch unklar auf den Zeitpunkt der „Bestellung“ für den Fristbeginn abgestellt hatte. Diese Regelung bleibt allerdings nach wie vor dispositiv.
- 47 Im Gegensatz zur FARL überlässt die RRV die Rechtsfolgen eines Verstoßes gegen die Vorschriften der Leistungszeit nicht dem Recht der Mitgliedstaaten. Liefert der Unternehmer nicht unverzüglich oder zumindest innerhalb der 30-Tages-Frist, so kann der Verbraucher ihn zunächst gem. Art. 18 Abs. 2 UAbs. 1 S. 1 RRV zu einer Nachlieferung innerhalb einer angemessenen Frist anhalten. Erst bei Ablauf dieser zweiten Frist hat der Verbraucher sodann gem. Art. 18 Abs. 2 UAbs. 1 S. 2 RRV ein Recht zur Kündigung des Vertrages. Art. 18 Abs. 2 UAbs. 2 RRV macht zahlreiche Ausnahmen vom Grundsatz der Verpflichtung zur Nachfristsetzung, die mit wenigen Besonderheiten den Ausnahmen des Mahnungserfordernisses in § 286 Abs. 2 BGB respektive des Fristsetzungserfordernis in § 323 Abs. 2 BGB entsprechen.

b.) Auswirkungen auf § 271 BGB iVm. §§ 286 und 323 BGB

- 48 § 271 BGB statuiert die sofortige Fälligkeit einer Leistung, sofern nichts anderes vereinbart ist. Damit ist § 271 BGB strenger als Art. 18 Abs. 1 RRV. Eine Umsetzungsverpflichtung hängt mithin davon ab, ob Art. 18 Abs. 1 RRV vollharmonisierend ist. Grundsätzlich sind gem. Art. 4 RRV alle Regeln der RRV vollharmonisierend, solange nichts anderes in der RRV bestimmt ist. Weder Erwägungsgrund 52, noch die Artikel der RRV schränken den vollharmonisierenden Charakter des Art. 18 RRV ein. Damit ist Art. 18 RRV gem. Art. 4 RRV vollharmonisierend, die strengere Regelung des § 271 BGB kann nicht für eine Umsetzung herangezogen werden. Auch der dispositive Charakter der Vorschrift entlässt die Mitgliedstaaten nicht aus der Umsetzungspflicht,⁷⁹ da

die Vorschrift nur zur Disposition der Vertragsparteien, nicht aber des Mitgliedstaates steht. Insoweit hat der Mitgliedstaat die Disponibilität der Norm umzusetzen, die Vorgaben der Norm an sich sind für ihn jedoch nicht disponibel.

- 49 Die Rechtsfolgen der Fälligkeit richten sich nach den allgemeinen Verzugsregeln des § 286 BGB, der im Wesentlichen in Art. 18 Abs. 1 und 2 RRV nachgebildet ist. Die Nachfristsetzung entspricht im deutschen Recht der Mahnung gem. § 286 Abs. 1 BGB respektive der Fristsetzung gem. § 323 Abs. 1 BGB, die Kündigung dem Rücktritt gem. § 323 BGB. Fraglich ist jedoch, ob der Ausschlussgrund des Nicht-Vertretenmüssens in § 286 Abs. 4 BGB weiter aufrechterhalten werden kann. Die RRV lässt eine solche Rückausnahme nicht zu, daher ist im Anwendungsbereich der RRV die Ausnahme des Verzugs bei Nicht-Vertretenmüssen nicht einschlägig.

c.) Ergebnis

- 50 § 271 BGB kann angesichts des vollharmonisierenden Charakters des Art. 18 RRV nicht zu dessen Umsetzung herangezogen werden. Daher ist Art. 18 RRV explizit in das deutsche Recht umzusetzen, was für die Vorgängernorm des Art. 7 Abs. 1 FARL nach Ansicht der Bundesregierung wegen des schärferen § 271 Abs. 2 BGB nicht der Fall war.⁸⁰ Denkbar ist die Einführung eines § 271 Abs. 2 BGB, der nur für Verbraucherverträge Geltung beansprucht. Korrespondierend hierzu kann auf die allgemeinen Verzugsregelungen der §§ 286 iVm 323 BGB zurückgegriffen werden mit der Ausnahme, dass § 286 Abs. 4 BGB keine Anwendung findet. Dieser Ausschluss sollte in den spezialgesetzlichen Regeln der 312 ff. BGB festgelegt werden.

II. Recht der Schuldverhältnisse

1. Fernabsatzverträge, § 312b BGB

a.) Vorschriften über den Fernabsatzvertrag in der RRV sowie Harmonisierungsgrad

- 51 Die Neuregelung des Termins des Fernabsatzvertrages in Art. 2 Abs. 7 RRV führt im Vergleich zur FARL zwei wesentliche Änderungen ein: Zum einen werden die Elemente der Definition der „Fernkommunikationstechnik“ aus Art. 2 Abs. 4 FARL in die Definition des Fernabsatzvertrages integriert, zum anderen wird die irreführende Terminologie „Vertragsabschluß im Fernabsatz“ aus Art. 2 Abs. 1 FARL ersetzt durch den Begriff des „Fernabsatzvertrages“. Die Einbeziehung der „Fernkommunikationstech-

nik“ birgt materiell keine Änderungen und dient wohl im Wesentlichen der Vereinheitlichung der Definitionen. Dass Art. 2 Abs. 7 RRV nicht mehr vom „Vertragsabschluss“, sondern vom „Fernabsatzvertrag“ spricht, trägt der Tatsache Rechnung, dass ein „Fernabsatzvertrag“ grundsätzlich auch schon im Zeitpunkt der Vertragsanbahnung bestehen muss.⁸¹ Diese Tatsache wird von Erwägungsgrund 20 dahingehend präzisiert, dass ein Fernabsatzvertrag auch dann vorliegen soll, wenn „der Verbraucher die Geschäftsräume lediglich zum Zwecke der Information über die Waren oder Dienstleistungen aufsucht und die nachfolgenden Verhandlungen und der Vertragsabschluss auf Distanz stattfinden.“ Wird jedoch ein Geschäft unter gleichzeitiger Anwesenheit beider Parteien in Geschäftsräumen verhandelt und findet sodann nur der Vertragsabschluss auf Distanz statt, soll es sich nicht um einen Fernabsatzvertrag handeln. Daher bleibt es auch bei der Neuregelung dabei, dass ein „Kontinuum an Rechtsbeziehungen“⁸² auf Distanz und unter bewusstem Einsatz von Fernkommunikationsmitteln erfolgen muss. Damit hat der Gesetzgeber nun wieder von der Lösung im ersten Entwurf der RRV Abstand genommen, nachdem nur noch der Vertragsabschluss unter Zuhilfenahme von Fernkommunikationsmitteln hätte erfolgen müssen.⁸³

- 52 Die Bereichsausnahmen der RRV stimmen im Wesentlichen mit denen der FAREL überein.⁸⁴ Im Gegensatz zum vorherigen Entwurf⁸⁵ findet sich hier auch wieder die „de minimis non curat praetor“-Klausel des Art. 3 Abs. 4 RRV (hiernach: „de minimis“-Klausel), nach der es Mitgliedstaaten frei steht, die Vorschriften der Richtlinie auf Gegenstände, deren zu zahlender Gegenwert 50 EUR nicht überschreitet, nicht anzuwenden. Würde man die „de minimis“-Klausel im Fernabsatzrecht anwenden, wäre jedoch ein Großteil der problematischen Fälle wie beispielsweise Verträge über Klingeltöne⁸⁶ nicht erfasst. Konsequenter Weise findet Art. 3 Abs. 4 RRV im Fernabsatzrecht daher auch keine Anwendung.
- 53 Die Regelungen zum Geltungsbereich sind mangels anderer Angaben vollharmonisierend gegenüber den Mitgliedstaaten. Gem. Art. 3 Abs. 6 RRV steht es jedoch den Gewerbetreibenden offen, in Vertragsbedingungen Verbrauchern weitergehenden Schutz anzubieten.

b.) Auswirkungen auf § 312b BGB

- 54 Die Auswirkungen auf § 312b BGB sind gering. Terminologisch spricht § 312b Abs. 1 BGB schon immer – wie nun auch die RRV – vom „Fernabsatzvertrag“. Die Definition der „Kommunikationstechnik“ findet sich bereits in § 312b Abs. 2 BGB, sodass auch hier keine Umsetzung vonnöten ist. Anpassungsbedürftig könnte lediglich der Terminus „unter ausschließlicher [Hervorhebung durch Verf.] Verwen-

dung“ sein, da gem. Erwägungsgrund 20 auch solche Verträge erfasst sein sollen, bei denen der Verbraucherkäufer sich zuerst im Geschäft persönlich informiert hat. Insoweit ist nun der Vertragsschluss als Kontinuum, das von der ersten Anbahnung des Vertrags bis zu seinem Abschluss reicht,⁸⁷ unterbrochen. Hier wird daher vorgeschlagen, den Begriff „ausschließlich(er)“ zu streichen.

c.) Ergebnis

- 55 Die im Wesentlichen kosmetischen Änderungen beim Fernabsatzbegriff und im Geltungsbereich der Richtlinie haben nur geringe Auswirkungen auf § 312b BGB. Nach der hier vertretenen Lösung soll das Wort „ausschließlich(er)“ in § 312b Abs. 1 BGB gestrichen werden.

2. Unterrichtung des Verbrauchers bei Fernabsatzverträgen, § 312c BGB

- 56 Die Informationspflichten sind wohl die weitreichendsten und zeitgleich verworrensten Vorschriften der RRV. Der Abbau der Transaktionskosten, die Unternehmen durch unterschiedliche Informationsanforderungen in den Mitgliedstaaten entstehen, war ein wesentlicher Grund für die ursprünglich anvisierte Vollharmonisierung der Informationsregelungen durch die RRV.⁸⁸ Der nun verfolgte Ansatz der „Gemischten Harmonisierung“ gerade in diesem Kernbereich irritiert daher.

a.) Vorschriften über die Informationspflichten in der RRV sowie Harmonisierungsgrad

- 57 Die Vorschriften über die Informationspflichten der RRV sind strukturell nur mit Mühe fassbar⁸⁹ und so umfangreich, dass die Änderungen hier nicht in vollem Umfang wiedergegeben werden können. Der Schwerpunkt der Darstellung liegt daher – sofern die Regelungen hier nicht schon als allgemeine Regeln klassifiziert worden sind – auf der Form (aa), dem Zeitpunkt (bb) sowie ausgewählten Problemen des Inhalts von Informationen (cc). Darüber hinaus wird auf den Harmonisierungsgrad und die Kollision mit geltendem Unionsrecht (dd) eingegangen.

aa) Form

- 58 Der Grundsatz der *Mediengerechtigkeit* ist nunmehr in Erwägungsgrund 36 festgelegt. Im Ergebnis ändert sich dadurch jedoch nichts, da Erwägungsgrund 36 nur die Grundsätze der ohnehin geltenden Praxis niederschreibt.⁹⁰ Eine spezielle fernabsatzrechtliche Ausgestaltung des allgemeinen *Transparenzgebots* fin-

det sich in Erwägungsgrund 39 RRV. Demnach müssen die essentialia negotii des Vertrages „in unmittelbarer Nähe der für die Auslösung der Bestellung erforderlichen Bestätigung angezeigt werden“. Dies betrifft insbesondere den Preis, der nunmehr nicht mehr losgelöst vom „Bestell-Button“, beispielsweise auf einer anderen Webseite wie in einem Pop-Up Fenster, angezeigt werden darf.

- 59 Erwägungsgrund 15 der Richtlinie stellt Regelungen über die *Sprache* ausdrücklich in die Kompetenz der Mitgliedstaaten. Allerdings steht auch dieses Erfordernis unter der Prämisse, dass jegliche Information verständlich für den Verbraucher sein muss.⁹¹ Damit ist den Mitgliedstaaten insoweit europarechtlich eine Grenze gesetzt, dass die für den konkreten Verbraucher verständliche Sprache zu verwenden ist. Im Internet grundsätzlich Englisch als lingua franca zuzulassen,⁹² dürfte daher nur bei speziellen Fachkreisen, nicht jedoch im regulären Verbrauchervertragsrecht möglich sein.⁹³ Wenn sich, wie häufig im Fernabsatzrecht, die Sprache des Verbrauchers nicht vom Unternehmer ermitteln lässt, so ist die Sprache maßgeblich, in der der Verbraucher seine Bestellung abgegeben hat. Wer sich auf fremdsprachige Vertragsverhandlungen einlässt, muss auch das Risiko des fehlerhaften Verständnisses der Informationen tragen.⁹⁴
- 60 Bezüglich der *Informationsverschaffung* im M-Commerce regelt Erwägungsgrund 36 der RRV, dass dem Verbraucher zumindest ein Link auf eine Webseite mit den vollständigen Informationen bereitgestellt oder eine gebührenfreie Rufnummer, bei dem er die entsprechende Informationen abfragen kann, angegeben werden muss. Diese Regelung birgt nichts Neues, da dies bislang gängige Praxis war.⁹⁵

bb) Zeitpunkt

- 61 Gem. Art. 6 Abs. 1 RRV muss der Gewerbetreibende den Verbraucher informiert haben, bevor dieser durch einen Vertrag oder an ein Vertragsangebot gebunden ist. Bestimmte, für den Vertragsschluss besonders relevante Informationen, die größtenteils die essentialia negotii umfassen, hat der Gewerbetreibende gem. Art. 8 Abs. 2 Uabs. 1 RRV sogar bereitzustellen, bevor der Verbraucher seine Bestellung tätigt. Die Vorschriften weichen daher von der problematischen Vorgabe der Art. 4 Abs. 1; 5 Abs. 1 FARL ab, nach der der Verbraucher „rechtzeitig vor Abschluss eines Vertrages“ (Art. 4 Abs. 1 FARL), spätestens jedoch „zum Zeitpunkt der Lieferung“ (Art. 5 Abs. 1 FARL) informiert sein muss.⁹⁶ Während für die Regelungen gem. Art. 8 Abs. 2 Uabs. 1 RRV klar ist, dass diese Informationen vor der Bestellung, somit vor Abgabe der Willenserklärung durch den Verbraucher vorliegen müssen, bleibt fraglich, ab wann die übrigen Informationen vorzuliegen haben. Insbesondere fällt unter diese „sonstigen“ Informatio-

nen gem. Art. 6 Abs. 1 h) RRV auch die Information über das Widerrufsrecht, deren Zeitpunkt im deutschen Recht Gegenstand zahlreicher Diskussion gewesen ist.⁹⁷ Art. 6 Abs. 1 RRV stellt nun für deren Vorliegen ausschließlich auf den Zeitraum ab, bevor der Verbraucher an den Vertrag respektive sein Vertragsangebot gebunden ist. Da sich die Vertragsschlussmodalitäten und insbesondere die Wirksamkeit von Vertragsschlüssen gem. Erwägungsgrund 14 RRV nach wie vor nach nationalem Recht richten, wird demnach auch dieser Zeitpunkt der Verpflichtung zur Informationsbereitstellung durch den nationalen Gesetzgeber bestimmt. Somit ist der maßgebliche Zeitpunkt derjenige, in dem der Verbraucher nach deutschem Recht an seine Willenserklärung gebunden ist. Gem. § 130 Abs. 1 BGB wird eine Willenserklärung unter Abwesenden mit Zugang beim anderen Teil wirksam. Gem. § 145 BGB ist der Verbraucher auch in diesem Moment an seine Willenserklärung gebunden. Damit ist gem. Art. 6 Abs. 1 RRV der Zugang der Willenserklärung der Zeitpunkt, an dem die Informationen spätestens bereitstehen müssten. Die Informationspflichten können demnach auch erst nach dem „Klick“ auf den „Bestell-Button“, somit auch nachdem sich der Verbraucher schon für einen Kauf entschieden hat, bereitstehen. Der EU-Gesetzgeber geht damit offensichtlich davon aus, dass nur die in Art. 8 Abs. 2 Uabs. 1 RRV genannten Informationen für den Kaufentscheid des Verbrauchers maßgeblich sind. Die übrigen Informationspflichten können, müssen jedoch nicht vor der Bestellung erfüllt werden. Dies ist auch grundsätzlich im Hinblick auf die dort genannten Informationen sinnvoll, wie am Beispiel der Mitteilung über die Widerrufsmodalitäten deutlich wird: Der Verbraucher wird seinen Kaufentscheid nicht von den Modalitäten des Widerrufsrechtes abhängig machen. Er benötigt die Informationen jedoch im Zeitpunkt nach Vertragsschluss, wenn er sich über einen Widerruf Gedanken macht. Warum die Verpflichtungen jedoch in dem Zeitpunkt vorliegen müssen, in dem der Verbraucher an seine Bestellung gebunden ist und nicht, wie bei der FARL, erst im Zeitpunkt der Lieferung, ist nicht einleuchtend. Dem Verbraucher entstehen durch diese Vorverlagerung keine Vorteile, da er ein Interesse an diesen Informationen, die sich auf die Möglichkeit der Rückabwicklung beziehen, meist erst nach der Lieferung der Waren hat. Die vorzeitige Informationsverpflichtung bürdet dem Unternehmer damit eine unnötige Verpflichtung auf.

cc) Inhalt

- 62 Die Anforderungen an den Inhalt der Informationspflichten ist in der RRV im Wesentlichen mit den Anforderungen in Art. 5 der Richtlinie 2000/31/EG über den elektronischen Geschäftsverkehr (im Folgenden: E-Commerce-Richtlinie) harmonisiert worden. Da-

mit verkleinert der EU-Gesetzgeber die Lücke, die zwischen der FARL und der E-Commerce-Richtlinie im Hinblick auf die Informationspflichten besteht.⁹⁸ Was jedoch die eine Hand nimmt, gibt die andere Hand wieder: Mitgliedstaaten können gem. Art. 6 Abs. 8 UAbs. 1 RRV weitergehende Informationspflichten im Rahmen der E-Commerce-Richtlinie vorsehen und damit sowohl die eben neu gewonnene Kohärenz als auch die Vollharmonisierungscharakter der Informationspflichten der RRV untergraben.

- 63 Gem. Art. 6 Abs. 1 c) RRV hat der Gewerbetreibende nunmehr vor allem auch eine *E-Mail-Adresse* anzugeben, unter der der Verbraucher schnell und effizient mit dem Gewerbetreibenden kommunizieren kann. Dieses Erfordernis ist allerdings schon in Art. 5 Abs. 1 c) der E-Commerce-Richtlinie statuiert. In Art. 6 Abs. 1 e) RRV hat der Gesetzgeber den Begriff des *Gesamtpreises* näher bestimmt. Zum einen sind beim „Gesamtpreis“ sämtliche Steuern und Abgaben mit einzurechnen. Damit ist nun neu der Brutto- und nicht wie noch im Rahmen der FARL der Nettogesamtpreis anzugeben.⁹⁹ Vorbild dieser Regelung dürfte Art. 23 der VO über gemeinsame Vorschriften für die Durchführung von Luftverkehrsdiensten in der Gemeinschaft (EG) 1008/2008 gewesen sein, die eine solche Gesamtpreisangabe für sogenannte „Billigflieger“-Preise bereits vorschreibt.¹⁰⁰ Art. 6 Abs. 1 e) RRV stellt darüber hinaus für den Fall von Abonnements klar, dass „Gesamtpreis“ die pro Abrechnungsraum anfallenden Gesamtkosten umfasst. Damit soll wohl vor allem eine Lehre aus den Fällen der „Abofallen“ gezogen werden. Wie sich aus dem Wort „pro“ ergibt, muss der Abrechnungszeitraum regelmäßig sein, sofern nur ein Preis angeboten werden soll. Ist der Abrechnungszeitraum unregelmäßig, so zum Beispiel während einer dreimonatigen „Schnupperphase“, an die sich sodann ein halbjähriger Abrechnungszeitraum anschließt, so ist der Preis für jeden dieser Zeiträume gesondert anzugeben.
- 64 Mit der Einführung des *Muster-Widerrufsformulars* ist nunmehr auch in Art. 6 Abs. 1 h) RRV geregelt, dass dem Verbraucher dieses zur Verfügung gestellt wird, bevor er an den Vertrag oder an sein Vertragsangebot gebunden ist. Darüber hinaus sind die Pflichten zur *Kostentransparenz* erweitert worden. Erwägungsgrund 36 beinhaltet zur vereinfachten Handhabung konkrete Vorschläge zur Kostenberechnung der potentiellen Rücksendungskosten. Verstößt der Gewerbetreibende gegen den Hinweis auf die Kosten, so muss der Verbraucher gem. Art. 6 Abs. 6 RRV diese Kosten, über die er nicht oder nicht hinreichend informiert wurde, nicht zahlen.

dd) Harmonisierungsgrad und Kollision mit geltendem Unionsrecht

- 65 Die Informationspflichten sind gem. Art. 6 Abs. 5 RRV ausdrücklich vollharmonisierend. Allerdings besteht dieser Grundsatz nur auf dem Papier. Andere Richtlinien wie die E-Commerce-Richtlinie sowie die Dienstleistungsrichtlinie enthalten ebenfalls Informationsvorschriften, die im Fernabsatzrecht zu berücksichtigen sind. Da diese Richtlinien nur minimalharmonisierend sind, steht es den Mitgliedstaaten grundsätzlich frei, weitergehende Informationspflichten einzuführen. Da sich die Anwendungsbereiche der beiden Richtlinien mit der RRV überschneiden, kommt es daher zur Kollision zwischen den vollharmonisierten Vorschriften der RRV und dem Grundsatz der Minimalharmonisierung der E-Commerce- und Dienstleistungsrichtlinie. Führen Mitgliedstaaten weiterreichende Informationsvorschriften im Rahmen der beiden minimalharmonisierenden Richtlinien ein, so finden diese Vorschriften faktisch auch Anwendung im Geltungsbereich der RRV und konterkarieren somit deren vollharmonisierenden Charakter. Die Dienstleistungsrichtlinie ist in solchen Fällen gem. Art. 3 Abs. 1 eigentlich subsidiär, sodass der vollharmonisierende Charakter der RRV vorgehe. Weitergehende Informationspflichten, die Mitgliedstaaten im Rahmen der Dienstleistungsrichtlinie eingeführt hätten, fänden dann im Geltungsbereich der RRV keine Anwendung. Für die E-Commerce-Richtlinie gibt es keine solche Kollisionsregel, sodass unklar bliebe, wie nun im Kollisionsfall zu entscheiden wäre. Art. 6 Abs. 8 RRV enthält jedoch eine Kollisionsregel, die gem. ihrem UAbs. 2 den Regelungen der RRV den Vorrang gegenüber den Regelungen der E-Commerce- und Dienstleistungsrichtlinie einräumt. Für die Dienstleistungsrichtlinie wiederholt Art. 6 Abs. 8 UAbs. 2 RRV somit nur das, was in Art. 3 Abs. 1 Dienstleistungsrichtlinie schon geregelt war. Für den wesentlich interessanteren Fall, dass Mitgliedstaaten im Rahmen der E-Commerce- und Dienstleistungsrichtlinie weitergehende Informationspflichten einführen, sieht Art. 6 Abs. 8 UAbs. 1 RRV jedoch das Gegenteil vor. Solche weitergehende Informationspflichten bleiben demnach gültig. Damit hebt Art. 6 Abs. 8 UAbs. 2 RRV in diesem Fall die Subsidiarität der Dienstleistungsrichtlinie auf und räumt den Regelungen der E-Commerce-Richtlinie Vorrang ein. Er hebt damit das Konzept der Vollharmonisierung der Informationspflichten nahezu vollständig aus, da Mitgliedstaaten nun im Rahmen der beiden minimalharmonisierenden Richtlinien weitergehende Informationspflichten einführen können. Das ursprüngliche Anliegen, den Unternehmern die Errichtung eines einheitlichen Binnenmarktes durch vereinheitlichte Informationspflichten zu erleichtern¹⁰¹, ist damit hinfällig.

66 Gem. Erwägungsgrund 12 letzter Satz RRV soll jedoch etwas anderes für Informationspflichten gegenüber Dienstleistungserbringern gelten. Im Verhältnis zu jenen würde es Mitgliedstaaten gestattet sein, weitergehende Informationspflichten zuzulassen. Damit steht Erwägungsgrund 12 letzter Hs. RRV im Widerspruch zum Wortlaut von Art. 6 Abs. 5 RRV, der sämtliche Informationsvorschriften im Fernabsatz für vollharmonisierend erklärt. Verstößt der Wortlaut einer Norm in einer Richtlinie gegen den Wortlaut von Erwägungsgründen, so dürfen Erwägungsgründe nicht herangezogen werden, um eine Abweichung von einer Regelung des Rechtsaktes zu rechtfertigen¹⁰². Genau dies wäre hier jedoch der Fall. Art. 6 Abs. 5 RRV lässt keine Interpretation hinsichtlich der Zulassung von weitergehenden Informationspflichten für Dienstleistungserbringer zu. Eine solche Ausnahme nur in den grundsätzlich nicht verbindlichen Erwägungsgründen¹⁰³ zuzulassen, ist nicht hinreichend. Damit darf hier entgegen Erwägungsgrund 12 der RRV keine Ausnahme bezüglich Dienstleistungserbringern gemacht werden.

67 Zudem können gem. Art. 6 Abs. 5 RRV die Parteien jedoch ausdrücklich ein Abweichen von den Informationspflichten vereinbaren. So kann das mit der Vollharmonisierung verfolgte Ziel zusätzlich durch Dispositionen der Parteien am Markt unterlaufen werden.¹⁰⁴ Da auch diese Vorschrift vollharmonisierend ist, entsteht nun die seltsame Situation, dass die Mitgliedstaaten zwar im Rahmen der RRV die Informationspflichten nicht verändern dürfen, um den Binnenmarkt nicht durch Zersplitterung zu gefährden, nun aber durch AGB-Recht unzählige kleine Informations-Regimes entstehen, die miteinander im Wettbewerb stehen, von denen die Mitgliedstaaten allerdings ausgeschlossen sind. Grundsätzlich ist gegen diesen Wettbewerb nichts einzuwenden, da ein Wettbewerb von AGBen - verbunden mit effizienter mitgliedstaatlicher und EU-rechtlicher Kontrolle - effiziente Lösungen hervorbringen kann.¹⁰⁵ Auch ist der Wettbewerb der Rechtsordnungen der Mitgliedstaaten untereinander im Grundsatz mit der Binnenmarktidee vereinbar.¹⁰⁶ Jedoch war es gerade die - wenn auch vielfach in Frage gezogene - Grundannahme der Vollharmonisierungsstrategie, dass ein solcher Wettbewerb der Informationsanforderungen den Binnenmarkt eher hindert als fördert. Da die Vereinheitlichung der Informationspflichten somit das Herzstück der Vollharmonisierungsstrategie war, stehen diese Regelungen auch symbolisch für das Scheitern dieser Strategie.

b.) Auswirkungen auf § 312c BGB

68 Neben den einzelnen Änderungen der Informationspflichten in Art. 246 §§ 1 und 2 EGBGB, denen hier nicht näher nachgegangen werden kann, haben vor allem die Regelungen zum Harmonisierungsgrad Auswirkungen auf § 312c BGB. § 312c Abs. 4 BGB

sollte ersetzt werden durch den Hinweis darauf, dass es den Parteien frei steht, durch Vertrag andere Informationspflichten zu vereinbaren. In § 312c Abs. 2 BGB sollte an die durch die RRV harmonisierten Vorgaben der E-Commerce-Richtlinie angepasst werden.

c.) Ergebnis

69 Die Auswirkungen der neuen Informationsvorschriften auf das BGB sind gering. Lediglich der Inhalt im EGBGB ist anpassungsbedürftig, sowie die Vorschriften des § 312c Abs. 2 und 4 BGB. Darüber hinaus kann Deutschland allerdings weitergehende Informationspflichten, „getarnt“ als Umsetzungsakt der E-Commerce- und Dienstleistungsrichtlinie einführen. Daneben können die Parteien andere Informationspflichten vereinbaren. Da dies überwiegend Auswirkungen auf AGB haben wird, wird sich die Kontrolle der Informationspflichten auf die §§ 307 ff. BGB verlagern. Ob es in diesem Zusammenhang neuer Regelungen bedarf, bleibt abzuwarten.

3. Widerrufsrecht gem. §§ 312d und 355 BGB, sowie diesbezügliche Kosten, insbes. § 312e BGB

70 Das Widerrufsrecht gilt als „Urgestein“¹⁰⁷ des Europäischen Verbraucherrechts und steht als solches seit seiner Einführung in der Haustürwiderrufsrichtlinie 1985 unter verschärfter wissenschaftlicher Beobachtung.¹⁰⁸ Schon aus diesem Grund sind die Auswirkungen der zahlreichen von der Wissenschaft vorgebrachten Vorschläge in höchstem Maße interessant. Aufgrund der verzahnten Regeln von § 312d und § 355 BGB werden die Auswirkungen des Widerrufsrechts auf beide Normen untersucht.

a.) Vorschriften über das Widerrufsrecht in der RRV sowie Harmonisierungsgrad

71 Obgleich die Wirksamkeit eines allgemeinen Widerrufsrechts aus Sicht der Verhaltenswissenschaftler zugunsten eines Bestätigungsrechts kritisiert wird,¹⁰⁹ hält die RRV am Institut des Widerrufsrechts fest. Im Folgenden soll daher zunächst auf die Widerrufsfrist aa) eingegangen werden, bevor die Form des Widerrufs untersucht wird bb). Sodann wird auf die Pflichten der Parteien cc) und die Ausnahmen vom Widerrufsrecht dd) sowie auf die Beweislast ee) eingegangen.

aa) Widerrufsfrist

72 Der *Beginn der Widerrufsfrist* ist in den Artikeln der RRV, im Gegensatz zu Art. 6 Abs. 1 UAbs. 2 FARL nicht explizit geregelt. Daraus ergibt sich insbesondere,

dass ein Verstoß gegen die Informationspflichten seitens des Gewerbetreibenden nicht, wie noch in Art. 6 Abs. 1 UAbs. 2 FARL, zu einem Aufschub des Beginns der Widerrufsfristen führt. Selbst wenn die Mitgliedstaaten eine solche Erweiterung des Verbraucherschutzes einführen wollten, würde dies gegen den vollharmonisierenden Charakter des Art. 10 Abs. 1 RRV verstoßen.¹¹⁰ Art. 10 Abs. 1 RRV statuiert ausdrücklich nur eine Verlängerung der Widerrufsfrist, wenn der Gewerbetreibende den Verbraucher nicht *über sein Widerrufsrecht (!)* aufklärt. Eine darüber hinausgehende Verlängerung des Widerrufsrechts wegen des Verstoßes gegen andere Informationspflichten bspw. durch das Hinausschieben des Beginns des Widerrufsrechts ist – im Gegensatz zu Art. 6 Abs. 1 UAbs. 2 FARL und II.-5:103:(2) (b) DCFR – in der RRV nicht vorgesehen. Es würde auch zur faktischen Ausweitung des Widerrufsrechts über die Zwölf-Monats-Frist des Art. 10 Abs. 1 RRV hinaus führen. Da dies gem. Erwägungsgrund 43 RRV aus Gründen der Rechtssicherheit nicht möglich ist, würde ein solcher Aufschub des Beginns der Widerrufsfrist dieses Ziel konterkarieren.

- 73 Für dieses Ergebnis spricht auch, dass der EU-Gesetzgeber in Erwägungsgrund 40 der RRV Ausführungen über den Beginn der Widerrufsfrist macht. Darüber hinaus lassen sich aus Umkehrschlüssen zu den Regelungen des Endes der Widerrufsfrist auch Angaben über deren Beginn machen. Erwägungsgrund 40 statuiert, dass die Widerrufsfrist bei Kaufverträgen an dem Tag beginnen soll, an dem der Verbraucher oder ein von ihm benannter Dritter, der nicht Beförderer ist, in den Besitz der Ware gelangt. Dies entspricht der Regelung des II.-5:103: (1) (c) DCFR. Wenn mehrere Waren zur selben Bestellung gehören und sie zu unterschiedlichen Zeitpunkten geliefert werden, so beginnt die Frist zu laufen, wenn der Verbraucher oder der Dritte die letzte Lieferung erhält. Eine Ausnahme besteht arg. e. contrario Art. 9 Abs. 2 b) iii) RRV für Verträge über die regelmäßige Lieferung von Waren. In einem solchen Fall beginnt die Frist ausnahmsweise, wenn der Verbraucher oder Dritte in den Besitz der ersten Ware gelangt ist. Arg. e. contrario Art. 9 Abs. 2 c) RRV beginnt die Frist bei Verträgen über die Lieferung von Gas, Wasser und Strom, sofern sie nicht in einer begrenzten Menge angeboten werden, sowie für Fernwärme und digitale Inhalte ab dem Tag des Vertragsschlusses. Über den Fristbeginn bei Dienstleistungsverträgen sagt die Richtlinie explizit nichts. Allerdings endet die Frist gem. Art. 9 Abs. 2 a) RRV bei Verträgen über Dienstleistungen 14 Tage nach Vertragsschluss. Arg. e contrario beginnt die Frist auch hier im Zeitpunkt des Vertragsschlusses. Die Berechnung der Frist erfolgt gem. Erwägungsgrund 41 nach der Verordnung (EWG/Euratom) Nr. 1182/71 zur Festlegung der Regeln für die Fristen, Daten und Termine (hiernach: FristenVO), die mit der Fristberechnung gem. §§ 187 ff. BGB übereinstimmen. Die Frist beginnt demnach gem. Art. 3 Abs. 1 Uabs. 2 FristenVO am Tag nach-

dem die Lieferung in den Besitz des Verbrauchers oder Dritten gelangt ist.

- 74 Im Vergleich zu Art. 6 Abs. 1 FARL wurde die *Länge der Widerrufsfrist* in Art. 9 Abs. 1 RRV von sieben auf 14 Tage erweitert. Die RRV orientiert sich damit am Modell des § 312d BGB,¹¹¹ sowie des II. – 5:103 (2) DCFR. Diese Frist verlängert sich jedoch gem. Art. 10 Abs. 1 RRV um zwölf Monate, wenn der Gewerbetreibende den Verbraucher nicht über sein Widerrufsrecht aufgeklärt hat. Damit kann gem. Art. 10 Abs. 1 RRV der Gesamtumfang des Widerrufsrechts zwölf Monate und 14 Tage betragen. Dies steht prima vista im Widerspruch zu Erwägungsgrund 43 RRV, der – nach Vorbild des II. – 5:103 (3) DCFR – aus Gründen der Rechtssicherheit eine Begrenzung der Gesamtwiderrufsfrist auf zwölf Monate statuiert. Wie bereits dargestellt wurde, dürfen in einem solchen Widerspruchsfall Erwägungsgründe nicht herangezogen werden, um eine Abweichung von einer Regelung des Rechtsaktes zu rechtfertigen.¹¹² Damit ist es angesichts des klaren Wortlauts von Art. 10 Abs. 1 RRV unschädlich, dass Erwägungsgrund 43 RRV nur von einer Gesamtfrist von zwölf Monaten spricht. Maßgeblich ist allein die Frist des Art. 10 Abs. 1 RRV. Die Frist ist gem. Erwägungsgrund 41 in Kalendertagen, nicht Arbeitstagen, zu bemessen. Daher umfasst die Frist gem. Art. 3 Abs. 3 Fristen-VO auch sämtliche Sonn- und Feiertage. Die Frist muss mindestens jedoch gem. Art. 3 Abs. 5 Fristen-VO zwei Arbeitstage umfassen.
- 75 Im Gegensatz zur FARL enthalten Art. 9 Abs. 2, Art. 10 sowie Erwägungsgrund 43 RRV ausdrückliche Vorschriften zum *Ende der Widerrufsfrist*. Diese Vorschriften reflektieren die EuGH-Entscheidungen in den Rechtssachen Heining¹¹³ und Hamilton,¹¹⁴ die bei Nichtbelehrung zur Problematik des „ewigen Widerrufsrechts“ führten, welche nicht nur im Fernabsatzrecht,¹¹⁵ sondern aufgrund ihrer prinzipienbasierten Urteilsfindung auch in Grundlagenfragen des europäischen Vertragsrechts für Diskussion gesorgt haben.¹¹⁶ Bei Verträgen über Dienstleistungen endet die Frist gem. Art. 9 Abs. 2 a) RRV 14 Tage nach dem Tag des Vertragsschlusses, bei der Lieferung von Waren gem. Art. 9 Abs. 2 b) RRV 14 Tage nachdem der Berechtigte in den Besitz der Ware gelangt ist. Spiegelbildlich zum Beginn der Widerrufsfrist endet damit auch die Widerrufsfrist für mehrere Waren in einer Bestellung gem. Art. 9 Abs. 2 b) i), ii) RRV jeweils 14 Tage nachdem der Verbraucher oder entsprechende Dritte in den Besitz der letzten Warenlieferung gelangt ist. Bei Verträgen über die regelmäßige Lieferung von Waren endet die Widerrufsfrist hingegen gem. Art. 9 Abs. 2 b) iii) RRV bei der Inbesitznahme der ersten Ware. Gem. Art. 9 Abs. 2 c) RRV endet die Frist bei Verträgen über die Lieferung von Gas, Wasser und Strom, sofern sie nicht in einer begrenzten Menge angeboten werden, sowie für Fernwärme und digitale Inhalte, 14 Tage nach dem Tag des Vertragsschlusses. Maßgebliche Handlung für das wirksame

Betätigen des Widerrufsrechtes im Rahmen des Widerrufsrechtes ist gem. Art. 11 Abs. 2 RRV der Zeitpunkt des Absendens der Widerrufserklärung durch den Verbraucher.

bb) Form des Widerrufs

76 Die Ausübung des Widerrufsrechtes ist gem. Art. 11 Abs. 1 b) RRV in Anlehnung an II. – 5:102 (1) DCFR grundsätzlich an keine Form gebunden. Die Regelung erfordert nur, dass die Erklärung „eindeutig“ sein muss. Die Erklärung kann vor allem gem. Art. 11 Abs. 1 a) RRV durch die Verwendung eines Muster-Widerrufsformulars in der in Anhang I Teil B RRV festgehaltenen Form erfolgen. Der Gewerbetreibende kann diese Widerrufserklärung gem. Art. 11 Abs. 3 RRV online zum Ausfüllen oder in sonst einer Weise bereitstellen.

cc) Pflichten der Parteien bei Widerruf

77 Diese neuen Regelungen über die Pflichten der Parteien bei Widerruf sind Ausdruck der Kritik der als zu einseitig empfundenen verbraucherschützenden Regelungen des FARL. Wie sich aus Erwägungsgrund 50 ergibt, haben diese Regelungen nicht nur einen einseitigen Schutz des Verbrauchers zum Ziel, sondern sollen einen angemessenen Ausgleich der Interessen von Gewerbetreibenden und Verbrauchern bei Ausübung des Widerrufsrechtes gewährleisten.¹¹⁷

(a) Rücksendeverpflichtung des Verbrauchers

78 Den Verbraucher trifft gem. Art. 15 Abs. 1 RRV eine *Rücksendungspflicht ohne unnötige Verzögerung, innerhalb von spätestens 14 Tagen* ab dem Tag, an dem er dem Gewerbetreibenden den Entschluss mitteilt, den Vertrag zu widerrufen. Eine Ausnahme besteht lediglich wenn der Gewerbetreibende angeboten hat, die Ware selbst abzuholen. Zur Einhaltung der Frist kommt es gem. Art. 15 Abs. 1 S. 2 RRV nur auf den Zeitpunkt der Absendung durch den Verbraucher, nicht jedoch den Erhalt der Sache beim Gewerbetreibenden an. Fraglich bleibt jedoch, wann die Frist genau zu laufen beginnt. Die RRV stellt auf den Tag ab, an dem der Verbraucher dem Gewerbetreibenden den Widerrufsentschluss *mitteilt*. Darüber, was unter „mitteilen“ zu verstehen ist, schweigt die RRV. Auch aus den übrigen Sprachfassungen ist keine Konkretisierung ersichtlich.¹¹⁸ Es kommt der Zeitpunkt der Entäußerung der Widerrufserklärung sowie der des Empfangs der Widerrufserklärung in Betracht. Der vollharmonisierende Charakter der Vorschrift gebietet eine Auslegung nach europarechtlich-funktionalen Kriterien. Somit ist der nach deutschem Recht uU einschlägige § 130 Abs. 1 S. 1 BGB –wenn über-

haupt- lediglich im Rahmen der wertenden Rechtsvergleichung zu berücksichtigen.¹¹⁹ Die mitgliedstaatlichen Regelungen knüpfen – von einigen hier nicht einschlägigen Besonderheiten des postalischen Versandes abgesehen – Rechtswirkungen erst dann an Erklärungen, wenn sie dem Empfänger zugegangen sind.¹²⁰ Dieser Grundsatz findet sich auch in Art. I:109 (3) DCFR.

(b) Kostentragung bei Widerruf

79 Die Regelungen über die *Kosten* des Widerrufs lassen sich zu dem im Erwägungsgrund 46 enthaltenen Grundsatz zusammenfassen: Der Gewerbetreibende muss alle Kosten zurückerstatten, die er im Zusammenhang mit der Lieferung der Waren vom Verbraucher erhalten hat. Darüber hinausgehende Kosten sind nicht zu erstatten.

80 Demnach trifft den Verbraucher gem. Art. 14 Abs. 1 UAbs. 2 RRV die Pflicht, die Kosten der Rücksendung zu tragen. Er ist jedoch von dieser Pflicht befreit, wenn der Gewerbetreibende ihn zuvor nicht über seine Kostentragungspflicht informiert hat. Freilich muss der Verbraucher die Kosten auch dann nicht tragen, wie der gleiche Art. deklaratorisch festhält, wenn der Gewerbetreibende die Kosten freiwillig übernimmt.

81 Der Gewerbetreibende hat gem. Art. 13 Abs. 1 UAbs. 1 RRV alle Zahlungen, die er vom Verbraucher erhalten hat, zurückzuzahlen. Der Umfang ist jedoch gem. Art. 13 Abs. 2 RRV bei Lieferkosten auf die Kosten einer Standardlieferung beschränkt, sofern der Gewerbetreibende nicht selbst eine andere Lieferart gewählt hat. Für die Rückzahlung hat der Gewerbetreibende 14 Tage ab dem Tag Zeit, an dem er über den Entschluss des Verbrauchers, den Vertrag zu widerrufen, erfahren hat. Analog zu den Ausführungen zum Rücksenderecht ist dabei auf den Zeitpunkt des Zugangs abzustellen. Er hat gem. Art. 13 Abs. 1 UAbs. 2 RRV das gleiche Zahlungsmittel zu verwenden, das vom Verbraucher bei der ursprünglichen Transaktion eingesetzt wurde. Damit wird vor allem sichergestellt, dass die Rückzahlung nicht daran scheitert, dass das vom Gewerbetreibenden benutzte Rückzahlungssystem für den Verbraucher nicht verfügbar ist. Aufgrund dieser Vorschrift ist der Hinweis in Erwägungsgrund 46 darauf, dass eine Erstattung nicht in Form von Gutscheinen erfolgen soll, wenig hilfreich. Die davon erfassten Fälle, in denen ein Verbraucher eine Ware beispielsweise mit Kreditkarte zahlt, sind ohnehin gem. Art. 13 Abs. 1 UAbs. 2 RRV über das Kreditkartensystem rückabzuwickeln. Der in Erwägungsgrund 46 geregelte Fall kann also nur dann auftreten, wenn ein Verbraucher eine Ware auch mit einem Gutschein zahlt. Dann ist es aber auch gerade nicht ersichtlich, warum eine Kostenersatzung nicht auch mit einem Gutschein erfolgen soll. Gem. Art. 13 Abs. 3 RRV kann der Gewerbetrei-

bende jedoch die Erstattung der Kosten solange verweigern, bis der Verbraucher den Nachweis über die Rücksendung erbracht hat.

dd) Ausnahmen vom Widerrufsrecht

82 Ausnahmen vom Widerrufsrecht werden nach EU-Recht immer dann statuiert, wenn die entsprechenden Verträge ein spekulatives Element beinhalten¹²¹ oder wenn der „Schutz der Interessen der Verbraucher, die Fernkommunikationsmittel verwenden“ zu „unverhältnismäßigen Nachteile(n)“ für die „Interessen der Anbieter bestimmter Dienstleistungen“ führen würde.¹²² In diesen Fällen können die Kosten für ein Widerrufsrecht so hoch werden, dass das Risiko besteht, dass bestimmte Güter gänzlich vom Handel ausgeschlossen werden.¹²³ Art. 16 RRV hat im Wesentlichen die Ausnahmen des Art. 6 Abs. 3 FARL übernommen,¹²⁴ die Neuerungen bestehen vor allem in der Angleichung an die Ausschlussvorschriften des II.-5:201 (2) und (3) DCFR. Am praktisch relevantesten werden die neu hinzugekommenen Ausnahmen für versiegelte Waren sein. Gem. Art. 16 e) RRV sind aus gesundheitlichen Gründen versiegelte Waren, deren Versiegelung nach der Lieferung entfernt wurde, vom Widerrufsrecht ausgeschlossen. Solche geöffnete, zuvor aus gesundheitlichen Gründen versiegelte, Ware wird faktisch wertlos und damit für den Wiederverkauf uninteressant. Hier wird die Tatsache, dass solche Waren nach Ausübung des Widerrufsrechts ihre Marktfähigkeit verlieren, besonders deutlich. Die Verschärfung des Risikos, dass diese Produkte gänzlich vom E-Commerce-Markt verschwinden, kann nicht im Sinne eines wirksamen Verbraucherrechtes sein. Art. 16 i) RRV nimmt versiegelte Ton- oder Videoaufnahmen sowie Computersoftware, deren Versiegelung nach Lieferung entfernt wurde, vom Anwendungsbereich der RRV aus. Hierdurch wird vor allem dem Missbrauch entgegen gewirkt, der durch die einfache Vervielfältigungsmöglichkeit dieser Medien wahrscheinlich ist. Unter der Vorgängervorschrift Art. 6 Abs. 3 Sps. 4 FARL war streitig, ob die Waren nur bei Verkauf noch versiegelt sein müssen oder ob ein „entsiegelndes Verhalten“ zusätzliche Voraussetzung für das Eingreifen der Ausnahmeregelung ist.¹²⁵ Hintergrund des Streits war, ob im Downloadverfahren erworbene Software auch unter den Ausnahmetatbestand fällt.¹²⁶ Art. 16 m) RRV entschärft nun den Streit dadurch, dass er eine Sondervorschrift für solche im Downloadverfahren erworbene Vorschrift schafft und somit auch diese von Widerrufsrecht ausnimmt. Art. 16 f) RRV nimmt Waren, die nach Lieferung untrennbar mit anderen Gütern vermischt werden, vom Widerrufsrecht aus. Dies betrifft insbesondere Flüssigkeiten, wie beispielsweise Düngemittel oder Wasserzusätze jeglicher Art.

83 Keine Auswirkungen hat die Ausnahmegvorschrift des Art. 16 k) RRV für Versteigerungen auf sog. ebay-

Auktionen.¹²⁷ Wie schon dargestellt wurde, fallen ebay-Auktionen nicht unter die Definition von „öffentliche Versteigerungen“ iSd Art. 2 Abs. 13 RRV. Entgegen der Befürchtungen im Schrifttum¹²⁸ erleichtert Art. 16 a) RRV nicht das sogenannte „cold calling“. Art. 16 a) RRV nimmt Dienstleistungsverträge, die bereits vollständig erbracht wurden und denen der Verbraucher zuvor ausdrücklich zugestimmt hat, aus dem Anwendungsbereich des Widerrufsrechts aus. Die Formulierung „zuvor ausdrücklich zugestimmt“ verlangt, dass der Verbraucher vor Abschluss der Ausführung des Dienstleistungsvertrages zugestimmt haben muss. Diese Formulierung schließt gerade den Fall des „cold calling“ aus, bei denen der Verbraucher am Telefon, und damit nicht „zuvor“ zustimmt.¹²⁹ Das Widerrufsrecht bleibt damit im Fall des „cold calling“ erhalten.

ee) Beweislast

84 Die Beweislast für die Ausübung des Widerrufsrechts trägt gem. Art. 11 Abs. 4 RRV der Verbraucher. Da den Verbraucher hinsichtlich dieser „Ausübung“ keine weitere Pflicht als das rechtzeitige Absenden der Widerrufserklärung (Art. 11 Abs. 2 RRV) trifft, beschränkt sich diese Regelung grundsätzlich auch nur auf das rechtzeitige Absenden. Dieses Ergebnis wird von Erwägungsgrund 44 gestützt, der die Beweislast ausschließlich auf das rechtzeitige Absenden der Widerrufserklärung beschränkt. Der Beweis dafür, dass die Informationen über das Widerrufsrecht vorgelegen haben, obliegt demnach gem. Art. 6 Abs. 9 RRV konsequenter Weise dem Gewerbetreibenden. Fraglich ist jedoch, wer das Vorliegen von Ausschlussgründen des Widerrufsrechts zu beweisen hat. Die Ausschlussgründe bilden gewissermaßen eine negative Voraussetzung für dessen „Ausübung“ iSd. Art. 11 Abs. 4 RRV, da das Widerrufsrecht erst geltend gemacht werden kann, wenn kein Ausschlussgrund greift. Art. 11 Abs. 4 RRV gilt allerdings auch nur für Art. 11 RRV; die Ausschlussgründe des Widerrufsrechts in Art. 16 sind davon *expressis verbis* nicht umfasst. Demnach ist es auch Sache des Verbrauchers nachzuweisen, dass die Ausschlussgründe vorliegen. Der Verbraucher hat damit den Beweis zu führen, dass beispielsweise die Versiegelung einer Sache nicht von ihm entfernt wurde.

ff) Harmonisierungsgrad

85 Im Fernabsatzrecht sind diese Regelungen vollharmonisierend.

b.) Auswirkungen auf §§ 312d und 312e BGB

86 Die speziellen fernabsatzrechtlichen Regelungen über Umfang und Inhalt der Widerrufsfrist in § 312d BGB und auch in der soeben neu geschaffenen Vorschrift des § 312e BGB¹³⁰ sind nach der Harmonisierung dieser Regelungen mit dem Widerrufsrechts der Haustürrichtlinie obsolet geworden. Da diese Regelung nunmehr hinsichtlich Fernabsatz- und Haustürgeschäften einen allgemeinen Charakter hat, bietet sich statt einer Regelung in den speziellen fernabsatzrechtlichen Vorschriften eine Umsetzung in einer allgemeineren Norm an. Denkbar wäre eine Umsetzung in einer Norm, die die Voraussetzungen des Haustür- und Fernabsatzrechts zusammenführt. Vorzugswürdig wäre allerdings eine Umsetzung im allgemeinen § 355 BGB. Zwar gilt dieser auch für den nicht in der RRV harmonisierten Teilbereich des Widerrufs im Verbraucherkreditrecht, wie er in § 495 BGB zu finden ist. Jedoch stimmen hinsichtlich des Widerrufsrechts die Anforderungen ohnehin im Großen und Ganzen sachlich überein. Darüber hinaus statuiert § 495 Abs. 2 BGB Sonderregelungen bezüglich der meisten Voraussetzungen des Widerrufs, so zum Beispiel des Beginns der Widerrufsfrist, sodass eine allgemeine Regelung in § 355 BGB unschädlich ist.

c.) Auswirkungen auf § 355 BGB

87 Entsprechend dem Vorgesagten empfiehlt es sich daher, Beginn, Ende und Ausnahmen des Widerrufsrechts einheitlich in § 355 BGB zu regeln. Die weitreichenden Änderungen durch die RRV bedingen daher eine komplette Überarbeitung der Norm, bei der jeder Absatz anzupassen ist sowie ein Absatz mit den Ausnahmen vom Widerruf angefügt werden sollte.

d.) Auswirkungen auf § 357 BGB

88 Die Rechtsfolgen des Widerrufs wurden in der RRV grundlegend überarbeitet und nach den Verpflichtungen der Parteien systematisiert. Daher bietet sich auch eine grundlegende Überarbeitung des § 357 BGB an. Fraglich ist jedoch, ob er dabei der neuen Systematisierung der RRV folgen sollte. Schon bei der Darstellung in diesem Aufsatz hat sich die Systematisierung der RRV als nicht sinnvoll herausgestellt, da die Separierung nach Parteien einzelne Rechte und Gegenrechte künstlich trennt. So trennt die RRV die Kostenregelungen der Parteien in zwei Absätze je nachdem, ob die Pflichten den Verbraucher oder Gewerbetreibenden treffen. Sinnvoller erscheint es, sachlich nach Kostentragung und Rücksendeverpflichtung des Verbrauchers zu trennen.

89 Zusätzlich empfiehlt es sich, hinter § 357 BGB als § 357a BGB die Regelungen über die Beweislast umzusetzen. Da diese neben den Rechtsfolgen einen eigenständigen Regelungsbereich umfassen, sollten sie auch eine eigenständige Regelung erfahren.

e.) Ergebnis

90 Insbesondere die Vorschriften über die Widerrufsfrist sowie die Verpflichtungen der Parteien im Widerruf sind umfangreich geändert worden. Diese erfordert gleichzeitig eine umfangreiche Überarbeitung der Widerrufsregelungen im BGB. Die Harmonisierung der Widerrufsvorschriften führt jedoch zu einer Entschlackung der speziellen Fernabsatzvorschriften und einer zeitgleichen Aufwertung der allgemeinen Vorschriften über den Widerruf in §§ 355 ff. BGB.

4. Abweichende Vereinbarung, § 312i BGB

91 Der vollharmonisierende Charakter einzelner Vorschriften der RRV hat auch Auswirkungen auf § 312i BGB. Von vollharmonisierenden Vorschriften darf nunmehr gar nicht, auch nicht zum Vorteil der Verbraucher oder Kunden abgewichen werden. Daher empfiehlt es sich, „nicht zum Nachteil des Verbrauchers oder Kunden“ ersatzlos zu streichen.

5. Verbrauchsgüterkauf §§ 474 ff. BGB

a.) Vorschriften über das Widerrufsrecht in der RRV sowie Harmonisierungsgrad

92 Art. 30 RRV statuiert besondere Vorschriften für den Versandkauf. Während S. 1 der Vorschrift Altbekanntes wiedergibt, findet sich insbesondere in S. 2 der Vorschrift eine Neuerung. Wenn der Beförderer vom Verbraucher beauftragt wurde, geht das Risiko für den Verlust oder die Beschädigung der Waren schon mit Übergabe an den Beförderer auf den Verbraucher über.

93 Darüber hinaus statuiert Art. 18 Abs. 2 RRV ein Kündigungsrecht des Verbrauchers, sollte der Gewerbetreibende nicht innerhalb der in Art. 18 Abs. 1 RRV statuierten Frist und auch nicht in einer anschließend vom Verbraucher gesetzten, angemessenen Frist geliefert haben.

94 Die Vorschriften sind vollharmonisierend.

b.) Auswirkungen auf §§ 474 ff. BGB

95 § 474 Abs. 1 S. 2. BGB nimmt die Geltung des § 447 BGB für alle Verbrauchsgüterkaufverträge aus. Damit steht die jetzige Regelung im Widerspruch zu Art. 30 S. 2 RRV, der das Risiko ausnahmsweise auf den Verbraucher übergehen lässt, wenn der Verbraucher den Beförderer selbst bestellt hat und die Sache dem Beförderer übergibt. Der Sache nach handelt es sich hier um die in Deutschland schon lange umstrittene Frage, ob der Versandkauf auch die Beförderung durch „eigene Leute“ umfasst.¹³¹ Art. 30 S. 2 RRV hat dies nun für den Fall des Verbrauchsgüterkaufs negativ entschieden. Mithin ist § 474 Abs. 1 S. 2 BGB dahingehend anzupassen, dass er keine Anwendung auf den Fall findet, wenn der Verbraucher die Beförderungsperson selbst bestellt hat.

C. Ergebnis

96 Das BGB ermöglicht sowohl eine systemkonforme als auch europarechtsfeste Umsetzung der E-Commerce-Vorschriften der RRV. Es gilt lediglich, sein Potential durch den Gesetzgeber zu nutzen. In diesem Zusammenhang sei an die Kritik Wulf-Henning Roths zur Umsetzung der Verbrauchsgüterkaufrichtlinie erinnert, die angesichts der eben dargestellten Kritik nichts an Aktualität eingebüßt hat: „Das BGB nimmt in unserer Rechtsordnung eine zentrale Stellung ein. Soll diese Stellung [...] gestärkt werden, erfordert dies eine gründlich vorbereitete und in ihrer technischen Ausführung gut durchdachte Gesetzgebung, die sich von der Hektik und Beliebigkeit abhebt, was [sic!] auf dem Gebiet des Steuer- und Sozialrechts heute leider zur Norm geworden ist. [...] Dem Gesetzgeber sei dringend angeraten, sich diese Zeit auch zu nehmen [...]“¹³² Im Hinblick auf den derzeit verfügbaren Gesetzesentwurf zur Umsetzung der „Button“-Lösung sei daher kritisch angemerkt, dass weder dem Europarecht, noch dem BGB und damit der Rechtsanwendung ein Gefallen getan ist, wenn der Gesetzgeber die „Buchstabenvorschriften“ der Fernabsatzregelungen erweitert, ohne sich über eine passgenaue Umsetzung in das BGB Gedanken zu machen.

97 Der RRV selbst sieht man den schwierigen Prozess und die zahlreichen Kompromisse an, die sie durchlaufen hat. Die Regelungen sind unübersichtlich und wenig systematisch. Angesichts des vielen Hin und Her zwischen Regel und Ausnahme, die überall, sogar und gerade in den Erwägungsgründen lauert, lässt sich das letztlich geltende Recht nur schwer ermitteln. Der Klarstellungsfunktion, die die Zusammenfassung der zwei Richtlinien im Sinne der „Better“ oder nunmehr „Smart Regulation“-Strategie erreichen wollte, ist das nur bedingt zuträglich.

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Delineating and Promoting an Online “Legal Offer”: A Proper Task for Copyright Legislation?

How Efforts to Tackle Illegal File-Sharing Risk Creating Legal Uncertainty in the Cultural Content Digital Market

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Abstract: Legislations tackling the issue of illegal downloading of copyrighted content, notably those enabling so-called “graduated response” mechanisms, often present and promote the idea of “legal offers”, designed to encourage consumers to acquire cultural content legally, as the positive counterpart to their sanctioning provisions. The paper argues that

such legal rationales are actually underpinned by ambiguous concepts, bearing underestimated consequences on both practical and theoretical levels. The legislative promotion for the development of so-called “legal” services instills uncertainty in the online market place, thereby affecting online business practices but also the core tenets of copyright law.

Keywords: Copyright, Enforcement, Regulation, File-sharing, Graduated Response, HADOPI Law, Digital market, Legal offer.

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A. Introduction

1 Where copyright regulation and discourse target illegal content as being the main cause of wide-scale online copyright infringement, the development of legal content is often presented as the best solution to turn the tide. Indeed, what better alternative to *illegal* content than *legal* content? However, this seemingly simple pattern is far from being easy. On the contrary, those in charge of identifying what is legal and what is illegal should identify the questions arising from such an approach as perhaps proving to be too Manichean. The legislator has tackled the issue, adopting a questionable method opposing “legal”

versus “illegal” digital content and related services that lets us predict some of the negative consequences for the development of the cultural content digital market.

2 This questioning is all the more relevant when the legislator is attempting not only to promote but also to delineate so-called “legal offers” of copyrighted online content. In doing so, the copyright legislator is taking the risk of departing from his role while encroaching upon digital market development. This paper proposes to question the “legal” rhetoric used in such legislation as it has developed in some recent laws aiming at influencing Internet users’ behaviour.

- 3 The promotion for “legal” content can be found in legislations supporting “graduated response” solutions, namely in the French law where it is particularly emphasised. “Graduated response” refers to a system of online copyright enforcement that is an alternative to the traditional judicial procedure targeting individual infringers.¹ The system is based on a principle of cooperation between rights holders and Internet Service Providers (ISPs), through which the former can notify the latter of potential infringement by their subscribers and have increasingly severe measures taken against them. The core common measures – which vary according to their different implementations in national laws – consist of issuing an order for ISPs to take steps affecting access to and/or use of the Internet (such as internet bandwidth reduction, blocking internet access or temporarily suspending accounts) on Internet end-users in certain circumstances described by the law. The progressive enforcement process is often referred to as the “three strikes” approach. The French HADOPI Law² was one of the first legislations to introduce “graduated response” language in national law. The HADOPI, which stands for “*Haute Autorité pour la Diffusion des Oeuvres et la Protection des droits sur Internet*”, is the dedicated body in charge of arbitrating and controlling the implementation of the “graduated response” measures between rights holders and ISPs, up to the communication of the cases subject to litigation to the judge. It is then up to the judicial authority to decide whether to sanction individual infringers.³
- 4 Although this paper does not aim at describing the HADOPI system in detail,⁴ the French legal environment offers a specifically relevant basis for analysis about the market promotion counterpart of “graduated response” legislations, which has not triggered much attention in literature so far. Such an analysis shall start with the outline of the legal provisions dealing with the “legal offer”, while already questioning their relevance and revealing their ambiguity (B). The reflection shall then be pursued to show how this legislative approach risks affecting online market practices and perverting the task of the copyright legislator (C). It is interesting to note the role of copyright (online) enforcement legislation in this respect, which will lead us to some conclusive remarks about the global context of Internet regulation (D).

B. The promotion for a “legal offer” of cultural content online services: an ambiguous concept

- 5 Among the main missions of the HADOPI Authority⁵ is the “promotion of a legal offer”⁶, which holds a strategic position within the copyright enforcement system enabled by the HADOPI legislation. The omnipresence of the “legal offer” concept appears in the explanatory statements of the law: “[the first part of the provided legislative measures] directly aims at fostering the attractiveness and the resources of offers proposed to the public, notably through referencing and certification, through the shortening of release delays of films in off-line and on demand videos (...)”⁷ Scrutinizing the meaning of the “legal offer” is therefore crucial to understand the “graduated response” model, especially as set out under the French HADOPI Law.
- 6 The HADOPI legislation aims at promoting a “legal offer” through a certification process for digital services offering copyrighted content (e.g. VOD services, music streaming services). The conditions of certification of online services are outlined in an application Decree adopted in 2010.⁸ However, the described certification process (I) does not help clearly define the “legal offer”, with some questions already coming up with respect to its implementation in practice. This ambiguity leaves room for an unprecedented legal uncertainty to be borne not only by service providers, but also by rights holders themselves. In this questioning process, one crucial point keeps arising: what is to be understood exactly by “legal offer”? (II).
- 7 According to the HADOPI Law, the promotion for a “legal offer” shall be achieved through a certification process aimed at allowing Internet users to clearly identify legal online services and at diverting them from “illegal offers”. In spite of a detailed description of the certification process (1), the law fails to provide for the necessary elements of interpretation as to the scope and impact of the “labels” granted to the services complying with the given criteria (2).
- 8 Under a voluntary basis, providers of cultural content digital services can ask the HADOPI Authority to grant them a certificate (“label”) demonstrating that the copyrighted works offered to the public on their services are duly licensed by rights holders. The 2010 Decree⁹ provides for a detailed certification procedure for digital service providers who have to file a formal request before the HADOPI Authority. The request has to contain: the list of works included in the concerned service, the access conditions to read and to reproduce the works, an affidavit stating that all works contained in the service are duly licensed by rights holders and an obligation to answer to any demand from the HADOPI Authority to verify the accuracy of the delivered information.¹⁰
- 9 All complete request files shall then be published on the HADOPI’s website.¹¹ Rights holders shall be able

to oppose the certification request (within a delay of four weeks from its publication). In case of opposition from rights holders, service providers applying for the label have to either enter into licensing agreements with the complaining rights holders or proceed to withdraw the concerned works (within a maximum delay of two months). In this public procedure, the decision of the HADOPI Authority to award the label must be explicitly delivered (no certification can be inferred from a tacit decision).

- 10 The Decree further provides for some conditions allowing the narrowing of the scope of the obtained certification. The label is granted for a limited period of time (one year from the publication of the label on the HADOPI's website) and is renewable under the same conditions. The HADOPI Authority can decide to withdraw the label if the service provider does not comply with its obligations, in particular if the copyright licenses have not been obtained as announced (although the procedure offers the service provider the opportunity to justify the situation before the Authority). The infringement of rights on one single work can lead to the withdrawal of the certification for the whole service. These conditions can be considered as guaranteeing the control and review of the certification process, thus preventing the misleading use of labels by online services offering unlicensed content.

2. ... with uncertain scope and impact

- 11 Although the promotion for a "legal offer" appears as a "positive" aspect of the HADOPI Law to be differentiated from the "graduated response" provisions of the same legislation pertaining to the prevention and the sanctions against illegal file-sharing, it does not suggest favorable developments for copyrighted content providers and users. The concept of "legal offer" and its related certification procedure show the legislator's intention to encourage service providers to undertake a proactive attitude in cooperation with the HADOPI Authority. Nevertheless, in going beyond the claimed education purpose towards users (to divert them from "illegal offers" and from illegal uses),¹² the law fails to give the marks needed to provide legal force and certainty to such an ambitious task.
- 12 The certification process aims at granting a label of legality to service providers, after due verification through the certification process, who can then hope to attract users and gain an advantage on the market. The HADOPI certification is thus an important investment for professionals taking part in the digital market of cultural content, to such an extent that some rights holders might require service providers to obtain a label before entering into licensing negotiations. This requirement can even be part of the written provisions of the licensing contract, and can even be invoked by investors wishing to secure their assets. As a consequence, the HADOPI certification might create derivative obligations for service providers wishing to succeed in their business.¹³ In reality, the "legal offer" certification tends to put additional pressure on online services, thus instilling uncertainty in whether the service will be able to get or keep its label, which is important in its bargaining activity with the rights holders.
- 13 The certification process raises questions regarding consequences in terms of liability for service providers, but also for the HADOPI Authority itself. Should the Authority reject the label, concluding that all the conditions are not fulfilled, the economic impact may be significant for a service provider looking to integrate the "legal offer" market. It is still uncertain whether the provider facing a certification dismissal is able to complain about the Authority's decision in court (using for instance a competition law defense).
- 14 The law does not provide for any guidance as to what kind of information shall be given to identify the works as a condition of certification (see above, B.I.1). Nor does it say whether the objection from only one rights holder shall be enough to prevent the delivery of certification if the situation cannot be cleared within the two month delay. This question is far from being merely hypothetical. If a service provider has negotiated licensing contracts with music recording producers, what would happen if collective management societies representing performers oppose the certification? Beyond the certification itself, this also questions the role of the HADOPI Authority, the mission of which is to protect copyright holders (bearing in mind that HADOPI stands for "Haute Autorité pour la diffusion des œuvres *et la protection des droits sur Internet*" – our underlining) and presumably, to take a position when some rights holders complain and oppose a certification request.
- 15 The certification awarded to some services might be questioned in many situations. In such circumstances, the HADOPI Authority has to somehow take part in the discussion, or at least act as a host or even as an arbitrator in the discussion between the parties. Disagreements about the interpretation of the contracts between service providers and rights holders might add to the complexity of the situation, not to mention the issue pertaining to the possible obligation to disclose some confidential business clauses that might be asked for in order to solve the dispute. Moreover, rights holders might ask for a review of the licensing terms each time the technique of communication evolves, thus submitting the certification process to constant and unpredictable changes. In the end, the initial purpose of better information to the public might not be fulfilled.

- 16 Whether rights holders may be held liable when contesting a certification is also a question worth mentioning. Should one rights holder oppose a certification, would other rights holders be entitled to argue that this opposition is depriving them from a business opportunity? Would the service provider itself be entitled to a claim for the liability of the complaining rights holder for similar reasons? Such a variety of situations cannot be entirely covered by the HADOPI certification procedure.¹⁴ In the business world, any disappointment can potentially lead to legal action. It would then belong to the judge to determine whether to engage in liability rules, depending on the concerned obligations, infringement conditions, and on the judge’s interpretation of the contract (also considering the online market good practices).¹⁵
- 17 The interference of the “legal offer” certification system with the market and competition regulation is already tangible. How will such interference occur in practice? The national competition authority may be asked to give its opinion if a service provider claims that the “label” granted to a competitor has been unfairly distributed or disturbs the market rules. A decision from competition authorities on the implementation of copyright “derivative” provisions – as those relating to the certification of “legal offer” services are – can be envisioned and create some indirect consequences on the digital market place. We also have to bear in mind the interest of certain established online services in having this “legal offer” endorsed by the law. Some of them might indeed find in it a way to keep their market predominance or to gain further advantages against their competitors.¹⁶
- 18 Besides, the HADOPI certification process involves the creation of conditions adding to the existing French copyright legal framework regarding the protection of works, the obligations of users and the publicity of the information on rights. Indeed, French copyright law grants copyright protection without formalities, infers copyright infringement from material facts, and provides for specific obligations for users of audiovisual works, who must search for information on rights in dedicated public registries. As such, the certification process, albeit voluntary, differs from these existing copyright law provisions and should therefore be interpreted as being part of a system independent from the French Intellectual Property Code.¹⁷ Nevertheless, how such independence shall take place in practice within the whole legal system (of copyright but also of electronic commerce) is a very delicate question to which it is still impossible to give any definite answer.
- 19 Although all these questions have not been subject to litigation so far, they are already arising in practice. As the HADOPI certification process intends to shape the offering of digital content, the uncertainty of its economic impact and of its implementation in business practice and in court is somehow already embedded within the law. It seems that the consequences of the HADOPI “legal offer” certification system were not fully assessed by the French legislator. As a result, the “legal offer” bears a wider impact than initially intended.
- 20 It is worth noting that the HADOPI legislation’s provisions on the “legal offer” were targeted by the appeal against the “HADOPI 1” Act brought before the French Constitutional Council.¹⁸ The appellants contended that “*by leaving it to a Decree to specify the conditions in which the High Authority can award a label making it possible “to clearly identify the lawful nature” of offers of online communication services, the law gives the High Authority the power to determine discretionarily those offers which, in its opinion, are of a lawful nature.*” The Constitutional Council rejected the appellants’ argument saying that, “*the awarding of labels attesting to the “lawful nature” of offers of online public communication services is designed solely to facilitate the identification by the public of offers of services respecting intellectual property rights. (...) Leaving it to a Decree to fix the conditions for the awarding of such a label is solely designed to determine the manner in which applications for the award of such a label are to be received and examined by the High Authority. These provisions do not confer any arbitrary authority on the latter*” (Constitutional Council’s decision, § 34).
- 21 The constitutional judge validated the certification process but did not answer the still crucial question with respect to the role of the HADOPI Authority to “discretionarily” determine which services shall be deemed of lawful nature. Indeed, what is a “legal offer”?

II. The relativity of legality

- 22 What is “legal”? What is “illegal”? Which of these questions should be answered first? Is illegality defining legality, or shall it be the other way around? This echoes the everlasting query of lawyers. When it comes to sanctioning, shall we rather define what is “lawful”, or what is “unlawful”? Shall we start with sanctioning what we do not want, rather than trying to define what we want?¹⁹ This “chicken and egg” situation appears even more complex in the digital environment, where the rapid development of unlawful activities is continuously re-shaping the established legal framework and the boundaries of what shall be deemed “legal”.
- 23 The sanctioning system put in place under the HADOPI legislation chose to target not the act of downloading *per se* but the “default of safeguarding one’s internet access.”²⁰ As Internet users are facing prosecution for the default of safeguarding their own Internet access, it is therefore more the lawful access to content than the lawful nature of content that

should be the issue.²¹ What defines what should be deemed “legal” is what users are doing with the content to which they access. The core problem targeted by the “graduated response” is more about legal uses than about legal *content*. Because the objective is to curb illegal uses, inciting content providers to enable the development of legal uses through a “legal offer” may appear to be a good idea, in the sense that it helps loosen the sanction system targeting users, thus contributing to balance the “graduated response” system. However, such a balance might only be theoretical given the realities ignored by the legislators.

- 24 What kind of “legality” is the “legal offer” referring to? Shall it only (mainly?) refer to *licensed* digital services? Whether a service shall be considered as “licensed”, how can its legality be absolutely guaranteed? For a service provider, running licensing negotiations with rights holders consists of a succession of contracts subject to varying conditions and unexpected developments. Business practices show that legality cannot be a consistent notion over time, especially in the fast-changing digital environment. Moreover, total legality should imply licenses with *all* rights holders, without any exceptions. Shall a “licensed” music service be meant to have a license with just at least one record company or with all of them, and with all rights holders (authors, performers, publishers) represented by the corresponding collecting societies?
- 25 The HADOPI system obviously does not help bring more visibility to the fragmentation of rights and of “rights managers”, which has been increasing in the online environment during the last decade.²² With such imprecise guidance on copyright licensing that is supposed to sustain “legal offer” services, uncertainty may even become more acute, with increased legal consequences for digital content providers experiencing the impeding effects of the licensing “minefield”.
- 26 Besides, if there should be any threshold to assess total/partial legality, what should it be? Who shall be entitled to determine the applicable criteria, and on what legal basis? Could it belong to the competence of the HADOPI “independent Authority”? If an independent public authority might be entitled to guide business practices, it should do so on a clear legal basis with objective criteria characterised by generally accepted public interest principles. As regards to the HADOPI, these criteria lack clarity as the Authority’s main mission is to guide copyrighted content service providers in their business practice while failing to take due consideration of the digital market realities (as said above and demonstrated in more detail below).

C. Towards a risky business implementation of copyright law?

- 27 While devising a legal framework to achieve the creative content digital market, lawmakers are introducing new rules of interpretation of the law to be imposed to a wide range of stakeholders, affecting business practices but also the core tenets of copyright law. The concept of “legal offer” introduced in “graduated response” legislations provide for a good illustration of this legislative trend attempting to include some market considerations into substantive law, with some poorly controlled consequences by the legislator.
- 28 Rights holders shall be recognised as business partners of digital service providers. To put things into pragmatic terms, rights holders supply cultural content to service operators who then provide it to consumers. Despite this reality, the business status of copyright holders is still taboo, especially under copyright law systems focusing on the protection of authors with a distance from the economic world, as is the case under continental copyright law systems and more particularly in France.²³ Nevertheless, whereas this business status of rights holders is far from being recognised, the *droit d’auteur* legislator is throwing himself into a risky business implementation of copyright law without having duly considered the possible consequences. In setting out the “legal offer” certification process, the French legislator has skipped some basic steps that risk hindering the development of cultural content online services.
- 29 The concept of “legal offer” appears biased by nature. This is the result of an unprecedented combination of copyright law and business considerations affecting each other. The proponents of the HADOPI Law may say that this is for the sake of a more practical and consumer/business-friendly copyright law, and that it is acting toward more responsible and fair digital business practices. However, such assertions might not survive the observation of online market’s realities.
- 30 Despite prevailing difficulties in copyright licensing in the online environment (see above, B.II) revealing a flawed business situation for content providers, the specific business nature of cultural content digital services does not seem to have been taken into due consideration by the legislator. However, to what extent shall this market dimension be taken into account by the copyright legislator? Shaping an online offer, like the “legal offer” provisions of the HADOPI Law claim, is a task that seems to be too ambitious for the national legislator²⁴ and might go beyond his field of competence.²⁵
- 31 The procedural nature of the “legal offer” as set out by the HADOPI Law’s certification process (see

above, B.I) tends to expand to the contractual relationships between digital services and rights holders, thus contradicting the ongoing trend for legal simplification of online commerce.²⁶ Besides, if some obligations may be imposed on online market actors, they aim more at regulating the existing practices and at bringing legal certainty into the digital business environment than at guiding their actions, especially when it comes to the *content* of the digital market. In strongly prompting online content providers to act in a certain direction – towards a “legal offer” – copyright legislation promotes an intrusive approach into the market sphere, which is doomed to be counter-productive. Indeed, it can be foreseen that the “legal offer” HADOPI label might not even be adapted to the online market place. Some services might obtain the certification but eventually decide to abandon it, some other services might refuse to enter the “legal offer” certification process, and some others might complain about the granting of a label to a competitor... all this rendering the online market environment even less predictably foreseeable to all stakeholders, thus weakening legal certainty and impeding the development of the digital market.

- 32 Legal online services are said to be suffering from unfair competition from illegal services. To which extent is it a *copyright law* problem? Can E-commerce legislation²⁷ help to add some complementary elements of interpretation in this respect? It would probably not in the sense that mechanisms such as the “legal offer” tend to isolate copyright law from online market reality. Paradoxically, such intrusion of copyright legislation into the market sphere would thus influence the role of copyright within the global legal apparatus, but not move it towards more economic integration.
- 33 These considerations can be supported by some expectable consequences flowing from the HADOPI Law certification process. Let us envisage some of them. First of all, the certification procedure shall not be interpreted as imposing new obligations on rights holders. In particular, a service provider shall not be entitled to claim that a rights holder is not allowed to contest the label awarded, arguing that the latter had the possibility to oppose beforehand during the public procedure (see above, B.I).
- 34 Moreover, a certification should not be used as a defense by infringing services. Nevertheless, one can expect that service providers might be tempted to use their certification as an argument in their favour in case of copyright infringement claims. Should this argument be received in court, this could lead to a reversed interpretation of the rules of evidence and possibly to a revision of the core copyright principles. Copyright infringement, even unintentional, is usually inferred from material facts. However, the presence of a certification might bring some intent elements into the defense of suspected infringers. Indeed, service providers might use their certification as evidence proving that they have been acting to make their service “legal”. If a provider claims that it “*did not want to infringe copyright*”, on the basis of the granted “HADOPI label”, the certification might then be used to build a “negative” defense, calling for positive counter-evidence from rights holders²⁸.
- 35 In such conditions, service providers are offered powerful tools to object to copyright infringement claims, thus leaving rights holders in an unprecedentedly weak position.²⁹ Such consequences might not comply with the original intention of the copyright legislator when drafting the law.
- 36 This shall be put into perspective with the global trend for a “new” *droit d’auteur*³⁰, focusing not on the protection of rights holders but rather on the public deserving to be offered works, and more generally “content”. Copyright protection tends to become “negative”: the effort of demonstration would no longer be asked from users (or more precisely here, from service providers) but from rights holders themselves, not only in copyright infringement disputes but also within contractual relations. To which extent shall this trend take place, with which guarantees for legal certainty and good business practices?
- 37 The risk of inverting the copyright legal system thus comes from within the copyright legislation itself, which inserts some flawed language, inducing that self-proclaimed “good” market rules might decide not only what is “illegal”, but also what should be deemed “legal”. Where “legality” becomes a marketing object, lawyers are entitled to worry.
- 38 The most immediate negative impact of the HADOPI certification process lies in its misguided conception of business practices. The changing nature of commercial dealings can be especially problematic in the digital business of audiovisual or musical works. While distinguishing “legal” from “illegal” services implies drawing a line between two categories of services, such a line appears to be blurred by the online market’s realities. In a fast-changing technical environment shaping ever-evolving marketing strategies, copyright licensing contractual terms for online exploitation are bound to evolve. Indeed, rights holders usually tend to ask for regular revisions of licensing terms, thus affecting the consistent development of licensed and “legal” services over time (see also above, B.II). However, copyright holders’ demands in the context of the digital market do not always win the judge’s sympathy, as illustrated in the French *Deezer* case.³¹ The dispute opposed the leading digital music platform in France - *Deezer*, owned by *Blogmusik* company, which offered free and paying streaming as well as downloading services - and Universal Music. In this litigation, the service

provider refused the new contractual terms proposed by the record label, who then threatened to end their licensing contract. After *Deezer* continued to exploit Universal's music, the recording company sued the provider for copyright infringement. The court rejected the label's claim, ruling that Universal, the leader in the music market, was putting the economic viability of their service at stake, and was thus found liable for anti-competitive behaviour and abuse of monopoly power (but the case was then settled between the parties by private agreement and did not reach second instance level).

- 39 This business aspect has been tackled in an agreement between the main stakeholders of the digital music market in France, which intends to regulate the business practice in a more "reasonable" way for all interested parties: creators, recording producers and service providers.³² The HADOPI certification process might not have any particular positive influences on the usual business practices between content providers and rights holders, each of whom are keeping their suspicions and demands towards one another.³³ This is precisely one of the reasons why the agreement ("*Les 13 engagements pour la musique*") was deemed necessary to improve the environment of copyright licensing negotiations.
- 40 Therefore, the promotion for a "legal offer" might occur at the expense of the cultural content digital market. Behind some seemingly good intentions, the legislator has sowed the seeds for an unprecedented level of legal, and also economic, uncertainty for copyrighted content digital services.

D. Conclusion

- 41 Is the "legal offer" likely to change the demand for cultural online content and to divert web users from "illegal offers", as contended by the legislator? Nothing could be less certain, knowing the fast evolution of online services and the wide range of choices being constantly offered to users. "Illegal offers", if concealed behind more attractive "legal offers", are not going to disappear from the Internet landscape.
- 42 What concrete results have been observed since the HADOPI "legal offer" certification system has been enforced? It seems that the objective of creating a legal alternative to copyright infringing offers has deterred a certain amount of web users from using illegal content.³⁴ However, whether this asserted deterrent effect shall also have a genuine "legalisation" effect on users' behaviour is far from being certain, as admitted by the HADOPI Authority itself.³⁵
- 43 Will the market offers put an end to illegal file-sharing? More "legal offers" and less successful "illegal offers" might sound like a happy story for copyright

protection and for reasonable users who can benefit from a wider range of choice. Despite this positive note, the "legal offer" certification mechanism confirms the trend that argues for a short-sighted legal approach based on only some economic interests. This tends to show how legislation can be used to serve some immediate market purposes, at the expense of long-term reflection on the adaptation of copyright law to the development of wide-scale uses of cultural content online.³⁶

- 44 In a way, the "legal offer" suggests a "lazy" approach, limited to the existing environment, following some short-sighted considerations, while leaving aside the exploration of innovative models. The "legal offer" instills the idea that illegal offers (and more broadly, the idea of online sharing) are a market failure needing to be repaired. Such an approach lacks objectivity and decides too quickly on things that deserve deeper scrutiny.
- 45 What kind of cultural content online market is encouraged through the "legal offer" concept? The HADOPI Authority contends in its annual report³⁷ that the success of legal offers has increased, overtaking some popular illegal file-sharing websites (such as MegaUpload). However, these conclusions have to be tempered in the context of an online audiovisual market where the dominant position of a few actors (e.g. Apple's service iTunes) is strengthened, even if some other legal services have managed to break into the national market.³⁸ Such prevailing market dominance is not contributing to cultural diversity³⁹ and to the development of competitive innovative services.
- 46 In including market considerations into copyright law, the legislator tends to acknowledge that solutions can be found outside the usual legal framework. With the promotion for "legal offers", the law gives legislative force to some copyright market incentives. Although this might lead to underestimated consequences affecting the development of the digital market and disturbing the copyright law system, this tends to show that the legislator is looking for a certain balance in copyright enforcement regulation.
- 47 The promotion for a "legal offer" is a landmark legislative step in copyright enforcement regulation, departing from the usual focus on the sanctioning of users and on the blocking of illegal websites. This is to be directly linked with the policy adopted towards ISPs and their role and liability in enabling access to online content. Some national legislations aiming at curbing uses of illegal copyrighted content might prefer insisting on the liability of ISPs to block access to illegal content rather than encouraging a "legal offer."⁴⁰ Meanwhile, the European legislator is working on the revision of the E-Commerce Directive (2000/31/EC), and more particularly on the rules

of liability applicable to ISPs.⁴¹ The European Commission’s initiative names “illegal content” without further definition.⁴²

- 48 Impeding illegal content and encouraging legal content should be addressed simultaneously. This is what the HADOPI Law attempts to do, in spite of all the flaws presented in this paper. The promotion for a “legal offer” positions itself in a praiseworthy “positive agenda” approach. However, how shall this be implemented within a copyright enforcement system also containing sanctioning measures? The “good” intentions of the HADOPI Law, consisting in the development of a “legal offer” of cultural content, are claimed to guide (to excuse?) the punitive provisions set forth in the same legislation. The ambiguity of the “legal offer” concept is therefore multi-faceted: is the “legal offer” to be considered a goal or a justification for sanctioning measures? Meanwhile, users are indeed perceived as potential infringers targeted by monitoring and/or criminal measures. How shall these two extremes (“positive” and “negative”) be conciliated within a same legal instrument? The schizophrenic nature of the law does not allow for the hope for a clear and objective implementation.
- 49 Such copyright law intrusion into the online market practice illustrates the current evolution of regulation applicable to the Internet, which tends to mirror the blurring of the patterns of the off-line world.⁴³ The creation of a public authority like the HADOPI to deal with online copyright infringement and with how to shape the cultural content market represents a landmark step – even a turning point – in copyright law, bearing some direct and indirect impact for digital market’s stakeholders, including rights holders. A public authority might play a significant role in controlling and “guiding” self-regulation among online market’s stakeholders. However, we can question the French legislator’s intention in how it is influencing such self-regulation. Indeed, the HADOPI “legal offer” focuses on a certain model of self-regulation where service providers are key players, which paradoxically weaken the rights holders’ position. One can wonder whether these far-reaching consequences were deliberately contemplated by the copyright legislator.
- 50 Despite its public authority denomination, the HADOPI acts as a kind of private substitute for copyright enforcement – the intervention of the judicial authority occurring only at the last stage of the “graduated response” process and under the initiative of the HADOPI – while being endorsed by the legislator and financed by public funds. It thus operates as a new form of self-regulation or “self-help” on the Internet.⁴⁴
- 51 In fighting illegal downloading and file-sharing, the legislator has paved the way for underestimated le-

gal uncertainty. Copyright enforcement legislations attempting to introduce some so-thought “positive” and “innovative” market-friendly measures tend to blend values, resulting in counter-productive effects. When it comes to curbing wide-scale Internet trends and influencing web users’ behaviours, regulators can be tempted to overstep some traditional limits. If this is to characterise the current approach for Internet regulation, it should be driven by long-term considerations going beyond the current market interests and enabling genuine access to culturally diverse online content.

- 52 As “graduated response” legislations are subject to the influence of different national political contexts, questioning the meaning of online “legal offers” is all the more important when governments tend to abandon their punitive approach and insist more on the “positive” market dimension. The recent statements by the new French government on the progressive cut back in the HADOPI’s budget seem to go in that direction.⁴⁵

- 1 P. Yu, *The Graduated Response*, Florida Law Review 2010, 62, p. 1373.
- 2 The HADOPI Law was enacted in two steps (see below, note 7): “HADOPI 1” (June 2009) Act and “HADOPI 2” Act (October 2009).
- 3 For an analysis on the implications of the HADOPI “graduated response” measures on users, see notably N. Lucchi, *Regulation and Control of Communication: The French Online Copyright Infringement Law (HADOPI)*, Cardozo Journal of International and Comparative Law, 19/2011, Max Planck Institute for Intellectual Property & Competition Law Research Paper No. 11-07, available at <http://ssrn.com/abstract=1816287>; H. Ranaivoson and A.C. Lorrain, *The Graduated response beyond the copyright balance. Why and how the French HADOPI takes consumers as targets*, Info Journal 2012, Vol 14 No 6, Special Issue: EuroCPR Policies for the Future Internet.
- 4 For more detail on the HADOPI measures, see for instance P. Sirinelli, *Graduated response and the role of intermediaries: avoiding the Apocalypse or a return to the sources?*, in L. Bently, U. Suthersanen and P. Torremans (eds), *Global copyright: three hundred years since the Statute of Anne, from 1709 to cyberspace*, Edward Elgar Publishing, 2010, p. 478; Ch. Geiger, *Honourable Attempt but (ultimately) Disproportionately Offensive against Peer-to-Peer on the Internet (HADOPI) - A Critical Analysis of the Recent Anti-File-Sharing Legislation in France*, IIC, 4/2011, Vol. 42, p. 457.
- 5 The HADOPI High Authority was created by the HADOPI Law as an independent administrative body. It is composed of two committees: one in charge of implementing the general missions of the Authority and one in charge of the protection of rights and of the “graduated response” process. Its members are appointed by State authorities such as the judicial authority and the Ministry of Culture.
- 6 Interestingly enough, the promotion of a “legal offer” is the first mission of the HADOPI Authority listed in Art. 331-13 § 1 of the Intellectual Property Code (CPI).
- 7 Cf. “HADOPI 2” Act, explanatory statements (first and third paragraphs). The French “graduated response” process is set out in two legislative acts and multiple implementing decrees. In June 2009, the so-called “HADOPI 1” Act was passed, which aims at “furthering the diffusion and protection of creation

- on the Internet” (Act of 12 June 2009 also called the Creation & Internet Law). Following a censorship decision from the French Constitutional Council (Decision n° 2009-580 DC, 10 June 2009), the “HADOPI 2 Act “on the criminal protection of copyright on the internet” was adopted (Act of 28 October 2009). On the HADOPI legislative process, see Ch. Geiger, *HADOPI ou Quand la Répression Devient Pédagogique. Une Analyse Critique du Dispositif Juridique de Lutte Contre le Téléchargement sur les Réseaux de Pair à Pair*, Dalloz 2011, 11, p. 773; V.L. Bénabou, *Glose de la loi HADOPI ou opération nécessaire de débroussaillage*, Revue Lamy Droit de l’Immatériel 52/2009, p. 63.
- 8 Application Decree adopted on 10 November 2010 (n° 2010-1366, enacted in Art. R. 331-47 to R. 331-54 CPI).
 - 9 See above, note 8.
 - 10 For an analysis of the Decree, see G. Vercken, Revue Lamy Droit de l’Immatériel 66/2010, p. 6.
 - 11 <http://www.pur.fr>. The “PUR” label standing for “Promotion des Usages Responsables”, the acronym sounds like “pure”, i.e. “purified” from unauthorized content. The HADOPI webpage dedicated to the certification process, launched in June 2011 with 17 certified services, claims “to reference legal cultural content services, in order to promote responsible behavior amongst consumers in using cultural content”. To date, 59 online services have obtained the HADOPI label (information accessed in September 2012).
 - 12 See H. Ranaivoson and A.C. Lorrain 2012.
 - 13 See G. Vercken 2010, p. 7.
 - 14 See G. Vercken, *Ibidem*.
 - 15 See G. Vercken, *Ibidem*: these questions can be compared to the liability provision of the 2004 French Act “for trust in the digital economy” – “*Loi pour la confiance dans l’économie numérique*”, LCEN – stating in its Art. 6 I-4 that: “*The presentation of a content or of an activity as unlawful with the purpose of obtaining its withdrawal while knowing that this information is inaccurate, is punishable by up to one year in prison and a 15.000 euros fine*”.
 - 16 The stakes are high. On-demand subscription services pay out the majority of revenue to content owners. Combined with the cost of building, maintaining, and marketing the platform, the cost of content requires services to achieve on a large scale in order to be profitable. There is no small-scale success in this part of the audiovisual business.
 - 17 See G. Vercken 2010, p. 8.
 - 18 See aforementioned decision n° 2009-580, § 32 & subseq. (translation available on the French Constitutional Council’s website: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2009580DC2009_580dc.pdf).
 - 19 These questions notably arose during the discussion on the European Telecoms Package, following some controversial amendments referring to “lawful content” which were finally deleted. The directives of the package now refer to “illegal content” (see “Authorization” Directive 2002/20/EC as amended by Directive 2009/140/EC, Annex, A.9).
 - 20 The criminal sanctions provided in the HADOPI Law are based upon the “characterized negligence” related to the legal obligation for one’s own secure internet connection. This legal obligation was introduced (in CPI, Art. L 336-3) by the 2006 DADVSI Law (“*Loi relative au droit d’auteur et aux droits voisins dans la société de l’information*”, Act of 2 August 2006). An application Decree develops the technical requirement to achieve the so-called “secure” individual network connection by providing a “white” list of technical tools to be recommended to Internet users (Decree of 23 Dec. 2010). The Decree provides for a public certification procedure to be applied to manufacturers of Internet security tools.
 - 21 In the UK, the 2010 Digital Economy Act requires the national communications regulator Ofcom to issue some recommendations about the implementation of the provided online copyright infringement measures (also qualifiable of “graduated response” measures, although different from the ones provided under the French HADOPI Law). Ofcom recently published a draft code for consultation, which includes measures to help inform the public and *promote lawful access* to digital content. It is worth noticing that the UK regulator does not use the term “legal offer” but prefers targeting “more attractive online services to offer their content” (http://stakeholders.ofcom.org.uk/consultations/infringement-notice/?utm_source=updates&utm_medium=email&utm_campaign=copyright-statement-code).
 - 22 This so-called fragmentation of rights and of rights managers could be observed since the European Commission adopted a Recommendation on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/CE), which encouraged more competition between European copyright collecting societies. It resulted in the withdrawal of some categories of rights from collecting societies, which has caused confusion among licensees. On this issue, see for instance J. Drexl, *Competition in the field of collective management: preferring ‘creative competition’ to allocative efficiency in European copyright law*, in *Copyright law: a handbook of contemporary research*, Paul Torremans (ed.), Edward Elgar Publishing, 2007, p. 255; Th. Riis, *Collecting societies, competition, and the Services Directive*, Journal of Intellectual Property Law & Practice 6/2011, n° 7, p. 482.
 - 23 On the differences between the “copyright” and “*droit d’auteur*” systems, see for instance R. Deazley, M. Kretschmer and L. Bently, *Privilege and Property: Essays on the History of Copyright*, Open Book Publishers, 2010; A. Strowel, *Droit d’auteur et Copyright*, Bruylant & LGDJ, 1993.
 - 24 The European legislator tends to give a particular focus on the market dimension of copyright law by emphasising its implementation in the European Single Market: e.g. European Commission, *Creative Content in a European Digital Single Market: Challenges for the Future, A Reflection Document of DG INFSO and DG MARKT*, October 2009: http://ec.europa.eu/avpolicy/docs/other_actions/col_2009/reflection_paper.pdf. The paper, which calls for an “economically viable single market for digital content” (p. 2), is a clear invitation to think about copyright from an European market perspective. Commissioner Viviane Reding outlined the importance for a “*consumer friendly legal framework for accessing digital content in Europe’s single market, while ensuring at the same time fair remuneration of creators*” (p. 2). However, this EU market perspective cannot be transposed into the national legislative environment of European Member States. This gap of perspective between the European and national legislative processes tends to be increased as the national legislator attempts to grasp the market issues – at a national level – without being duly prepared for this task.
 - 25 The legislator’s field of competence can change over time, and this is also true for the copyright legislator. However, the latter does not seem to be ready, at least at the present time, to include some market-wise elements going as far as the “legal offer” does.
 - 26 National and international regulation on electronic commerce aims at improving the fluidity of exchanges between online business partners. The legal framework applicable to the digital market place is rather meant to streamline contractual law than clutter up the system with further legal requirements.
 - 27 As for instance the French “*Loi pour la confiance dans l’économie numérique*” (LCEN, mentioned above in note n° 14).
 - 28 A negative fact is difficult to prove, which explains the rule of the French *Code Civil* Art. 1315 providing that anyone claiming for the execution of an obligation has to bring the evidence in court. In the circumstances exposed here, this task would have to be undertaken by rights holders claiming for the infringement of their rights. On these issues, see G. Vercken 2010.

- 29 This remark is particularly true for “small” rights holders who do not necessarily have the means to assess these risks and to organise themselves to contest the system.
- 30 See G. Vercken 2010, p. 9: “un nouveau droit d’auteur sous servitude, préalable, peut-être, d’une inversion du système”; “(...) a constrained droit d’auteur as a possible preamble for an inversion of the system” (our translation).
- 31 *Tribunal de grande instance de Paris, Blogmusik v. Universal Music France, Ordonnance de référés*, 5 Sept. 2011.
- 32 “Les 13 engagements pour la musique” (or “13 Commitments for Music”), also called “Rapport Hoog”, signed in February 2011 by the main digital music platforms, representatives of performers, of authors and of recording producers, is a soft-law initiative coordinated by the French government. The agreement sets forth 13 “good business practices” committing recording producers to the durability and stability of contracts concluded with service providers.
- 33 See aforementioned court case *Blogmusik v. Universal Music France*: the music platform used its HADOPI label in their defense, although the court did not base its decision on this argument.
- 34 This trend has been shown in some studies surveying web users’ behaviours in accessing cultural online content. Among those, the HADOPI 2012 Activity Report tends to show that the success of illegal websites tends to decrease in favour of legal offers (<http://www.hadopi.fr/sites/default/files/page/pdf/note17.pdf>). One of the most objective reports on the issue is the 2011 Columbia University survey-based study on *Copy Culture in the US and Germany*, in which a large numbers of illegal downloaders were said to have altered their behaviour in response to more attractive legal services for acquiring content (<http://americanassembly.org/project/copy-culture-us-and-germany>).
- 35 In its 2012 activity report, the HADOPI Authority admits that given the lack of perspective, it is not allowed to draw firm conclusions establishing a real transformation of French web users: “(...) such analysis are complex because the related conclusions are subject to divergence according to the methods adopted”. On the issue of assessing wide-scale Internet uses and their evolution in the face of copyright enforcement policies, see notably A. Bridy, *Is Online Copyright Enforcement Scalable?*, *Vanderbilt Journal of Entertainment & Technology Law*, 13/2011, No. 4, p. 695, available at <http://ssrn.com/abstract=1739970>. See also J. Poort & P. Rutten, *File Sharing and its Impact on Business Models in Music*, in *Internet Econometrics*, S. Allegrezza & A. Dubrocard (ed.), Palgrave Macmillan, 2012, p. 197.
- 36 New copyright models have nonetheless been developed by several proposals: e.g. Ph. Aigrain, *Sharing, Culture and the Economy in the Internet Age*, Amsterdam University Press, 2012.
- 37 See HADOPI 2012 Report, aforementioned in notes 34 and 35.
- 38 The constant predominance of the iTunes platform on the French online music market since the HADOPI Authority became operational has been outlined in a study conducted by American scholars: B. Danaher, M. Smith, R. Telang, and S. Chen, *The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France* (January 21, 2012) (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1989240).
- 39 This encouraged dominance on the cultural online market is triggering criticism, notably from Ph. Aigrain (see above, note 35), citing the “organization of cultural regression” (Ph. Aigrain).
- 40 As it is the case in Denmark, a draft law recently tabled by the government (in June 2012) privileges a “simplified procedure” to withdraw online illegal content.
- 41 The EU Commission has announced a “Notice and Action” (“N&A”) initiative (June 2012) along with the launch of a related public consultation: <http://ec.europa.eu/yourvoice/ipm/forms/dispatch?form=noticeandaction>.
- 42 See the glossary of the aforementioned (note 40) EU Commission “N&A” public consultation: “Illegal content” corresponds to the term “illegal activity or information” used in Article 14 of the E-commerce Directive. This directive does not further specify this term. It may be understood in a wide sense so as to include any infringement of applicable EU or national laws and regulations. This could for instance include defamation terrorism related content, IPR infringements, illegal online gambling, child abuse content, misleading advertisements or incitement to hatred or violence on the basis of race, origin, religion, gender, sexual orientation etc.” As said above (B.II, note 19), the European legislator decided to focus on “illegal content” (rather than on “legal content”).
- 43 Such copyright law intrusion into the market field could notably be observed during the discussion of the EU Telecoms Package (aforementioned, note 19), where some “graduated response” provisions were introduced in legal instruments meant to rule on telecommunication operators’ activities. Following fierce discussion, these provisions were tempered (see also above, note 19). On this issue, see notably N. Lucchi, *Access to Network Services and Protection of Constitutional Rights: Recognizing the Essential Role of Internet Access for the Freedom of Expression*, *Cardozo Journal of International and Comparative Law*, 19/2011, p. 645, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1756243&rec=1&srcabs=1816287.
- 44 On Internet regulation, see for instance C. Engel, *The Role of Law in the Governance of the Internet*, Max Planck Institute for Research on Collective Good Preprint No. 2002/13, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=325362.
- 45 <http://www.lemonde.fr>, 14 September 2012, “Aurélie Filippetti livre une nouvelle charge contre la Hadopi”.

Information Society Services and Mandatory Data Breach Notifications: Introduction to Open Issues in the EU Framework

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Abstract: In 2011 Sony suffered an extensive breach in its online game network that led to the theft of account data of 77 million users from all over the world. This was one of the largest internet security break-ins that resulted in a large scale personal data breach. As an answer to numerous incidents of security breaches where personal data have been compromised, an instrument of mandatory data breach notification is currently being implemented in the European Union that follows the approach taken in the United States. The revised e-Privacy Directive and the fresh proposal for a General Data Protection Regulation both introduced a provision whereby the entity suffering a breach will have to notify the competent authorities of the breach. Many large online service providers, operate globally, offering its services to users in different countries and processing

users' data in different locations, in the EU and wider. In case such a provider suffers a data breach, and on condition that European law applies to its operations, the provider will be obliged to report the data breach to the authorities and possibly to the injured individual users.

The paper presents the changes in the regulatory framework in the EU and tackles the question of how the new regulations on mandatory breach notifications will affect online service providers, especially the ones operating across borders. The paper presents the legal framework, assesses its implications and sheds light on the issues that will arise, in terms of applicable law, competencies of the national authorities and the rights of the injured individuals.

Keywords: Information society service providers, Data protection, Mandatory breach notification, EU data protection framework.

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A. Introduction

1 In 2011 Sony suffered a massive breach in its video game online network that led to the theft of names, addresses and possibly credit card data belonging to 77 million user accounts from all over the world. This was one of the largest internet security break-ins re-

sulting in a large scale personal data breach.¹ Criticism over Sony's response to the break-in accumulated also with regard to its relatively late notification of their customers because it took a few days before the users were notified. The customers argued that Sony did not allow them "to make an informed decision as to whether to change credit card num-

bers, close the exposed accounts, check their credit reports, or take other mitigating actions”.² The fact that credit card data was said to be encrypted did not mitigate the responsibility Sony had towards its clients. The Sony incident was, however, only the last of the well-publicized breach cases, which opened the questions of when to notify the data subjects and what to do if the data in question was encrypted.

- 2 As an answer to these incidents of security breaches where personal data is compromised, an instrument of mandatory data breach notification has been introduced in many of the States in the U.S. and is currently being implemented in the European Union. The revised e-Privacy Directive³ introduces a new obligation for electronic service providers (internet and communications providers) – a mandatory notification to the national authority and the users in the case of a personal data breach. A very similar provision is foreseen in the new proposal of the Data Protection Regulation⁴ that is on the way to replace the Data Protection Directive 95/46/EC⁵ in the years to come. This provision will horizontally affect all data controllers in all sectors, thus also online service providers. Many large online service providers, such as the mentioned Sony online gaming network, operate globally, offering its services to users in different countries and processing the users’ data in different locations, both in the EU and wider. In case such a provider suffers a data breach, and on condition that European law applies to its operations,⁶ the provider will be obliged to report the data breach to the authorities and, if necessary, to the injured individual users.
- 3 As the provisions are only beginning to be introduced in the telecoms sector and are only yet proposed for implementation in all other sectors, many questions regarding practical implementation remain unanswered, such as the what are the thresholds for when a breach must be notified, what are the standards of encryption, what channels should be used for notifying the individuals, etc. Bearing in mind the cross border nature of large online service providers, issues may arise, such as who is the competent authority to receive the notification, which entity of the provider is supposed to report the breach if the provider has establishments in different states, how should the authorities cooperate in such cases, when and how the users should be notified of a breach, etc. To achieve harmonized implementation that will result in greater data protection for the users whose data was compromised, further guidance will be necessary (either from the national authorities, or in terms of harmonization, even better from the European Commission).
- 4 In the present paper I propose to tackle the question of how the regulations on mandatory breach notifications will affect individuals and information society service providers, especially the ones operating

across borders. I will briefly touch upon the U.S. experience with breach notifications, and then proceed to the new legal framework in the EU. I will assess its implications there and shed light on the issues that will arise in terms of content, form and scope of notifications, applicable law, competencies of the national authorities and the rights of the injured individuals.

B. Data breach notifications and the U.S. experience

- 5 Today we live in a world of online services. We shop online, socialize online, make use of e-government services and e-banking, buy plane tickets, and we play online. The information society services are ever improving, capable of processing immense quantities of our data, remembering our preferences, and also tracking our activities to offer us better service and, of course, to target us with relevant advertisements. The development of information society services is important for societal development and for the economy. However there is an obstacle – we, the citizens need be able to trust the online service providers in order to make the most out of the offers. In this realm, data protection issues are emerging on a daily basis. New technological tools that facilitate seamless gathering of information and sophisticated ways of processing that information have greatly contributed to the increasing severity of today’s information privacy problems and concerns.⁷
- 6 In the last ten years we witnessed immense changes in the ways personal data is processed and got acquainted with new risks, such as identity thefts. Many well publicised cases of unlawful acquisition of individual’s data held by reputable organizations added to the idea that we need a more robust data protection framework. Data breaches occurred in the private sector, as well as in government agencies, educational institutions, etc. The compromised data included credit card numbers and security codes, user names and passwords, social security numbers, sensitive data, search histories etc.⁸ ⁹ New frameworks for protection of personal data are thus on the agenda in the U.S., as well as in the EU and globally.¹⁰ As an answer to incidents of security breaches where personal data is compromised, an instrument of mandatory data breach notification is being introduced.
- 7 The rationale behind the data breach notification legislation that was initially enacted in a number of U.S. states was that by exposing poor security measures of organisations, it would give them incentives to build stronger protection for the data they process in order to avoid potential sanctions and bad reputations. The other rationale was that individual had

a “right to know,” to be informed on how organizations used or abused their data, and to be able to take appropriate actions to prevent identity theft, additional financial damage, etc.¹¹ Such legislation is now seen as especially important in terms of personal internet security. Additionally, traditional civil litigation has proved ineffective when a company’s negligence in security of data processing leads to identity theft. It is very hard for the consumer to prove duty, negligence, or causation and is thus unlikely to succeed in court. Another difficulty is the fact that the consumer in this case lacks redress until damages actually occur. The organizations therefore do not have an incentive to share information on possible data breaches.¹²

- 8 On the other hand, opponents to data breach notification legislation argue that it creates unnecessary costs for organizations and thus reduces innovation and commercial activity. If risks of data exposure or adverse effects on the individuals in case of a data breach are low enough then the organizations only suffer greater costs, whereas the positive effects of greater protection of the individuals is questionable. They also claim that risks of identity theft are actually very low. The opponents do not see the solution in stricter regulation, but in forms of self-regulation, which could also work as market differentiator.¹³
- 9 An analysis of the U.S. states’ data breach laws by Romanosky, Telang and Acquisti¹⁴ shows that legislation is consistent in central themes. The laws of different states require a notification in a timely manner if personally identifiable information has been compromised or has become available to an unauthorised person, and if its exposure presents a negative effect for the injured individual.¹⁵ The trigger or the threshold by which the notification must be made, however, is different. Part of the states require notification when it is reasonably assumed that the data has been acquired by an unauthorised party, whereas the other states have a higher threshold and require notification only if it is reasonable to expect that the exposed information will cause harm to individuals. The benefit of a lower threshold is that the individual is aware of potential breaches; however it may also result in too much reporting and exaggerated actions or ignorance toward the notices.¹⁶ The laws are not applicable across all sectors. Notification processes and channels are defined as well – the entities to receive notifications may be the individuals, law enforcement, state agencies and/or Congress. The channels of notification are prescribed but commercially reasonable channels may be used. The laws include exemptions for the firms already governed by specific legislation; for those that have contacted law enforcement and believe notification to consumers may jeopardize the investigation; if the number of affected individuals is below threshold; and for the data that has been encrypted. Penalties are foreseen for failing to notify.¹⁷

- 10 A critique of the U.S. patchwork framework for data breach notifications recognises the clear need for a comprehensive approach and exposes some of the issues: the absence of federal legislation creates legal uncertainty for the organizations and for individuals, and it incurs costs for the cross border data controllers complying with different regimes. Many authors therefore advocate the introduction of a federal law. Inadequate enforcement of state legislation is highlighted.¹⁸ The problem of the risk-based trigger for notification is also raised for putting the interests of the organizations before the interests of the potentially injured individuals.¹⁹ Also, the level of adequate encryption is not specified in the state laws, even though encryption creates an exemption to notification. A call for a clearer specification of encryption is present.²⁰ Winn argues that the focus should not be on notifications of data breaches but rather on preventive measures where the organizations would reduce risks at a systematic level. Regulation of the security aspects of data processing should not only be statutory but also exist in the form of self-regulation.²¹

C. European data breach framework

- 11 In the EU it has been argued that today’s technology is not the same as when Data Protection Directive 95/46 was adopted. Globalisation has given businesses an increasing worldwide dimension. Cross border data processing and international transfers have tremendously increased over the past years.²² Also in the light of a number of security and data breaches that have happened over the past years (stolen computers with data on citizens, attacks on networks), culminating with the attack on the Sony online Playstation Network, the new frameworks for data protection and privacy in electronic communication emphasize the importance of an instrument of mandatory data breach notification. A breach notification requirement is seen as having the potential to increase the level of data security in Europe and foster reassurance amongst citizens as to how their personal data is being secured and protected²³ by different data controllers, from the providers of electronic communication services to other online data controllers.
- 12 As the European Data Protection Supervisor argues, “...security breach notification serves different purposes and aims. The most obvious one /.../ is to serve as an information tool to make individuals aware of the risks they face when their personal data are compromised. This may help them to take the necessary measures to mitigate such risks. For example, when alerted of breaches affecting their financial information, individuals will be able, among other things, to change passwords or cancel their accounts. In addition, security breach notification contributes to the effective application of other princip-

les and obligations in the Directive. For example, security breach notification requirements incentivize data controllers to implement stronger security measures to prevent breaches. Security breach is also a tool to strengthen the responsibility of data controllers and, more in particular to enhance accountability /.../. Finally, it serves as a tool for the enforcement by data protection authorities. The notification of a breach to DPAs may lead to an investigation of the overall practices of a data controller.”²⁴

- 13 Mandatory breach notifications are a tool for individuals to protect themselves against identity theft, financial loss, loss of business or employment opportunities, and physical harm.²⁵ Notices of security breaches, applied across sectors, can help individuals take the necessary steps to mitigate any potential damage that results from the information compromise and encourage companies to improve data security and enhance their accountability.²⁶

I. The revised e-Privacy Directive introduces a mandatory breach notification

- 14 In the EU data breaches were firstly addressed with Directive 2009/136/EC, including amendments to the Directive 2002/58/EC – more widely known as the revised e-Privacy Directive. The revised e-Privacy Directive introduced a new obligation for electronic communications service providers (the providers of communications and internet access)²⁷ – a mandatory notification to the national authority and the users in case of a personal data breach.
- 15 A personal data breach is defined as “a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorized disclosure of, or access to, personal data transmitted, stored or otherwise processed in connection with the provision of a publicly available electronic communications service in the Community” (article 2(h)). A clear reference is made to personal data, defined in the Data Protection Directive 95/46/EC as “any information relating to an identified or identifiable natural person (‘data subject’); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.” A personal data breach therefore means any unauthorized disclosure or unauthorized access to personal data, from cases of simple accidental destruction or alteration, which is not followed (or very unlikely to be followed) by unauthorized access,²⁸ to cases where large amounts of personal data have been disclosed or accessed by unauthorised entities.
- 16 Article 4 of the revised e-Privacy Directive specifically places an obligation on the providers of publicly available electronic communications services to notify a personal data breach to the competent national authority *without undue delay*. When the personal data breach is likely to *adversely affect* the personal data or privacy of a subscriber or individual, the provider also has to also notify the subscriber or individual of the breach. The competent national authority may require the provider to notify the subscribers and individuals concerned, if it deems that the breach may likely have an adverse effect on the subscribers or individuals. Such notification to the subscriber or individual is not required if the provider has demonstrated to the satisfaction of the competent authority that it has implemented *appropriate technological protection measures* to the data in breach, that render the data unintelligible to any person who is not authorised to access it.
- 17 Article 4 of the revised e-Privacy Directive also gives guidance as to the content of the notification. The notification to the subscriber or individual must include at least (1) the description of the nature of the personal data breach and (2) the contact points where more information can be obtained, and must (3) recommend measures to mitigate the possible adverse effects of the personal data breach. The notification to the competent national authority must, in addition, describe the consequences of, and the measures proposed or taken, by the provider to address the personal data breach. Providers must, according to the provision, maintain an inventory of personal data breaches comprising the facts surrounding the breach, its effects and the remedial action taken to enable the competent national authorities to verify compliance.
- 18 As seen from the above, some common core elements are defined by the Directive. One is the legal thresholds that apply: the provider must notify any breach to the competent authority, but only notify the injured individuals if the breach is likely to adversely affect their personal data or privacy. An exception is included if the data was rendered unintelligible. The content and time (without undue delay) of notification are also defined. However, as the Working Party 29 argues, the provision is not specific enough to prevent un-harmonized implementation among different Member States²⁹. Different approaches may emerge in relation to the (1) scope of application of the obligation, (2) technological protection measures and (3) further specific guidance by national authorities. Regarding the scope of application, the obligation to notify a breach is only put on the providers of publicly available electronic communications services. However, the Directive in the recitals encourages Member States to expand the scope of application to other data controllers horizontally, regardless of the sector or data concerned.³⁰ Differences may also be established regarding the technological protection measures, which must render the data unintelligible to any person who is not authorized – if this is the case the provider is exempt from

notification obligation. National authorities are to be free in the decision regarding appropriate technological measures if not further prescribed by the Commission.³¹

- 19 The Directive furthermore leaves the door open to the national authorities to issue greater guidance regarding the implementation, such as the circumstances in which providers are required to notify personal data breaches, the format of the notification, and the manner in which the notification is to be made. However if it is deemed necessary to ensure consistency in implementation, such further guidance and measures may be issued by the Commission directly, after consultation with (among others) Working Party 29.³² As can be observed from one of the recent published documents, the Working Party 29 has given its opinion on the draft measures proposed by the Commission. The Commission is proposing to clarify some parts of the notification procedure: developing the notion of “*undue delay*” and recommending, that the first (incomplete) notification should happen within 24 hours of the discovery, and a detailed one no later than 3 days after initial notification. It details the minimum content of the initial notification and of the completed notification. The Decision clarifies that including “information about a personal data breach in a regular invoice” is not adequate, but mentions notifications through national media. It also highlights that in order to consider data unintelligible, it must either be the product of an encryption mechanism, a keyed hash function or irreversible deletion. The measures also suggest that the related cryptographic keys must not be easy to guess and must not have been compromised in any security breach.³³
- 20 The deadline for transposition of the amended e-Privacy Directive passed in May 2011; however, many Member States have not yet implemented the changes into their national legislation. One of the rare examples of Member States that has implemented the changes and also issued further guidance regarding data breach notifications is Ireland.³⁴ Ireland adopted a Personal Data Security Breach Code of Practice³⁵ which applies horizontally to all data controllers, except for the providers of electronic services. The Code of practice specifies that in case of a breach the data controller must give immediate consideration to informing those affected. In appropriate cases, *data controllers should also notify organisations that may be in a position to assist in protecting data subjects including*, where relevant, the police, financial institutions etc. Guidance as to the technological measures which make data unintelligible to unauthorised entities is offered – a high standard of such measures (such as encryption) is required.
- 21 The Irish Code of Practice also offers some specific guidance on the threshold of *when the breach must be reported to the authority*. The e-Privacy Directive

provides that all breaches have to be notified to the authorities. That also includes, for example, letters being sent to wrong recipients. It is easy to imagine the burden on the authorities, who are trying to focus on cases that present a higher threat to a greater number of individuals, but must instead devote the resources to all breaches in question. The Irish guidance provides for a threshold – not all breaches have to be reported and thus the resources can be allocated more efficiently.³⁶ All incidents in which personal data has been put at risk should be reported to the Office of the Data Protection Commissioner as soon as the data controller becomes aware of the incident, except when *the full extent and consequences of the incident has been reported without delay directly to the affected data subject(s) and it affects no more than 100 data subjects and it does not include sensitive personal data or personal data of a financial nature*.

- 22 In case of doubt - in particular any doubt related to the adequacy of technological risk-mitigation measures - the data controller should report the incident to the Office of the Data Protection Commissioner. The initial contact with the Office should happen within *two working days* of becoming aware of the incident, outlining the circumstances surrounding the incident. The Office then makes a determination regarding the need for a detailed report³⁷ and/or subsequent investigation. The Office may sanction for breach of the Code.

II. The Proposal for a General Data Protection Regulation

- 23 In January 2012, the European Commission officially published the long expected proposal for a new framework regarding data protection in the EU, in the form of a General Data Protection Regulation, which is to replace national data protection legislation and thus enable full harmonisation of the data protection rules across Member States. During the preparatory phases the Commission emphasised the importance of informing the individuals about data breaches if they occur. The Commission expressed its intention to examine the possibilities for the introduction in the general legal framework of a personal data breach notification covering all sectors, consistent with the one for providers of electronic communication services, set in the revised e-Privacy Directive.³⁸
- 24 Article 29 Working Party has, in recent years, strongly argued for a horizontal obligation for all data controllers to be obliged to notify the authorities and/or users on personal data breaches. The background behind the idea is the ever increasing role of the information society services in everyday life of all EU citizens and the amount of personal data processed by these services, namely e-banking ser-

vices, private sector medical records, online shopping and more.³⁹

- 25 Articles 31 and 32 of the newly proposed General Regulation thus introduce an obligation to notify users of personal data breaches, building on the personal data breach notification in Article 4(3) of the e-Privacy Directive. The General Regulation is at times even more specific and introduces a 24 hour deadline:

In the case of a personal data breach, the controller shall without undue delay and, where feasible, not later than 24 hours after having become aware of it, notify the personal data breach to the supervisory authority. The notification to the supervisory authority shall be accompanied by a reasoned justification in cases where it is not made within 24 hours (Article 31 of the General Data Protection Regulation).

- 26 It also clarifies the duty of a contractual data processor to alert and inform the data controller immediately after the establishment of a personal data breach. The content of the notification remains similar to the framework proposed by the e-Privacy Directive,⁴⁰ so as the obligation put on the controller to document any personal data breaches and make the documentation available for supervisory authorities. The Commission has reserved for itself the possibility to adopt a standard format for notifications and other specific measures.⁴¹
- 27 The General Regulation reiterates that the controller must, after the notification to the authorities communicate the personal data breach to the data subject without undue delay when the personal data breach is likely to adversely affect the protection of the personal data or privacy of that data subject. It must describe the nature of the breach and contain at least the information on the contact details of the data controller and the recommendations regarding mitigation of adverse effects. The communication of a personal data breach to the data subject is again not required if the controller demonstrates to the supervisory authority that it has implemented appropriate technological protection measures. The supervisory authority, having considered the likely adverse effects of the breach, may then require the controller to notify the breach to data subjects.

D. Open questions regarding data breach notifications

- 28 The European model seems to follow the recommendations from the U.S. experience in that the data breach legislation is intended to apply across sectors, to all organizations processing personal data. Oversight is given to competent authorities, and the content of notifications is prescribed.⁴² Even though the introduction of the mandatory breach notification is undoubtedly an improvement in the framework for

data protection in the EU, there are some yet unsolved issues regarding its successful implementation.

- 29 In this context the European Network and Information Security Agency (ENISA) found that the following topics have been identified as problematic in the proposed framework: lack of a unified approach towards data breach notifications among sectors and among Member States; different understandings of the nature of a data breach; lack of guidelines on best practices and common formats of notifications; lack of guidelines on effective technical measures for protection of data; lack of guidelines on follow-up actions after notification, economics of notifications, and cases of exemption from notification; and a lack of reliable and comprehensive data on data breach (trends and statistics).⁴³ Further work on guidelines regarding the procedure and the timing for notification (both to national data protection authorities and to affected individuals) and on the criteria on how to measure the effectiveness of technical protection measures were among the topics Working Party 29 will concentrate on.⁴⁴
- 30 In this part I will shortly present some open questions on the procedure and timing for notification and on the technical protection measures. I will focus on the following:
- when to notify the competent authority and the injured individuals;
 - the adverse effect on the individuals privacy and data protection;
 - the content and form of the notification; and
 - technical protection measures
- 31 Furthermore, I will also address breach notifications in cross border cases, where additional issues of applicable law, competencies of the national authorities and the efficient protection of rights of the injured individuals arise.

I. The threshold of notification

- 32 The question of a threshold for notifying the competent authority has already been partly addressed above, in the case of the Irish Code of Practice. Considering the resources the authorities have in order to deal with data breach cases, and the danger of notification fatigue if they receive too many notifications,⁴⁵ it would seem sensible if certain criteria were developed, so as to allow for the notification of “serious” breaches without undue delay to the authorities, and on the other hand, the breaches with low impact to only be documented, ready to be shown to authorities on request. There might be a thin, fine line between the two types of events. How-

ever, looking from the e-Privacy Directive's perspective or the proposal for a General Regulation, no such thresholds are foreseen at all – all breaches have to be notified to the authorities, and the authorities are left with the task of assessing which notifications are to be given priority.

- 33 To aid the authorities and the data controllers who have suffered a breach, an impact/severity assessment model was proposed by ENISA, building on two categories: an identifiability⁴⁶ requirement and level of exposure. To assess the identifiability requirement one would have to look at the nature of the data breached, e. g. ID data (name, address, data of birth, gender etc), sensitive data in the sense of article 8 of Directive 95/46/EC (data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life). The level of exposure would look at the type of breach that took place, e.g. unauthorised or unlawful access, destruction, alteration/modification, disclosure, transmission, processing, storing, and accidental or unlawful loss of personal data. The number of injured individuals should also be taken into account.⁴⁷ Such a tool is to be of help to data controllers, when assessing the dimensions of the breach, and also to the authorities when prioritising the cases and when considering whether the injured individuals should be informed.⁴⁸
- 34 Additionally the deadline for notification “without undue delay” or as proposed in the General Regulation, within 24 hours after the breach was discovered, raises questions. The argument that such prompt notification cannot reveal meaningful information as the breach has not yet been assessed is valid. However, a delay may not always be appropriate due to the potential threats for the injured individuals. ENISA suggested the notification be split into two phases where the initial reaction is merely a report that a breach occurred. The detailed notification can be submitted later, when further analysis of the breach is conducted.⁴⁹ As seen from the latest documents the Commission is in favour of such two-tier notification process – the initial notification in 24 hours and an additional one in 3 days.
- 35 As learned from the review of the U.S. experience with data breach notification criteria, the risk-based approach to the threshold has its drawbacks in terms of protection of the injured individuals but is more favourably accepted by the organizations affected and creates a smaller amount of notifications. A low threshold may produce a significant number of notifications, which may, in turn, produce fatigue (Jones 2007-08). The European model can be said to build on best practices. All data breaches have to be notified to the authorities whereas only the ones that present adverse effect have to be communicated to the individuals as well. The authorities are the safe-

guard in assessing the adverse effect and may order the organizations to notify the individuals. In a theoretical sense the EU model is expected to produce the desirable outcome, however it has been suggested often that the authorities will be forced to take on a significant number of breach cases (in the telecoms sector and wider), with only limited resources.⁵⁰ That is why an assessment model, which would allow authorities to quickly assess the seriousness of the situation and react accordingly, will probably be a necessity.

II. Adverse effect on the individual's privacy and data protection

- 36 Another open question is the meaning behind the term “adverse effect”. European framework foresees that the data controller should notify the injured individual of a breach, when the breach is likely to *adversely affect* the personal data or privacy of that individual. An unauthorised access to a phone number of a member of general society might have a completely different effect on his or her privacy than the unauthorised access and publication of a celebrity's phone number. However, neither the e-Privacy Directive nor the General Regulation offers insight into the tools for assessing the “adverse effect”. This seems particularly problematic in the context of the Regulation which does not offer any margin of appreciation as regards to its enforcement in the Member States.
- 37 ENISA thus proposes that the level of adverse effect is assessed by the following scale:
- low/negligible effect: no or negligible adverse effect - little problems or unpleasantness that can be easily overcome, e.g. loss of time, irritation etc.;
 - medium effect: any adverse effects are not very serious and can be overcome, e.g. economic loss;
 - high effect: considerable/somewhat serious, but they can be overcome with some effort, e.g. significant economic loss, social/reputation-related adverse effects;
 - very high: the adverse effects are extremely serious and significant effort would be required to address them or with possible permanent consequences that cannot be overcome by the persons, e.g. effects on health, or combination of severe economic loss and bruising of one's reputation.⁵¹
- 38 A model of severity assessment is not only necessary in the context of clarification of the term “adverse effect,” but also in terms of practical implementa-

tion of the data breach legislation. Since all of the breaches will have to be notified to the authorities in the EU, a model for assessment will be of benefit to the authorities, as well as to the data controllers suffering a breach, to be able to locate and resolve the serious cases first. The question of notification to the individuals would be resolved faster, which individuals would benefit from the most.

III. The content and form of the notification

- 39 The answer to the question of content and form of notification is to an extent offered by the e-Privacy Directive and the proposed General Regulation, which provide for the list of information that should be communicated to the authorities and to the individuals. The authority should receive as detailed information as possible to be able to draw conclusions as to the seriousness of the breach. Development of a standard form, available for electronic notifications, is seen as beneficial⁵² in cross border breaches, as well, where authorities from different Member States would have to be notified and would cooperate based on their competencies. The Commission, following the recommendation, proposes two notification forms, with standardised content.⁵³
- 40 Regarding the notification to the individuals, the proposed content includes information about the contact point, information on what personal data has been compromised and how and what service the data controller is offering the individual to mitigate the adverse effects, as well as what steps individuals could consider taking in order to mitigate the adverse effects. The information should be in language that is easy to understand. Other useful information that may be reported includes the type of data, impacts from the breach, and actions being taken by the controller to avoid future breaches.⁵⁴
- 41 In terms of the content and form of notification, the channel of communication is an open issue (for example, is notification in a newspaper or an e-mail enough in certain situations, or should there be a more proactive phone call if the data in question are sensitive?), as is the language to be used if the controller holds data on subjects residing in different Member States. As seen from the Commission proposal, the national media are recognised as a possible channel for notifications.⁵⁵

IV. Technical protection measures

- 42 Another open question touches upon the technical protection measures, which may, if they make the data unintelligible to unauthorised persons, provide for an exemption of the notification to the data sub-

jects. The criteria for such technical protection measures should be set in advance and harmonized in all Member States, so as to assure for efficient implementation and legal certainty.

- 43 ENISA offers some guidance, when the data shall be considered unintelligible:
- if it has been securely encrypted or hashed;⁵⁶ and
 - if it has been securely deleted (on a media that was physically destroyed, degaussed or deleted with a secure erasure algorithm).⁵⁷
- 44 The question of technological protection measures is indeed very important as the level of protection present will be the data controllers' strongest argument when unwilling to share the information of a breach with its customers in order to avoid it negatively impacting the sense of trust. Common criteria should be established and harmonized across Member States regarding which technological measures are in fact strong enough, what kind of encryption will suffice, and which standards are to be trusted.
- 45 Encryption is often regarded as a "silver bullet" that can solve information security problems but it has its limitations. First of all, it can only protect the data at rest and in motion but cannot protect data while the data is actually being processed. Second, it is only as strong as the weakest link.⁵⁹ In that sense the Working Party 29 urges the Commission to be more prescriptive regarding encryption and proposes that the data shall be considered unintelligible if:
- (a) *it has been securely encrypted with a standardised algorithm, the key used to decrypt the data has not been compromised in any security breach, and the key used to decrypt the data has been generated so that it cannot be ascertained by available technological means by any person who is not authorized to access the key; or*
 - (b) *it has been replaced by its hashed value calculated with a standardised cryptographic keyed hash function, the key used to hash the data has not been compromised in any security breach, and the key used to hash the data has been generated in a way that it cannot be ascertained by available technological means by any person who is not authorized to access the key; or*
 - (c) *it has been irreversibly deleted, either through physical destruction of the medium on which it was recorded or by means of a secure deletion algorithm.*⁵⁸

V. Breach notifications in cross border cases

- 46 In the ecosystem of providers of electronic communication services and even more in the world of in-

formation service providers (social networks, online gaming environments, online banking, and such) it is expected that data breaches may have cross border dimensions. A data controller may operate in one Member State, but the breach may happen in another if its data centres were attacked there. It may well be that the data controller is processing data of individuals residing in another Member State, or that the data breach has happened simultaneously in various establishments. The data controller may not be able to uncover where the breach has actually happened, but the effects may be felt in all its establishments in different Member States.⁶⁰

- 47 The purpose of this chapter is to shed light on the questions of applicable law and cooperation procedures between competent authorities in cases of cross border data breaches. As neither the legislation nor the cooperation procedures have yet been put in place this part will mainly offer open questions and search for potential issues that might arise in the next years due to the horizontal implementation of the data breach notification obligation.
- 48 The questions in cross border breach cases mainly centre on:
- issues of applicable law, namely which entity of the controller, operating cross borders, should report a breach to which national authority?; and
 - how should competent authorities from different Member States cooperate?
- 49 It may happen that a data controller is established or has capacities in more than one Member State, and serves its clients who are also residing in different Member States. Which authority should therefore receive the notification of a breach in such case? In this case the location of the clients seems irrelevant – they should receive a notification, regardless of the whereabouts of the competent authority. But the authorities must be able to cooperate in this case. In terms of the clients, the language and the channel of communication are more important.
- 50 A solution might be that each establishment which suffered a breach notifies its national authority. If the breach happened in a German establishment and a UK establishment of the data controller, the German notifies the German authority and the UK establishment notifies the UK authority. The General Regulation proposal introduces a notion of a “main establishment” (Article 4), however in the telecoms sector that notion is missing and other interpretations might be possible. What if a breach happens at a data processor, contracted by one of the establishments? In this case the proposed General Regulation offers a potential answer – the processor should notify the data controller and the latter should refer

the notification to the competent authority. What would happen if the location of the breach is unknown? Should the headquarters notify the authority in the Member State where it is established or should all the authorities from all the Member States where the group operates be notified? These are only some of the yet unanswered questions the data controllers that operate across Member States will be faced with.

- 51 An important aspect in cross border breaches is also cooperation between competent authorities from different Member States. A situation might occur, where more than one authority is competent but the different competent authorities disagree regarding further steps to be taken by the data controller who has suffered a breach in a number of Member States (for example, should it notify the data subjects or not). In this case cooperation procedures should be defined for the authorities to cooperate efficiently, and an instrument should be in place to resolve the situations where authorities disagree. The proposal for a General Regulation offers some guidance in terms of cooperation procedures between data protection authorities (Article 55 and 56), but the terms of cooperation in the context of the telecoms sector are not clear, as the competent authorities are not only data protection authorities but also the national regulatory agencies for telecommunications.⁶¹
- 52 What seems to be clear is that the data controllers should not be the ones to decide or search extensively for the authority that is legally competent to receive their notification and consider further actions. The legal framework should be clear enough to allow for a relatively quick decision on the competent authority. Authorities on the other hand should be empowered with tools and guidance to be able to decide efficiently and quickly, whether to deal with a notification or whether to forward it to another authority(es). For the purpose of the telecoms sector a platform should be established to aid communication between competent authorities and the Commission should address the issue of cooperation in its implementation measures. There might be confidentiality constraints in national legislation that prevents the authorities from sharing information openly.

E. Conclusion

- 53 A great number of security incidents, involving personal data, that have happened in the recent years gave rise to a new mechanism that is now being implemented in the EU – a mandatory breach notification mechanism. The revised e-Privacy Directive and the fresh proposal for a General Data Protection Regulation both introduced a provision whereby the entity suffering a breach will have to notify

the breach to the competent authorities and possibly to the injured individual users.

- 54 The paper briefly presented the U.S. experience with data breach legislation, focused on changes in the regulatory framework in the EU, and tackled the question of how the new regulations on mandatory breach notifications will affect online service providers, especially the ones operating across borders. The paper assessed the implications of the new proposals and shed light on the issues that will arise, in terms of applicable law, competencies of the national authorities, and the rights of the injured individuals. Even though the introduction of the mandatory breach notification is undoubtedly an improvement in the framework for data protection in the EU, there are some yet unsolved issues regarding its successful implementation. The paper offered insight on the open questions of thresholds, the adverse effect on the individuals' privacy and data protection, the content and form of the notification, and technical protection measures. Breach notifications in cross border cases are also addressed with a focus on the questions of applicable law and cooperation procedures when more than one authority is competent in considering the case of a breach.
- 55 In order for a successful implementation of the mechanism of data breach notification, it is necessary that the competent bodies (may it be the national bodies, or the Commission) consider all of the described dimensions, where further guidance will be much needed and appreciated, in order to achieve harmonized implementation.
- 6 According to the proposal of the General Data Protection Regulation (Art. 4) the Regulation will apply also to data controllers from outside of the EU if they will offer their services to the European citizens or monitor their behaviour.
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- 37 According to the Code the controller might be ordered to compose a report, containing the information on the amount and nature of the personal data that has been compromised, the action being taken to secure and / or recover the personal data that has been compromised, the action being taken to inform those affected by the incident or reasons for the decision not to do so, the action being taken to limit damage or distress to those affected by the incident, a chronology of the events leading up to the loss of control of the personal data and the measures being taken to prevent repetition of the incident.
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- 40 Article 28(3) of the proposed directive states: "The notification referred to in paragraph 1 shall at least:
- (a) describe the nature of the personal data breach including the categories and number of data subjects concerned and the categories and number of data records concerned;
 - (b) communicate the identity and contact details of the data protection officer or other contact point where more information can be obtained;
 - (c) recommend measures to mitigate the possible adverse effects of the personal data breach;
 - (d) describe the consequences of the personal data breach;
 - (e) describe the measures proposed or taken by the controller to address the personal data breach.
- 41 See Article 31(5) and 31(6) of the proposed Regulation:
- "5. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria and requirements for establishing the data breach referred to in paragraphs 1 and 2 and for the particular circumstances in which a controller and a processor is required to notify the personal data breach.
6. The Commission may lay down the standard format of such notification to the supervisory authority, the procedures applicable to the notification requirement and the form and the modalities for the documentation referred to in paragraph 4, including the time limits for erasure of the information contained therein. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 87(2)."

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- 56 (a) The data was encrypted with a standardized secure symmetric or asymmetric encryption algorithm, or was hashed with a standardized cryptographic keyed hash function.
 (b) The key used to encrypt or hash the data was not compromised in any security breach.
 (c) The key used to encrypt or hash the data was generated so that it cannot be guessed by exhaustive key search with current available technological means." See ENISA 2011 at 5.2.2.
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- 61 Member States have made different decisions regarding competence to receive notifications by operators – in the Netherlands for example it is the telecoms regulator, whereas in Ireland it is the data protection authority.

Walking a Thin Line: The Regulation of EPGs

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Abstract: The digitisation of television broadcasting has facilitated an exponential growth both in the number and the diversity of programs and channels. Electronic Programme Guides (EPGs) help consumers find their way in this abundance of offerings. EPGs serve as a classical listing magazine or broadcasting guide with extensive information on television programs; like VCRs, they enable the recording of programs; as search engines, they allow users to

look for content on the basis of a keyword; and finally, EPGs list the most favoured programs on the first page, either on the basis of popularity, the personal profile of the consumer or on the basis of agreements with particular broadcasting agencies. This article assesses how various European countries approach the regulation of EPGs and determines whether and how they try to reaffirm guarantees for diversity and pluralism in the digital television environment.

Keywords: Electronic Programme Guide, EPG, regulation, Access Directive, due prominence, media law, competition law, consumer law, neutrality, diversity.

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A. Introduction

- 1 Traditionally, governments have been involved in regulating the media to promote quality and diversity in television programming, among other reasons. To this end, national regulating authorities have introduced rules to divide the scarce television capacity equally among the different groups in society, sometimes granting a preferred position to certain minorities in society such as religious minorities or groups with a minority language. This ensured that each group of any size had a chance to express its vision to and on society, and that other communities were able to take notice of differing viewpoints and ideologies. The rationale behind government interference was initially the equal division of the scarce transmission capacity; later it was the fear that commercial broadcasters would focus only on larger, well-off groups in society and not on commercially unattractive groups and minorities.
- 2 The question is whether this logic is still valid in the era of digital television, in which a digital television package easily consists of over 100 channels, some of whose packages target very specific interests – perhaps related to sports, eroticism or movies – or focus on specific groups with a certain religious, national or ethnic background. The television landscape is thus characterized by abundance rather than scarcity, making it both difficult and time-consuming for the consumer to determine which program to watch. EPGs help to tackle this problem. This has spurred a discussion on the question of whether governments still have a facilitating or regulating role to play in ensuring that diversity and pluralism are sufficiently guaranteed in the digital environment.
- 3 EPG regulation focusses on three issues. First, the programs that are listed on the first page of the EPG will attract more viewers than those on the second or third page. Some national regulators have implemented ‘due prominence’ rules, which require EPG providers to give public broadcasters or other se-

lected channels a preferred position in their page-ranking system. Since “[i]n the standard terrestrial television set, the public service channel is usually “number one on the dial” but in an EPG, it may be relegated to any other number, which could disadvantage it vis-à-vis competing channels’,¹ this is a way to maintain the status quo. Since governments can influence the programming on the public channels – to guarantee diversity in programming, among other reasons – this rule allows governments to retain part of their influence over the content consumers watch. Second, there is a competition issue. By integrating services and entering into contractual agreements, an EPG provider might favour a broadcaster’s programs or channels with which it has an agreement. The question is how competition rules and the emphasis on network neutrality, which also plays a role in relation to EPGs, should be applied in this case.² Finally, some EPGs provide incomplete program information, incomplete access possibilities and are not user-friendly. Consequently, EPG regulation can be based on media law principles, with quality and diversity as one of its cornerstones; on competition law, which aims at stimulating market competition; and on general consumer law principles.

- 4 The structure of this article is as follows. First, in section 2, a short explanation will be provided on the different functions and services EPGs offer. Subsequently, section 3 provides a brief history of the development of EPG regulation in the European Community. Finally, the Dutch, the British and the German approaches towards EPG regulation are discussed in sections 4, 5 and 6; these three countries symbolize the different regulatory approaches governments can and have adopted with regard to EPGs. The main issue of this article regards the regulatory approach towards EPG regulation and the different choices to be made in this respect. The conclusion will focus on the dilemmas these choice represent, such as the choice between European-based or national-based regulation; between treating EPG providers as providers of content or as providers of access services; regulating EPGs on the basis of media law, competition law or consumer law principles; the choice for states to remain involved in media regulation or to abstain from EPG regulation; and between stimulating new developments in the digital broadcasting environment and maintaining their influence.³

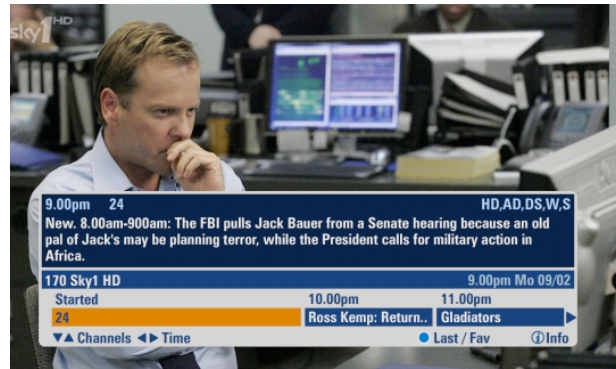
B. The electronic programme guide

- 5 An EPG offers a variety of functions. The picture below contains a sample screenshot of a standard navigation screen with a list of programs; with a click on a certain program, the user can access detailed information.



Picture 1: A standard navigation screen of an EPG.⁴

- 6 If the user chooses to watch a certain program, information on the current or subsequent programs can be obtained via a bar at the bottom of the screen.

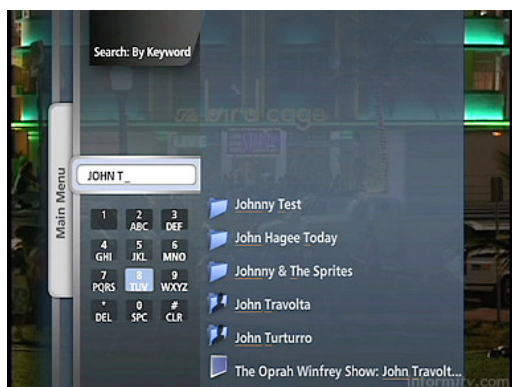


Picture 2: The information bar of an EPG.⁵

- 7 The EPG not only serves as an old-fashioned program guide, but may also incorporate a record function and may offer a Google-like search engine, through which programs can be found by entering a keyword.



Picture 3: The VCR function of an EPG.⁶



Picture 4: The search function of an EPG.⁷

- 8 Finally, in most EPGs it is possible to change the ranking of the programs on the navigation screen shown in the first picture so that, for example, BBC One and Two are not first, but a commercial channel is. Also, a ‘favourite list’ may be compiled, with a viewer’s favourite programs or with a cluster of programs with a similar topic or genre. From a regulator’s perspective, it is the page ranking that is pivotal since public channels might lose their prime position, EPG providers might unduly favour commercial parties with which they have contractual agreements and, given the fact that consumers may compile their own list of favourites and EPG providers may, as search engines do, personalize the search results on the basis of the personal profile of a particular consumer, some fear that this might diminish the possible serendipity and result in a filter bubble.⁸ The next section outlines the European framework for EPG regulation.

C. European Access Directive

- 9 Although it does not regulate EPGs, the Advanced Television Services Directive of 1995 contains the basis for the current regulation of EPGs in the European Union.⁹ The directive was primarily concerned with the promotion of the accelerated development of advanced television services¹⁰ and focused on behavioural rules for conditional access providers and providing certainty for investors in digital television services.¹¹ It required television access and related services to be offered on a fair, reasonable and non-discriminatory basis.¹² However, since ‘[p]olicy-makers as well as consumers were expecting broadcasting to continue to fulfil its traditional social and cultural role’¹³ and since ‘[c]ompetition rules alone may not be sufficient to ensure cultural diversity and media pluralism in the area of digital television’,¹⁴ the directive not only aimed at promoting technological developments but also at safeguarding pluralism.¹⁵
- 10 Since pluralism and competition can be countervailing interests,¹⁶ EPG regulation often finds itself torn between these two core values. Still it might

be said that the attempt at diversity is ill served ‘by under-developed competition law regimes, which fail to take into account pluralism and media diversity’.¹⁷ In addition, competition rules¹⁸ may also be concerned with the existence of certain public policy objectives, such as the preservation of pluralism and consumer choice.¹⁹

- 11 Although their main function is to provide content,²⁰ and consequently some regulators have treated EPGs primarily as such,²¹ it seems apparent that EPGs do not qualify as television programs or content services.²² Taking account of their dual role of transmission and selection, which is even further complicated by the fact that ‘the EPG provider has constitutional rights of its own that need to be respected’,²³ the regulation of EPGs is focused on avoiding anti-competitive practices against potential competitors, on the promotion of innovation, on the protection of civil rights of citizens and on promoting and preserving information plurality.²⁴
- 12 EPG services balance on a thin line between content providers and access services, two categories that are regulated under two different regimes in the European framework.²⁵ Currently, EPGs fall under the Access Directive,²⁶ which in some ways may be seen as the successor of the Advanced Television Services Directive. Like its predecessor, this assumes at its core that the bottleneck issues cannot be tackled only by competition rules; instead, public policy priorities – for instance, the preservation of pluralism – must also be taken into account.²⁷
- 13 Before the implementation of the Access Directive, some Member States had already implemented regulation on EPGs, including Italy, Ireland, France,²⁸ Spain,²⁹ Germany and the UK.³⁰ Interestingly, pursuant to a British case in which a digital television set-top box among others embedded an EPG by an aligned provider,³¹ the European Commission issued a notice that the competition rules may equally apply on access issues in digital communications sectors, to the extent that comparable problems arise.³² Furthermore, a European Union Green Paper stated that exclusive arrangements tying particular EPGs to particular service bundles may require intervention to ensure third-party access on a fair, transparent and non-discriminatory basis.³³ In a response, the Danish government stated that ‘...when the consumer is to choose among several hundred offerings, it is not immaterial in what order or context an offering is presented. Control of an EPG may therefore serve as a basis for drawing attention to one’s own offerings, while offerings that the controlling operator does not wish to be promoted are given a less conspicuous presentation.’³⁴
- 14 This served as a prelude to the Access Directive of 2002, which extended the anti-competition principles to new gateways that had emerged since 1995,

most notably EPGs and Applications Program Interfaces (APIs). This suggests that the Commission did not believe that specific access issues in the digital TV sector should be regulated by market forces at that stage.³⁵ The directive carried over the provisions regarding the obligation to provide conditional access on fair, reasonable and non-discriminatory terms³⁶ and allowed these obligations to be imposed on EPGs by national regulative authorities, to the extent that is necessary to ensure accessibility for end users to specified digital broadcasting services.³⁷ In contrast to APIs, in relation to which the European Commission has reserved the right to implement standards,³⁸ EPGs are left entirely to the Member States to be regulated with regard to access issues.³⁹ This is important since traditionally community law is more concerned with competition regulation and Member State legislation is more concerned with the protection of pluralism.⁴⁰

- 15 Besides the conditions regarding fair, reasonable and non-discriminatory terms, there was some discussion during the drafting process regarding the question of whether EPGs should fall under the conditions imposed on Conditional Access Systems (CASs); this was favoured by both the commission and members of Parliament,⁴¹ but the Council felt it to be overly rigid.⁴² As a compromise, the article regarding conditional access systems holds that Member States may impose obligations in relation to the presentational aspect of electronic programme guides.⁴³ However, it may not always be easy to distinguish between access and presentational aspects, since ‘... the presentational aspects of an EPG design are crucial in determining if and how services are accessible to end users’.⁴⁴
- 16 In conclusion, the European framework offers two grounds for EPG regulation by national authorities.⁴⁵ The European framework is primarily based on anti-competition rules and leaves room for regulation on presentational aspects of EPGs; the media law principles form no part of the rules, but the regulation of EPGs is left to a large extent to the national regulators, who traditionally are involved with promoting diversity and pluralism. The next sections describe the Dutch, the British and the German approach towards EPG regulation.

D. The Netherlands

- 17 The Netherlands only has sparse regulation on EPGs. The Telecommunications Act (Telecommunicatiewet)⁴⁶ holds that to guarantee access by end users to specified services that are broadcasted digitally and can be received using television or radio systems, a ministerial regulation may lay down rules with respect to granting access to electronic programme guides by providers. These rules may regard

the provision of access to electronic programme guides, the access conditions, providing information on obtaining access and the maintaining of separate bookkeeping for activities related to the provision of EPGs and for other activities.⁴⁷

- 18 The ministerial regulation to which the law refers never materialized. The Media Commission (Commissie voor de Media), the regulatory authority in the media (content) sector, announced a number of years ago that it was not planning to introduce regulations regarding the position of the channels in EPGs. When asked, the Independent Post and Telecommunications Authority (Onafhankelijke Post en Telecom Autoriteit), the regulating authority in the telecommunications sector, stated that it had no rules under which the EPGs would be regulated: ‘The rules on EPGs are sparse and unclear. There is no regulation which provides an interpretation of the law, so there is no possible applicability.’⁴⁸ The possible role of the two different regulators, one in the field media and the other in the field of telecommunications, says something about the regulation of EPGs. This matter will be further discussed in the next section on the UK.
- 19 During the parliamentary debate, there was no extensive discussion regarding EPG regulation. The explanatory memorandum to the law merely states that EPGs may be seen

*...as an electronic version of the familiar TV listings magazine. To encourage consumers to watch and listen to as many different digital services, it is important that they can inform themselves to the fullest extent possible on the available digital services. In this respect, EPGs can play an important role. A concise and complete EPG can be an excellent source of information. Providers of digital television or radio services should be able to include their program information in an EPG. This is not only in the interest of the content providers and the consumers, but also in that of the EPG provider. Indeed, an integral guide will normally be more regularly consulted than an incomplete one.*⁴⁹

- 20 Like a number of European countries, Holland has abstained from implementing specific EPG regulation. If there is any real regulatory approach to be discovered, it is not the pursuit for diversity and pluralism nor the focus on competition rules. Rather, the explanatory memorandum seems to be particularly concerned with consumer interest in terms of transparency, an integral offer and access to services and information.

E. The United Kingdom

- 21 Already from 1990 onwards, British EPG providers were put under license conditions ensuring a wide

range of services throughout the UK and fair and effective competition.⁵⁰ Since EPGs were not standardized, both competence and user freedom were hindered;⁵¹ similarly, both commercial issues and technical issues arose.⁵² In 1997, there were two codes of conduct in this field, one by the technical regulator, the Office of Telecommunications (OfTel), which interpreted EPGs as covered by the non-discrimination rules for telecommunications access service, and another code was drafted by the media regulator, the Independent Television Commission (ITC), which mandated that the visual interface of EPGs should grant public channels 'due prominence'.⁵³ The ITC and OfTel established a joint working group to ensure that there was consistency in regulation.⁵⁴ The question of due prominence applied to EPGs was new, since the regulatory approach had up to then been a question of scarcity rather than abundance of offerings.⁵⁵

- 22 Although the European legislation lagged behind, from an early stage the British approach provides an example of diversity-based regulation within a competition framework. This was due in large part to the fact that EPGs were considered both a technical telecoms and a broadcast programming bottleneck.⁵⁶ Some critics felt that the rules of OfTel and ITC were inconsistent with each other. Due prominence for public broadcasting channels seems to favour these channels not on the basis of their content but for their status. In an earlier stage, OfTel had already held this kind of favouring incompatible with the non-discrimination principle. OfTel presumed that discrimination by suppliers in favour of public service broadcasters or channels simply by virtue of their public service status would not be consistent with the non-discrimination requirement.⁵⁷
- 23 Next there was a case with regard to the due prominence clause, when the BBC moved from Sky's satellite to the Astra 2D satellite; as a reaction to this, Sky threatened the BBC that it would lose its top position on the provider's EPG. The BBC called in the ITC to determine the legality of Sky's announced action and to give clarification on the due prominence clause.⁵⁸ However, the ITC was not able to do so since BBC and Sky settled their dispute.⁵⁹
- 24 Subsequently, the Communications Act of 2003⁶⁰ provided for new provisions that were similar to those in the Broadcasting Act. It holds that the new, combined national regulating authority, the Office of Communications (OfCOM), is under the obligation to draw up a code giving guidance on the practices to be followed in the provision of electronic programme guides. The code must provide for rules regarding the due prominence of public service channels.⁶¹ According to the Code of Conduct,⁶² OfCOM considers that 'appropriate prominence' permits a measure of discrimination in favour of public service broadcasting channels. EPG providers should themselves ensure that the approach they adopt to fulfil the requirement of appropriate prominence is objectively justifiable. OfCOM does not give details on what appropriate prominence means, since it feels that there are many possible ways in which EPGs could display information about public television programs.⁶³ In considering whether a particular approach to listing public service channels constitutes appropriate prominence, OfCOM will take into account both the interests of citizens and the expectations of consumers. OfCOM does state that it would justify a decision by an EPG operator using a menu-based approach to position public service channels no more than 'one click' away from the home page. Giving public service channels first refusal on vacant listings higher in the category that they were placed might also be justified, according to OfCOM.⁶⁴
- 25 OfCOM further explains that when EPG providers enter into contracts with broadcasters, they should ensure that the terms are fair, reasonable and non-discriminatory and comply with an objectively justifiable method of allocating listings, such as objectively justifiable 'first come, first served' methods, alphabetical listings and listings based on audience shares. Undue prominence to a channel with which providers are connected and conditions specifying exclusivity to one EPG for any service or feature are prohibited unless when required in light of the appropriate prominence provisions.⁶⁵
- 26 During the consultation of the draft Code of Conduct, one of the debates concerned the due prominence provision.⁶⁶ The discussion primarily concerned the free and fair competition in the market and only to a limited extent the diversity policy. Although a number of respondents hoped for more detailed criteria on the 'appropriate prominence' clause, OfCOM stated that there were a number of different approaches that could be justified and that it believed that broad and general guidance maximizes the scope for diversity, to the benefit of consumers.⁶⁷
- 27 This standpoint was repeated time and again by OfCOM, for example, in 2008 when the OfCOM held its Second Public Service Broadcasting Review. In that report, OfCOM also seemed to play down the role of EPG prominence when it stated that

[o]n one hand, an active trade in EPG positions in the multi-channel sector suggests that broadcasters believe their channels can increase viewing in higher EPG positions. However, there is equal evidence that viewers will seek out particular channels and content irrespective of EPG position as the figure below illustrates - many channels attract significant share despite being absent from the first page of a particular genre category.⁶⁸

- 28 However, an external study for OfCOM from 2010 on the audience impact of page one EPG prominence

concluded that 28 of the 33 examined cases in which EPG listing was altered supported the argument that EPG positioning affects audience performance, 4 examples were inconclusive and only 1 supported the argument that EPG positioning did not affect audience performance at all.⁶⁹ It's not yet clear what OFCOM's response will be on this point.

F. Germany

29 In 1996 the German Broadcasting Treaty (Rundfunkstaatsvertrag)⁷⁰ already held that providers of systems which could control the selection of television programs and which are used as a super-ordinate interface for all services offered via that system must offer to all broadcasters, on fair, reasonable and non-discriminatory conditions, technical services enabling the broadcasters' services. More specifically, the law stated that the start-up page should make equal reference to public and private channels and ensure that the individual programs may be directly tuned into.⁷¹ This idea of equality in weight between public and private broadcasters has remained one of the distinguishing features of the German regulatory approach toward EPGs.

30 The current media law also regulates platform providers.⁷² According to the law, a platform provider is one who summarizes the supply of services by third parties via digital transmission services offered as an aggregated whole, or one who decides on the summary.⁷³ Regarding technical access freedom, the law provides that to ensure diversity of opinion and of choice, electronic programme guides may not discriminate without objective and reasonable justification.⁷⁴ The protection of diversity of opinion is one of the core goals of the law. Especially with regard to private broadcasters, the law imposes numerous provisions to ensure that its diversity policy is served.⁷⁵ EPGs are also regulated in that light and special rules exist for private platform providers. They must ensure that they also transmit public broadcasting programs⁷⁶ and take into account the provisions regarding diversity of opinion and offer.⁷⁷

31 According to the law, a statute may be drafted to specify details about the regulation of electronic programme guides, among others.⁷⁸ The regulatory authorities of the German *Länder* adopted (each for its jurisdiction) the statute on freedom to access digital services and on the regulation of platforms (*Satzung über die Zugangsfreiheit zu digitalen Diensten und zur Plattformregulierung*)⁷⁹ that names and describes in further details the main principles aimed to pursue the goal of diversity in offer and opinion. These principles are equal opportunity and non-discrimination.⁸⁰ Providers must ensure that access to distribution or marketing offers is not unduly (directly or indirectly) restricted, and that there is no discrim-

ination between similar providers without reasonable justification. Diversity in offer and opinion⁸¹ are the core values under the statute.

32 Equal opportunity is presumed if a provider gives everyone a realistic chance to access its access services. In contrast, conditions are presumed discriminatory if a provider offers the same service to one company under different conditions than to another company, unless the differences are objectively justifiable.⁸² Concerning EPGs, meeting the following conditions should always lead to the conclusion that the principles of equal opportunity and non-discrimination are respected:

- several lists with different sorting criteria are offered next to each other,
- the user has the ability to change the sequence of channels in the list or to create its own favourites list and
- a proffered list of favourites is offered without prefixed settings.⁸³

33 Furthermore, the statute holds that equal reference should be made to public and private programs.⁸⁴ This emphasis on the equality of public and private programs differs significantly from the British model that gives public channels due prominence, taking into account the particular importance of public service broadcasting and thus potentially causing the other broadcasters' chances of access and presentation to be unduly diminished.

The solution which has been adopted in Germany could prove to be a less intrusive, but nevertheless equally effective alternative. By providing that navigators must facilitate that the start-up page makes reference to public service and private channels which is equal in weight, ... the Interstate Broadcasting Treaty gives the public service broadcasters on the one hand and the remaining broadcasters on the other the same chances to be perceived without favouring the public service channels to the detriment of the other content providers.⁸⁵

34 It is then up to the user to choose what to view.

G. Conclusion

35 In many respects, EPG regulation balances on a thin line. First, there is a line between the position of EPG providers as providers of content and as providers of access services, two types that are regulated on different doctrines in EU law. EPGs are currently regulated under the European Access Directive, which means that EPG providers are primarily seen as access providers. However, the European rules allow national governments to treat EPGs in whole or in

part as providers of content. The fact that in both the Netherlands and initially in the UK, two regulators dealt with the topic of EPG regulation – namely the media (content) regulator and the regulator in the field of telecommunication – reflects this tension.

- 36 Second, there is a related distinction between rules that ensure diversity and pluralism on the one hand and antitrust regulation on the other. EPGs can be regulated under media law doctrines, which emphasize values such as the need for governmental interference to guarantee the quality and diversity in program offerings. Likewise they can be regulated by relying on competition law principles, with their particular emphasis on fair competition and a competitive market. Additionally, general consumer law aspects play a role in EPG regulation, emphasising the need for transparency, the importance of providing an integral service and laying out prohibitions on unfair trade practices.
- 37 Finally, the distinction between national and European regulation, in this case the Access Directive, is also of importance, as traditionally European law is more focused on competition aspects, and the national legislation is more concerned with encouraging diversity in media content.
- 38 On the European level, the choice has been made to treat EPGs primarily in the field of access services, to predominantly focus on antitrust principles and to opt for minimal regulation on the European level so as to allow national governments to introduce regulation based on media, competition or consumer law principles as they see fit. How the different European countries have used this margin of appreciation differs to a large extent. In this article, three countries that symbolize three types of approaches have been discussed: the Dutch, the British and the German regulation.
- 39 Though no specific regulation exists, the Dutch framework for EPG regulation is primarily based on consumer law practices. In contrast, the British regulation is dominated by media law principles as it allows for a preferred treatment of public broadcasting channels, which are traditionally used by the government to promote quality and diversity in program offerings. The ‘due prominence’ rule can be seen as a way to maintain the status quo because public channels are usually programmed first in the analogue television environment. Finally, in Germany, the core of the regulation of EPGs is based on the equal treatment of public and commercial channels in the EPG listings. This seems to be primarily concerned with the fear that certain EPG providers might enter into contractual agreements with television broadcasters and offer them a preferred position. This approach is thus based on competition law principles.
- 40 Another line that needs to be carefully observed by the national authorities is that of governmental interference to promote a qualitative and diverse television landscape while at the same time maintaining their neutrality. What neutrality means in this respect, however, is a matter of discussion. Roughly, three approaches towards state neutrality may be distinguished: exclusive, inclusive and compensating neutrality.⁸⁶ Exclusive neutrality implies that the government is not committed to any form of ideology, religion, etc. Manifestations of specific group characteristics such as crosses or headscarves by government officials are therefore forbidden.⁸⁷ In media terms, this means that the government does not adopt any rules that protect a specific category, group or ideology. Second, inclusive neutrality is based on the principle of proportionality; the government ensures that different groups in society are equally represented in government and have equal access to services.⁸⁸ This kind of neutrality is sometimes also referred to as proportional neutrality. ‘Proportional neutrality takes account of different comprehensive views by making representation of minority groups or state support for their culture proportional to their size. It requires that every group get representation in advisory councils and policy boards or funding for schools, broadcasting unions, and so on, in accordance with its share of the population.’⁸⁹ In media terms this might imply that the government ensures that different groups in society get equal attention or air-time in proportion to their size or number. Finally, compensatory neutrality means that governments actively promote and protect the interest of certain vulnerable minorities in society that are in need of special protection. For example, this may lead to a preferred treatment of religious minorities or those belonging to a language minority by giving them a larger time-slot on national television than their size would normally legitimate.
- 41 Again, governments make different choices in this respect, although as with the choice between media, competition and consumer law, a choice for one does not exclude the other. Still, it’s clear that the Dutch government is very reluctant to introduce any regulation that would actively ensure that EPGs offer a diverse and pluralistic programming; in doing so, it has chosen to adopt a form of exclusive neutrality in this field. In contrast, the British approach is partially based on the idea of compensatory neutrality, given the fact that the EPG regulation is primarily aimed at preserving the influence of public broadcasting channels in the digital environment and the fact that one of the main goals of the BBC is to stimulate minority ideologies, languages and cultures.⁹⁰ Furthermore, the BBC Broadcasting Agreement specifically calls for ‘appropriate coverage of sport, including sport of minority interest’⁹¹ and ‘appropriate provision in minority languages’⁹² and includes a special position for ‘co-funding by non-commer-

cial bodies for output in minority languages'.⁹³ The German approach aims at equality of different channels in the EPG listing by implementing safeguards to prevent a too dominant position of one or a number of specific broadcasters that may want to enter into contractual relations with EPG providers. This reflects the principle of proportionality that is also central to the idea of inclusive neutrality.

- 42 Finally, governments need to walk a fine line between stimulating new developments in the digital broadcasting environment and maintaining their influence; the original Advanced Television Services Directive was primarily concerned with the promotion of the accelerated development of advanced television services, but also maintained that competition rules alone may not be sufficient to ensure cultural diversity and media pluralism in the area of digital television. This dilemma is still prominent with regard to EPG regulation nowadays, since EPGs are no longer solely offered via a set-top box or digital TV, but increasingly through tablets, smartphones, apps and social networks.⁹⁴ This raises the question how far the legal definition of the 'EPG' and thus the scope of the regulation could and should reach since overly rigid regulation might hamper new developments and innovation; currently, the EPG regulation is mostly limited to the traditional EPG providers.⁹⁵ Will governments go so far as to impose media law principles on digital, Internet-based services? Only time will tell whether this will happen or whether this latest development might mean the end of EPG regulation – and perhaps, the de facto influence of media law-based regulation on the digital television environment.

* This article is the result of a study executed by IViR and TNO for the Dutch Ministry of Education, Culture and Science regarding the regulation of the audiovisual landscape in the Netherlands. <http://www.ivir.nl/publicaties/vaneijk/Distributierapport_TNO.pdf>.

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Domain Name Transfer before Slovak and Czech Courts

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Abstract: In Europe, a disagreement persists in the courts about the possibility of plaintiffs to request a domain name transfer in domain name disputes. In the last ten years, Slovak and Czech courts also produced some jurisprudence on this issue. Interestingly, the BGH's influential opinion in the *shell.de* decision, which denied domain name transfer as an available remedy under German law back in 2002,

wasn't initially followed. To the contrary, several Slovak and Czech decisions of lower courts allowed a domain name transfer using two different legal bases. This seemingly settled case law was rejected a few months ago by the *globtour.cz* decision of the Czech Supreme Court, which refused domain name transfers for the time being.

Keywords: Trademarks, Domain names, Domain transfer, Slovakia, Czech Republic, Case law, Remedies

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A. General introduction

- 1 Domain name transfer is a quick remedy stipulated in various narrowly tailored Alternative Dispute Resolution systems, such as WIPO's well-known UDRP or the European Union's ADR for .eu domain names.¹ It became popular following the success of the UDRP-based ADR systems. Influenced by UDRP, the plaintiffs soon also started to demand this remedy before the ordinary courts. Various European courts responded to this demand differently. While the courts in the UK, Belgium, Denmark, Finland, France, Ireland, Italy, Latvia, Netherlands, Portugal, Sweden and Spain were reported to allow domain name transfers, courts in Germany, Switzerland, Austria and Hungary resisted granting it.² The most well-known decision rejecting domain name transfer is perhaps the decision of the German Federal Supreme Court (*Bundesgerichtshof*, BGH) in the *shell.de* case.³
- 2 Because most European countries have no tailor-made legislation dealing with domain name disputes, the possibility of domain name transfers in a lot of countries depends on whether it can be seen as a part of currently available *ex delicto* remedies (claims based on torts). Therefore, the discussions in most

of the countries usually try to answer whether the domain name transfer

- i) could be seen as a part of the claim for removal (*Beseitigungsanspruch*) or the claim for cease and desist (*Unterlassungsanspruch*); or
- ii) could be constructed by analogy from some existing parts of the legislation that stipulates some kind of a claim for transfer (*Übertragungsanspruch*).⁴
- 3 From the specific jurisdictions, German and Swiss literature and jurisprudence quite soon rejected that the claims for removal and for cease and desist could serve as a legal basis for domain name transfers.⁵ On the other hand, the UK jurisdiction quickly accepted transfer as a part of the claim for cease and desist.⁶ In 2002, the German BGH also rejected any construction of the domain name transfer by analogy in its *shell.de* decision.⁷ Slovak and Czech courts, usually strongly influenced by German doctrine, initially took a different route.

B. Czech Republic

- 4 In 2003, the first Czech domain name transfer was granted by the Regional Court in Brno in the *tina.cz* case.⁸ The case was soon followed by a better known and more often-quoted decision of the Higher Court in Prague, the *ceskapojistovna.cz* case (2004).⁹ A few years later, similar decisions were rendered in *ostrava.cz* (2005), *cad.cz* (2006), *tpca.cz* (2007), *kaufland.cz* (2007), *ibico.cz* (2007) and other cases.¹⁰ The Czech literature at that time was also generally in favour of domain name transfers.¹¹
- 5 Although most of the decisions based domain name transfer on the claims based on tort, removal (most frequently) or cease and desist, one court surprisingly used the contractual basis.¹² Most of the transfers were directed against domain squatters, but a few were also granted against the domain name authority – CZ.NIC. The courts usually tried to legitimize their decision by stating that ‘it is the only effective way of stopping the infringements’ (*nutrici-adeva.cz* case). This might have been caused because the CZ.NIC registration rules have no equivalent to the German ‘dispute registration’ (*Dispute-Eintrag*), which BGH ‘relied’ on in *shell.de* in terms of effectiveness of domain name transfers in Germany. The Czech courts did not really elaborate on the problems of associating this interpretation with the doctrinal understanding of the claims based on tort. The claim for removal under Czech and Slovak law typically aims to recover the past situation that existed before the infringement took a place. In its practical effects, it is very similar to natural restitution, which can also be claimed as a form of claim for damages (§ 442(2) Civil Code).¹³ The main inconsistency with the traditional doctrine is that the domain name transfer actually puts the plaintiff in a better position than before the infringement.¹⁴ The claim for cease and desist, on the other hand, directs its effects to the future. It aims at preventing any future infringements and threatened infringements. If the court were to allow a measure preventing anybody other than the plaintiff from possessing the disputed domain name, it would mean that infringing is already the mere status of open registration, not its registration and subsequent use by a certain person. Such an interpretation is far-fetched as it would in fact presume only illegal conduct, not to mention that this interpretation counts on the presumably infringing conduct of somebody other than defendant. Czech lower courts, though recognizing some preventive effects of domain name transfers, did not see the above arguments as a great obstacle that would force them to reject it because of falling outside the claim for removal or cease and desist.
- 6 From the practical experience with CZ.NIC, however, it is questionable what the court was actually ordering when it obliged the ‘transfer of the domain name to the plaintiff’. In practice, both the transfers granted directly against the domain name authority – CZ.NIC – and also against the infringers were in fact treated by CZ.NIC as domain name cancellations connected with an exclusive open registration period for the plaintiff. To have a disputed domain name registered, the plaintiff always had to enter into a new domain name contract. From the common meaning of ‘transfer’, however, one would expect it to mean that an unsuccessful defendant has to assign the contract to the respective domain name to the successful plaintiff. Ordering ‘domain name transfers’ thus proved to be quite unclear in its consequences.
- 7 Until April 2012, only one case ended up before the Czech Supreme Court. The *systemy.cz* case did not concern typical cybersquatting, but an act of a frustrated employee *ultra vires* assigning his employer’s domain name to himself. The Supreme Court confirmed here that a domain name transfer can be based on a claim for removal arising from an unfair competition delict. It has to be noted, however, that in this case, transfer undoubtedly aimed at re-instituting the former position of the plaintiff before the infringement. As such, therefore, it wasn’t non-compliant with the doctrinal view on the claim for removal. Swiss literature¹⁵ also came to similar conclusions in its interpretation of local laws when it accepted domain name transfers as a part of the claim for damages in the form of natural restitution (*Schadensersatz in Form der Naturalrestitution*).
- 8 In 2004 Czech registration rules included an arbitration clause, which also enabled¹⁶ plaintiffs to sue before one designed arbitration court – the Czech Arbitration Court.¹⁷ Unlike other systems, this arbitration is not limited only to cybersquatting cases such as UDRP or .eu ADR, and it uses ‘ordinary’ Czech law as the source of law. Discussion about domain name transfer thus continued predominantly at this court. In the available case law of the arbitration court, all the arbitrators basically agreed that domain name transfer is an available remedy under Czech substantial law. However, there are two different ways the arbitrators reasoned this remedy:
 - i) the first bases domain name transfer on the claim for removal or the claim for cease and desist;¹⁸
 - ii) the second bases domain name transfer on the *per analogiam* application of Regulation No. 874/2004 of 28 April 2004 laying down public policy rules concerning the implementation and functions of .eu.¹⁹
- 9 The first group of arbitrators (i) thus follows the jurisprudence started by Czech ‘ordinary’ lower courts, while the second group of arbitrators (ii) recognized that domain name transfer cannot be considered a part of the claims for removal and cease and desist and subsequently constructed the claim for transfer by *per analogiam* applying Article 22(11) of Regulation

874/2004. It is argued that a transfer of the domain name was not anticipated by the law, and thus the so-called ‘gap in the law’ (*Gesetzeslücke*) exists. The latter approach is quite new and is represented by only two decisions from June and September 2011.

- 10 Most recently, the practice of ordering domain name transfers was substantially challenged. In April 2012, the Czech Supreme Court in *globetours.cz*²⁰ cancelled the decision of the lower court, which granted the plaintiff the transfer of the domain name against the infringer. Although the court recognized that the defendant had engaged in unfair competition and trade mark delict, it was of the opinion that a domain name transfer ‘*entirely exceeds the limits of the claim for removal*’. The main argument was that the claim for removal shall aim only at reinstatement of the former lawful situation. The court, although mentioning Regulation 874/2004, did not discuss any possibility of constructing the domain name transfer on the basis of an analogical application of its Article 22(11).
- 11 Furthermore, the court reiterated that a domain name is just a technical performance of a relative right based on contract. It reasoned that ‘*the claim for removal cannot lead to the imposition of the duty to transfer because the domain name does not provide its holder with any absolute (exclusive) right*’. This seems to be an additional argument. However, it is unclear why only the absolute (*erga omnes*) rights could be subject to such transfers. In § 65(2), for instance, the Czech Commercial Code stipulates two remedies in case of a breach of the non-competition obligation imposed on various members of the companies. It provides that ‘*[a] company may demand that any person in breach of such a ban shall relinquish any profit generated from the business transaction that resulted in the breach, or to transfer the rights ensuing from such a transaction to the company. This shall not affect the right to damages*.’ This delict, which in its foundations is based on general unfair competition law principles, thus provides a special remedy that arguably aims not only to transfer the absolute rights but also the relative (*inter partes*) rights such as obligations. It is therefore perfectly imaginable that a relative right based on tort would give rise to the transfer (assignment) of another relative right based on contract.

C. Slovakia

- 12 In 2007, the first domain name-related case, *rover.sk*, appeared before the Slovak Supreme Court.²¹ It was after the beginning of 2009, however, when the first domain name transfer was granted. The cases of the District Court in Banská Bystrica – *illy.sk* (2009), *spinalis.sk* (2009) and *viagra.sk* (2010) –, the Regional Court in Banská Bystrica in *viagra.sk* (2011), and the decision of the District Court of Košice I. in

havana-club.sk (2010) represent the Slovak decision landscape.²²

- 13 All the courts based the domain name transfer on the claim for removal using the very same reasoning as the Czech courts and the majority of the Czech Arbitration Court. However, Slovak courts were more clear on how the domain transfer should really be executed. The court orders were usually worded to say that ‘*the defendant is obliged to assign the rights from the domain name contract*’, which still allows some criticism for being misleading. This is because when the defendant has to assign the domain name contract, the defendant must not only assign the (rights) receivable (§ 524 of the Civil Code) but must also let the plaintiff assume the debts (§ 531 of the Civil Code). In any case, the Slovak courts recognize that assignment of the contract is left on the subsequent legal act, to which the court only obliges by virtue of the claims based on tort.²³
- 14 Another interesting aspect of the court orders is directly caused by conditions found in the current domain name registration rules, according to which only a Slovak natural or legal person can register the domain name ‘.sk’ in ccTLD. As several plaintiffs were foreign entities, they were forced to demand the transfer of the domain name not to themselves but to some other persons – usually patent attorneys. Slovak courts thus granted a domain name transfer, ordering the defendant ‘*to assign the rights from the domain name contract to the domain “exampledomain.sk” to the authorized person representing the plaintiff who satisfies the general eligibility criteria set out in the domain name registration rules*’. In the *illy.sk* decision, for instance, this order was issued without specifying the ‘authorized representative’ in the court’s order, while in others (e.g. *spinalis.sk*), this person was explicitly identified.²⁴
- 15 Slovakia, unlike the Czech Republic, does not currently use any arbitration clause for domain name disputes. The Slovak domain name authority SK.NIC, however, plans to incorporate an ADR-style dispute resolution system in the next amendment of the registration rules that are expected at the end of 2013. It is still not decided whether the ADR should copy the Czech style of ‘full jurisdiction’ and legally enforceable arbitration, or should rather switch to a more soft-law style of procedure like UDRP.

D. Concluding remarks

- 16 Despite the fact that Slovak and Czech lower courts have based domain name transfers on the claims for removal and cease and desist, this practice in most cases²⁵ conflicted with the local interpretation of these two remedies.²⁶ Using those two claims based on tort as a vehicle for similarly worded court orders can be compared to Pandora’s box. The courts could

soon be loaded with a plethora of other actions exercising these claims in ways that actually lead to transfers of different economic values.²⁷ The doctrinal interpretation²⁸ of the Czech Supreme Court in *globtours.cz*, which rejected domain name transfer as a part of the claim for removal, should therefore also be followed to some extent by the Slovak Supreme Court and the entire Czech Arbitration Court. On the other hand, construction of the domain name transfer by analogical application of Article 22(11) of Regulation 874/2004 should be further explored.²⁹ Although the *globtours.cz* case non-explicitly dismissed this line of argumentation, it shouldn't be seen as a great obstacle. From a methodological point of view, the absence of a domain name transfer remedy under the current laws can arguably be seen as a value-deficient gap in the law as understood by Prof. Reinhold Zippelius, because this absence of remedy was neither planned nor intended, and material justice sometimes requires this remedy.³⁰ This was already demonstrated by the European legislator *inter alia*, who stipulated Article 22(11) of Regulation 874/2004 in regard to .eu domain names for this purpose. It would be unfair and infringe on the principle of equal treatment if some specific factual circumstances in regard to the .eu domain name could provide the plaintiff with the claim for the domain name transfer,³¹ whereas the very same circumstances in regard to .sk or .cz could not.³² Moreover, this interpretation of the law would fail to satisfy its purpose in fairly solving the legal problems³³ and in being consistent. For exactly the same reasons, the analogical application of Article 22(11) of Regulation 874/2004 should not be extended beyond the facts (*Tatbestand*) of the 'speculative and abusive registrations'. Otherwise, the interpretation might step out from the realms of justified gap-filling and clash with the rule-of-law principle.³⁴ Moreover, allowing domain name transfer outside of speculative and abusive registrations would require a careful balance of interests, because too broad interpretation – requiring that even minor infringements of rights give rise to a domain name transfer – could lead to non-proportional interference with the right to the property.³⁵ This is because the domain name transfer represents a separate and quite strong remedy against the infringers, which arguably should not be granted in every single infringement case.³⁶ Moreover, extending this claim for transfer outside of the scope of speculative and abusive registrations would most likely go far beyond mere gap-filling.

1 The latter is based on Regulation No. 874/2004 of 28 April 2004 laying down public policy rules concerning the implementation and functions of the .eu and Regulation No. 733/2002 of 22 April 2002 on the implementation of the .eu Top Level Domain.

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- 3 BGH, CR 02, 525 – shell.de.
- 4 K. Weis, *Der immaterialgüterrechtliche Übertragungsanspruch zugleich ein Beitrag zum Kennzeichen- und Domainrecht in Deutschland, Frankreich und der Schweiz* (Konstanz: Dissertation, 2004).
- 5 See K. Weis, *Der immaterialgüterrechtliche Übertragungsanspruch*, p. 159, and the works and decisions quoted there: S. Stein, *Schutz von Name und Kennzeichen gegen eine Verwendung als Domain-Name durch Dritte* (Frankfurt a.M.: Lang Peter, 2002), p. 111; A. Kur, *Internet und Kennzeichenrecht, Praxis des Online-Rechts* (München: Ulrich Loewenheim/Frank A. Koch, 2001), p. 325; Decision of OLG Hamburg, CR 1998, 243 – krupp.de; BGH, CR 02, 525 – shell.de.
- 6 Decision of the High Court of Justice, Chancery Division, WIPR 1998, 32, 35: 'I accept that an order in the form of paragraph 2 (which requires the Defendants to take steps to have the disputed names assigned to the Plaintiffs) goes rather further than the negative form of injunctions normally appropriate quia timet. But it seems to me to be the most completely effective remedy, and one which does no injustice to the Defendants, for these names are of no value to them otherwise than as a means of threatening unlawful acts. It is the equivalent, in this rather arcane context, of the delivery up of infringing goods'.
- 7 Despite this early decision, even today domain name transfers provoke very interesting works in the German literature which try to analyse the content of the claim for transfer. See e.g. Weckbach, *Der Anspruch auf Löschung und Übertragung von Domains*; K. Weis, *Der immaterialgüterrechtliche Übertragungsanspruch*.
- 8 Regional Court Brno, 7 May 2003, 11 Cm 8/2003, tina.cz.
- 9 Higher Court in Prague, 10 August 2004, 2 Cm 290/2001, ceskapojistovna.cz.
- 10 Higher Court in Prague, 13 September 2006, 3 Cmo 114/2006, cad.cz; Higher Court in Prague, 15 January 2007, tcpa.cz; Higher Court in Prague, 25 April 2007, kaufland.cz; Higher Court in Prague, 4 June 2007, ibico.cz; Regional Court in Ostrava, 1 October 2005, 5 Cm 85/2001, ostrava.cz.
- 11 See I. Telec, *Cybersquatting formou neoprávněného útoku na název obce prostřednictvím doménového označení. Časopis pro právní vědu a praxi*, 2000, p. 314 – 324; R. Polčák, *Nekalositelství agrese na internetu. iPravnik.cz*, 2005; R. Pelikánová, K. Čermák, *Právní aspekty doménových jmen* (Praha: Linde, 2000), p. 191. V. Smejkal, *První rozsudek ohledně doménového jména ve věci samé. Inside*, 2003, p. 11. Against: J. Aujezdský, *Rozsudek ohledně domény ceskapojistovna.cz. Co je špatně? Itpravo.cz*, 2005.
- 12 See criticism in M. Husovec, *Is it possible to claim the domain name transfer?*, *Revue pro právo a technologie* 2011, Vol. 3.
- 13 Natural restitution under § 442(2) of the Civil Code, however, is more limited than a claim for removal.
- 14 More in M. Husovec, *Is it possible to claim the domain name transfer?*, pp. 32 et seq.
- 15 K. Weis, *Der immaterialgüterrechtliche Übertragungsanspruch*, p. 159.
- 16 The construction of the public offer of the arbitration clause was recently upheld by the decision of the Higher Court in Prague, 27 April 2011, 3 Cmo 367/2010.
- 17 It is the very same arbitration court as the one designated for .eu domain names.
- 18 Opinion of the arbitrators: Švorčík (Decision No. 00087), Hostaš (Decision No. 00013), Čermák (Decision No. 00024), Chamrád (Decision No. 00077), Olík (Decision No. 00129) and Loelb (Decision No. 00047).

- 19 Opinion of the arbitrators: Telec (Decision No. 00059) and Polčák (Decision No. 00060).
- 20 Czech Supreme Court, 19 April 2012, 23 Cdo 3407/2010, globe-tours.cz.
- 21 Slovak Supreme Court, 12 July 2007, 3 Obo 197/06, rover.sk. More at M. Husovec, The First Supreme Court Decision on Domain Names, Hutko's IT & IP legal blog 2010. Available online at [visited: 14 July 2012] <http://husovec.blogspot.de/2010/10/first-supreme-court-decision-on-domain.html>.
- 22 District Court Banská Bystrica, 27 October 2009, 10 CbPv 4/2009, illy.sk; District Court Banská Bystrica, 22 March 2010, 16 CbPv 10/2009, spinalis.sk; District Court Banská Bystrica, 23 October 2010, 16 CbPv 13/2008, viagra.sk; Regional Court Banská Bystrica, 9 November 2011, 41 Cob 179/2010, viagra.sk; District Court Bratislava I., 3 November 2009, 32 CbPv 4/2006, active24.sk (cancelled due to withdrawal of the plaintiff); District Court Košice I., 15 January 2010, 26 CbPv 2/2009, havanacub.sk.
- 23 It might be argued that this form of court order is more risky for the plaintiff due to its indirect enforceability only.
- 24 More M. Husovec, What is and what already isn't the claim for the removal?, Lexforum 2011. Available online at [visited: 14 July 2012] <http://www.lexforum.cz/306>.
- 25 Except for the natural restitution as explained.
- 26 A similar problem arises when a plaintiff asks for a domain name cancellation based on a claim for removal together with limited exclusive contract period (against the domain name authority) based on a claim for cease and desist. Granting the latter would mean that 'open registration' of the domain name is automatically also infringing somebody's rights.
- 27 Moreover, in some cases it would be more interesting for the right holder, for example, to request the transfer (assignment) of rights under a contract whose fulfilment infringes upon his rights, based on a claim for removal with objective liability, than to claim damages where the subjective (fault) liability principle applies.
- 28 In Germany, for instance, in the *krupp.de* case, OLG Hamm states: 'Der Schutzanspruch aus § 12 BGB gibt der Klägerin allerdings nicht das Recht, wie hauptsächlich von ihr beantragt wird, vom Beklagten die Zustimmung dazu zu verlangen, daß ihr die Domain-Adresse ... übertragen wird (anderer Ansicht LG München CR 1997, 479 = JurPC Web-Dok. 32/1998, Anm. der Redaktion). § 12 BGB räumt dem Verletzten lediglich einen Beseitigungsanspruch und einen Unterlassungsanspruch ein, ggf. auch einen Schadensersatzanspruch (Palandt a.a.O. § 12 BGB Rdn. 32 ff.). Das bedeutet, daß der Verletzer nur den Störungszustand nicht aufrechterhalten darf. Er ist aber nicht verpflichtet, an einer Verbesserung der Rechtsstellung des Verletzten in namensmäßiger Hinsicht mitzuwirken. Das bedeutet für den vorliegenden Fall, daß der Beklagte seine Sperrposition, die er mit der Registrierung und Nutzung seiner Domain-Adresse ... ausübt, zwar aufgeben muß, daß er aber nicht verpflichtet ist, seinerseits dafür zu sorgen, daß nunmehr die Klägerin statt seiner die umstrittene Domain-Adresse erhält.'
- 29 In Hungary, Pécs Regional Court of Appeal in Case No. Pf.I.20.229/2006/28, according to the publication F. Fazekas, M. Varju. European Union law before the Hungarian Constitutional Court and the Hungarian judiciary (Debrecen: Ffa and MVu, 2010), p. 9., argued that on 'appeal the court found that the regulation [Regulation 874/2004, a.a.] is not applicable *ratione material* because it applied only to the registration of .eu top level domains. It added, however, the regulation could be taken into account *per analogiam*.'
- 30 Especially in the cases where there is either no, or no effective dispute registration (Dispute-Eintrag) system.
- 31 Moreover, this claim for transfer, set in Art. 22(11) of the Regulation, is now limited only to the ADR process, so without analogical application it's not available for the actions brought before the national court.
- 32 It is interesting to speculate how the German BGH would have reacted if Regulation 874/2004 had existed in the time of deciding the *shell.de* case.
- 33 R. Zippelius, Introduction to German Legal Methods (Durham: Carolina Academic Press, 2008), p. 89.
- 34 The court could be seen as acting outside of its powers and could breach Art. 2(2) of the Charter of Fundamental Rights and Freedoms (shared by both Slovakia and Czech Republic), which states: 'The power of the State may be asserted only in cases and within the limits set by law and in a manner determined by law'.
- 35 More about the protection of domain names under the right to property in K. Nowrot, *Verfassungsrechtlicher Eigentumsschutz von Internet-Domains* (Halle: Institut für Wirtschaftsrecht, 2002), pp. 13-15.
- 36 See the 'ad-acta.de' decision of the European Court of Human Rights in joint cases No. 25379/04, No. 21688/05, No. 21722/05 and No. 21770/05. See also the decision of the Czech Arbitration Court No. 00047.

Copyright, Interfaces, and a Possible Atlantic Divide

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Abstract: Recent copyright cases on both sides of the Atlantic focused on important interoperability issues. While the decision by the Court of Justice of the European Union in *SAS Institute, Inc. v. World Programming Ltd.* assessed data formats under the EU Software Directive, the ruling by the Northern District of California Court in *Oracle America, Inc. v. Google Inc.* dealt with application program-

ming interfaces. The European decision is rightly celebrated as a further important step in the promotion of interoperability in the EU. This article argues that, despite appreciable signs of convergence across the Atlantic, the assessment of application programming interfaces under EU law could still turn out to be quite different, and arguably much less pro-interoperability, than under U.S. law.

Keywords: Software Directive, Interoperability, Interfaces

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A. Introduction

- 1 In the field of intellectual property law, interoperability refers mainly to the ability of information technology products to communicate, i.e. to exchange signals and data. From a user's perspective, products or systems are considered to be interoperable if they can work together. Beyond IT markets, assuring the compatibility of products with those of other brands can also be essential in order to assure the satisfactory working of competition processes.
- 2 Interoperability has obvious intrinsic value and, therefore, it is in the interest of society to support it. Seemingly, there are often private incentives at work that induce undertakings to spontaneously release the relevant interface information. For instance, it can be in the interest of a platform owner to share the rules of interconnection between her core technological building blocks and the surrounding ecology in order to promote the development of sets of complementary products and services and,

by doing so, increase the overall attractiveness of the platform. From the perspective of a business, decisions about the desired level of interoperability are both technology and market based, ultimately depending on the firm's expectations about its ability to create and capture economic value. In this respect, practices relating to interoperability can have positive or negative effects on the level of healthy competition, both *infra-* and *interplatform*.¹ Interoperability within a single platform is also called *vertical* interoperability, as opposed to the *horizontal* interoperability across platforms. Of course, horizontal interoperability is expected to have a decisive impact on the level of interplatform competition, especially when users of one platform stick to it because they cannot move their data and applications to another, "better" platform. The issue of vertical interoperability, and the denial of it, relates to the relationship between the platform owner and third party developers.²

- 3 The most significant *ex-ante* intellectual property rules on interoperability in IT markets are presently located in the area of copyright law.³ Ideally, copyright law should provide market participants with clear indications as to the ability to access and use interoperability information.
- 4 Unsurprisingly, perhaps, this approach delivers only partially satisfactory results. With regards in particular to Europe, the Software Directive has some indefinite language on the crucial issue of interoperability, and courts have been rather slow in delivering the necessary interpretative rulings. More than twenty years after the enactment of the EU Software Directive, the Court of Justice of the European Union (“CJEU”) in *SAS Institute, Inc. v. World Programming Ltd.* (C-406/10) (hereinafter *SAS v. WPL*), articulated for the first time an explicit ban on copyright protection in what are some of the building blocks of software, such as programming language and data formats. Moreover, the decision denies copyright protection to the functional effects of software. On the whole, the recent CJEU’s pronouncement provides those conducting the emulation of existing programs with much less shaky legal ground to stand on regarding their activities (Section 2, *infra*). The accrued legal certainty could have positive effects on competition in software markets. On the negative side, still unanswered under EU law are very important issues regarding interoperability, such as those decided in the U.S. *Oracle America, Inc. v. Google Inc.* (C 10-3561) (hereinafter *Oracle v. Google*) (Sections 3 and 4, *infra*).
- 5 Computer programs are protected as literary works under copyright law, within the meaning of the international Berne Convention for the Protection of Literary and Artistic works. Therefore, the written program code (both source and object code) is protected under copyright law by analogy with other literary works such as the text of a novel or poem. Based on the legal doctrine known as the idea/expression dichotomy, it is well understood that the scope of copyright protection for computer programs is limited to the expression of the program. The main rationale behind the idea/expression dichotomy is that it is socially desirable to allow for the free use of the fundamental building blocks (the “ideas”) of knowledge production in the area of copyright protection.
- 6 The idea/expression distinction manifested itself as a solid theme in support of the proposal of copyright protection for computer programs in the EU put forth in 1989.⁴ Article 1(2) of the subsequently enacted EU Software Directive⁵ states that “[i]deas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright.” However, what exactly constitutes the “idea” of a literary work, excluded as such from copyright protection, continues to stir very lively debates in Europe and elsewhere.
- 7 The question can be usefully framed in terms of the extent to which copyright infringement can consist in non-literal copying of the work. The concept of non-literal copying derives itself from traditional copyright law, and indicates that infringement in a work can take place even though little or nothing of the actual work was used. Thus, for instance, the plot of a novel may be protected by copyright and infringed even when there is no evidence that literal copying (i.e. actual copying of the text) has occurred. With respect to the non-literal copying of a computer program, however, an extra layer of complexity is added because of the dual nature of these works, that is “textual works created specifically to bring about some set of behaviors.”⁶ Therefore, whereas a computer program *behaves*, more traditional works protected by copyright, such as books, manifestly do not, and a too broad interpretation of the “plot analogy” could inappropriately extend copyright protection to the functional aspects (the behaviour) of a computer program.

B. SAS v. WPL and the EU Software Directive

I. Non-literal copying of computer programs

- 8 The recent *SAS v. WPL* ruling by the CJEU touches upon a whole set of crucial legal issues concerning the object and scope of the copyright protection of computer programs in the EU, thus extending its relevance well beyond interoperability issues. World Programming Ltd. (“WPL”) had carefully studied very successful analytical software developed by the SAS Institute (“SAS”), which enabled users to write and run application programs to perform data processing and analysis tasks. Based on that, WPL created an alternative computer program (system/platform) allowing users to execute application programs already written in the SAS language, and ensuring that the same inputs would produce the same outputs. WPL’s explicit goal was to enable SAS customers to run their own application programs written in the SAS language on WPL’s alternative platform.
- 9 The preliminary reference from the English High Court⁷ gave the CJEU the overdue opportunity to start clarifying, among other things, the scope of protection against non-literal copying of computer programs. Importantly, in the *SAS* decision it could not be established that the defendant in the national copyright infringement case, WPL, had access to object or source code and/or carried out any de-

compilation of the object code. WPL merely studied how the SAS program worked by performing “black box”⁸ analysis and reading the SAS manuals. WPL then wrote its own program to emulate the SAS program’s functionality, i.e. the specific processing and analysis tasks performed by the program. The subject-matter “taken” by the defendant WPL, which was at the basis of the allegation of copyright infringement, included the functionality of the SAS computer program, its language, and data formats.

- 10 In answering the questions posed by the national judge, the CJEU basically follows the opinion⁹ previously delivered by its Advocate General (“AG”) Yves Bot. The Court, however, seems to depart from AG Bot’s opinion on a very sensitive issue, as we will see in the following.
- 11 AG Bot first iterated the important role played by the internationally acknowledged idea/expression dichotomy in the area of copyright protection of computer programs. According to AG Bot, the reason underlying this core copyright principle was that “the originality of a work, which gives access to legal protection, lies not in an idea, which may be freely used, but in its expression” (para. 44). It is perhaps necessary to remind at this point that the Software Directive deliberately left to the courts the task of ascertaining the boundaries of this central dichotomy under EU law, but this, unfortunately, has created broad areas of uncertainty and possibly missed more ambitious harmonization objectives.
- 12 With regard to the scope of copyright protection for computer programs, AG Bot suggested that this is “conceivable only from the point at which the selection and compilation of those elements are indicative of the creativity and skill of the author and thus set his work apart from that of other authors” (para 48). Like a book author, the programmer “selects the steps to be taken and the way in which those steps are expressed gives the program its particular characteristics of speed, efficiency and even style” (para. 47).
- 13 As to the object of protection according to the Software Directive, AG Bot referred to Case C-393/09 *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo kultury*,¹⁰ decided in December 2010, in which the CJEU stated that protected is “the expression in any form of a computer program which permits reproduction of that program in different computer languages, such as the source code and the object code...from the moment when its reproduction would engender the reproduction of the computer program itself, thus enabling the computer to perform its function” (para. 49). The AG Bot therefore came to the conclusion that “the protection of a computer program is not confined to the literal elements of that program, that is to say, the source code and the object code, *but extends to*

any other element expressing the creativity of its author” (para. 50, emphasis added).¹¹

- 14 The English reference, however, required the Court to take position on issues going well beyond its 2010 ruling, i.e. concerning the copyright assessment of functionality of a computer program, its language, and data formats.

II. Functionalities

- 15 With respect to the functionalities of a computer program, AG Bot defined the latter as “the set of possibilities offered by a computer system, the actions specific to that program” (para. 52). He concluded that the functionalities “as such” cannot form the object of copyright protection under Article 1(1) of the Software Directive (para. 53). According to AG Bot, the multitude of actions “dictated by a specific and limited purpose” (e.g. performing online hotel bookings), are similar to an idea, and therefore other computer programs should be able to offer the same functionalities (para. 54). Eligible for copyright protection are instead “the many means of achieving the expression of those functionalities,” i.e. “the way in which the elements” composing a computer program “are arranged, like the style in which the computer program is written” (para. 55).
- 16 The CJEU squarely endorses the Advocate General’s statement according to which, to accept that the functionality of a computer program can be protected by copyright, “would amount to making it possible to monopolise ideas, to the detriment of technological progress and industrial development” (para. 40; AG Bot para. 57). It should also be noticed that the language employed by the CJEU and AG Bot strongly resonates with previous US decisions stating that copyright protection of computer programs should not extend to the program’s functionality because this would hamper scientific progress, ongoing innovation and competition in the marketplace.¹² This in turn mirrors the concern expressed by the already recalled TRIPS Agreement and WCT provisions that copyright protection for computer programs should not extend to “ideas, procedures, methods of operation, and mathematical concepts.”¹³ Moreover, the CJEU refers to the explanatory memorandum to the Proposal for a Software Directive,¹⁴ pointing out that by protecting “only the individual expression of the work,” other authors would have had ample latitude “to create similar or even identical programs provided that they refrain from copying” (para. 41). Interestingly, the CJEU does not seem to conform to the exact, and arguably more restrictive, language employed by AG Bot, who, as we have seen above, referred to “functionalities as such.”

III. Programming language and data formats

- 17 Beyond SAS computer functionalities, the subject-matter “taken” by the defendant WPL included SAS programming language and data formats. Therefore, the CJEU had to further decide whether the programming language and the format of data files were protectable by copyright law, i.e. whether they constituted a form of expression of the program.
- 18 With respect to “programming language and the format of data files used in a computer program in order to exploit certain of its functions,” the Court concludes that they do not “constitute a form of expression of the program and therefore are not protected by copyright in computer programs according to the EU Software Directive” (para. 46). Referring once more to *Bezpečnostní softwarová asociace*, the Court does not exclude the possibility that “the SAS language and the format of SAS Institute’s data files might be protected, as works, by copyright” under general copyright rules if “they are their author’s own intellectual creation” (para. 45).
- 19 In his Opinion to the CJEU, AG Bot argued with regard specifically to SAS programming language, that this is “a functional element which allows instructions to be given to the computer...made up of words and phrases known to everyone and lacking originality.” Thus, concluded the AG, the “programming language must be regarded as comparable to the language by the author of a novel. It is therefore the means which permits expression to be given, not the expression itself” (para. 71).
- 20 The assessment of interfaces in the form of data formats put forth by the CJEU in SAS offers further and most needed clarification, based as it is on the legal interpretation of less than crystal clear language of the EU Software Directive.
- 21 To understand this, it should first be considered that interface specifications are concrete, in written form, and normally form part of the code. Second, despite often challenging constraints, there can still be some room for programmer’s choices among functionally identical ways of formulating the interface specifications, in that case satisfying the Software Directive’s originality requirement. Third, the Directive does not state that copyright protection is unavailable to interfaces as such. Nevertheless, various recitals and articles would more or less explicitly promote interoperability.¹⁵
- 22 With respect specifically to data formats, the referring UK High Court asked whether it is an infringement for a program to be implemented in such a way that enables that same program to read and write data files that are in the format devised by another program. It is perhaps useful to recall at this point that WPL had reportedly obtained the interface information merely by studying how the SAS system operated. Specifically, WPL worked out enough of the data formats employed by the SAS system to be able to write a new source code that read and wrote data files written in that format, and by that, achieving interoperability with SAS users’ computer programs (scripts).
- 23 As anticipated above, the CJEU denied copyright protection to data formats under the Software Directive. The Court in particular reminded that “WPL did not have access to the source code of SAS Institute’s program and did not carry out any decompilation of the object code of that program” (para. 44), thus clearly differentiating its own assessment of the relevant facts from AG Bot’s imprecise view that WPL had performed an act of decompilation (AG Bot, para. 83). Doing so, the Court also “neutralized” the very restrictive interpretation of the decompilation provision put forth by AG Bot, who pointed *inter alia* to the requirement for the licensee to demonstrate the “absolute necessity” of its actions.¹⁶
- 24 However, both with regard to the SAS language and the format of SAS Institute’s data files, the CJEU concluded that they might be protected as works by copyright under general copyright rules if they are their respective author’s own intellectual creation (para. 45). While this last remark would seem to make the Court’s holding on the issue of this type of interfaces under EU law less clear-cut than some would have wished, it is nevertheless hard to dispute that the Court’s explicit reference to the “general” copyright Directive¹⁷ should not be read as authorizing the sweeping vacation of the fundamental copyright principle, enshrined in international copyright law, that ideas cannot be protected.
- 25 While the SAS v. WPL decision should be welcomed,¹⁸ it still remains to be seen if the language chosen by the CJEU will make the SAS decision sufficiently operational, especially with respect to the idea/expression dichotomy as applied to computer programs, considering that this case is bound to be carefully deciphered by other courts and various stakeholders in the months and years to come.
- 26 Needless to say, of particular importance are the possible repercussions of the SAS v. WPL decision on interoperability issues that were not expressly covered by this ruling, such as the copyright protection of application programming interfaces (“APIs”). The remaining parts of this article briefly consider how a District Court on the other side of the Atlantic recently decided the question of the copyrightability of APIs. This article concludes that it is far from inevitable that a court on this side would come to a similar conclusion under EU law.

C. Oracle v. Google and the Copyright Protection of APIs

I. Java's fork and the copyright dispute

- 27 In 2010, shortly after having acquired Sun Microsystems, Inc., Oracle sued Google for infringement of Java-related copyrights and patents.¹⁹ The *Oracle v. Google* case turned out to be a complex dispute, finally decided by the San Francisco Judge William Alsup on June 20, 2012, only a few weeks after the CJEU issued the SAS ruling considered in the previous Section.²⁰
- 28 Most interesting for our purposes, Judge Alsup had to, in particular decide whether the *structure, sequence, and organization* (“SSO”) of APIs were protected under US copyright law. It should first be reminded that the phrase structure, sequence, and organization does not appear in the U.S. Copyright Act. Nevertheless, it has become a sort of metaphor for non-literal copying of computer programs, whereas the more general issue under copyright law, as mentioned before, originally emerged with respect to traditional works such as books.²¹
- 29 Thus, with regard specifically to the non-literal copying of software, the phrase “SSO” captures the thought that the structure or order could, under specific circumstances, lie on the expression side of the idea/expression dichotomy. Specifically, in the case at issue it was alleged that Google’s Android platform had copied the SSO of the overall code for 37 APIs packages of Oracle’s Java platform. Interestingly enough, it was the first time that a decision by a U.S. court waded into the issue of the copyrightability of APIs. Judge Alsup came to the conclusion that Google had not infringed Oracle’s Java-related rights, in particular because Oracle could not claim any copyright to the SSO of Java APIs.
- 30 Similar to the SAS data formats, APIs are interfaces that allow software programs to communicate with each other. In particular, the Java APIs specify the behavior of program modules, while the so-called class library is the compiled object code implementing API specifications. By consulting the respective APIs, programmers can make use of specific program modules without having to know the details of the modules’ inner workings. Communication between software programs is achieved by following the same set of specifications.
- 31 Java currently has 209 API “packages” for the Java Standard Edition, compared to the 8 packages it had in 1996 when Java was first released. API design is a very complex task, involving difficult choices and

requiring significant expertise and time.²² Java API “packages” are broken into “classes” and “methods.” Put differently, they are articulated in pre-written programs (classes) carrying out subroutines (methods). Whereas APIs change over time, the Executive Committee of the Java Community Process has approved only three changes of the Java language so far.

- 32 The Android platform for mobile devices was launched in 2007, most likely as a reaction to the threat that the emergence of smartphones posed to Google’s core business model. The Android platform uses the Java programming language, the Dalvik virtual machine, and provides 168 of its own API packages, many of which have the same functions of Java APIs, but different design. However, Google replicated the SSO of 37 Java API packages, possibly those that “typical” Java programmers would expect to be callable by the same names used in Java and which were key to mobile devices. Specifically, Google used different code to implement the classes and methods of 37 Java API packages, but replicated their exact names and functions. In total, Google wrote – or acquired – 97 percent of the new code, whereas the remaining 3 percent consisted of replicated overall name organization and functionality.
- 33 As a result, applications written in the Java language could call the 37 sets of functionalities in Android by the same names as those used in Java. Computer programs already written for the Java platform could run on Android to the extent that they call functionalities of those 37 sets. It follows that computer programs written to run on Java were, to a certain extent, also able to run on the Android platform. Conversely, programs written for the Android platform were not fully compatible with the Java platform. In this respect, the compelling concept “write once, run anywhere,” did not hold true anymore for programs written in the Java language.

II. Disentangling the APIs

- 34 With regard to the exact nature of the Java SSO replicated by Google, to the extent that this turned out to be relevant to their copyright assessment, Judge Alsup drew a distinction between, first, the declaration or method header lines; second, the method and class names; and third, the grouping pattern of methods (p. 5 ff.).
- 35 As to the first, the San Francisco District Judge concluded that “(u)nder the rules of Java, they *must be identical* to declare a method specifying the *same* functionality – even when the implementation is different” (p. 3, emphasis in the original). Put differently, since “every method and class is specified to carry out precise desired functions,” it follows that the header (non-implementing code) line of code

“stating the specifications must be identical to carry out the given function” (p. 5). Therefore, since there is only one way to express an idea or function, this under U.S. merger doctrine must be free for everybody to use (p. 35). According to that well-established doctrine, “courts will not protect a copyrighted work from infringement if the idea underlying the copyrighted work can be expressed in only one way, lest there be a monopoly on the underlying idea.”²³

- 36 With regard to the second, i.e. method and class names, and third, i.e. the way in which the methods are grouped, there was not the same “functionality constrain” as with the header lines. Nevertheless, Judge Alsup decided that there was no copyright infringement. Specifically, with regard to method and class names, the legal argument presented by Judge Alsup was that “copyright protection never extends to names or short phrases as a matter of law” (p. 2).
- 37 The assessment of the way in which methods are grouped turned out to be perhaps the most delicate aspect of the whole decision. In fact, Judge Alsup basically agreed with Oracle’s assertion that in Android the methods could have been arranged in ways different from Java’s groupings and yet offer the same functionality. However, according to the U.S. District Judge, “while the overall scheme of file name organization resembles a taxonomy, it is *also* a command structure for a system or method of operation of the application programming interface” (p. 37, emphasis in the original), “a long hierarchy of over six thousand commands to carry out pre-assigned functions” (p. 38). The command structure is “a utilitarian and functional set of symbols, each to carry out a pre-assigned function.” It therefore qualifies as “system or method of operation” under Section 102(b) of the U.S. Copyright Act, and could not be copyrighted, even if it is original or even creative.
- 38 According to Judge Alsup, the interoperability argument would provide further support to the overall analysis of the Java grouping of methods under copyright law, and in particular, its character as a functional system or method of operation. The “fragmentation” among platforms lamented by Oracle during the trial, i.e. of the flawed interoperability between the Android and the Java platforms, was due to the fact that only Java-based applications using exclusively the replicated parts of the 37 API packages were Android-compatible. In case Java-based code needed a 38th package, it could not run on the Android platform. Therefore, insofar as the command structure for the 37 Java API packages was replicated in Android, third-party source code relying on those packages could run on the Android platform, by that achieving a certain level of interoperability/compatibility. In fact, those APIs whose organization differed from Java APIs would not have been interoperable, “for the name structure itself dictates the

precise form of command to call up any given method” (p. 12).

- 39 According to U.S. case law, interface procedures that needed to be replicated in order to achieve interoperability were “*functional* requirements for compatibility” (emphasis added), and as such were not copyrightable under Section 102(b). Finally, full interoperability was not relevant to the Section 102(b) analysis (p. 39).

D. Conclusion: Legal Assessment of APIs under the EU Software Directive?

- 40 Inevitably, even a cursory look across the Atlantic raises the question how a similar or identical case would have been decided by a national judge applying EU law. In the following it will be explained that, despite the influential CJEU decisions in *SAS v. WPL* and *Bezpečnostní softwarová asociace*, there is still no obvious answer to this important issue concerning interoperability under EU law. But it can be reasonably expected that, given the Software Directive’s clear intent to foster interoperability, courts will treat copyright infringement claims involving APIs with the necessary care.
- 41 Undoubtedly, the part of the *SAS v. WPL* decision concerning computer program’s functionalities illustrates an interesting convergence between the software copyright regimes across the North Atlantic, also consistent with international treaty obligations. In fact, both the Agreement on Trade-Related Aspects of Intellectual Property Rights and the World Copyright Treaty state that copyright protection for computer programs should not extend to ideas, procedures, methods of operation, or mathematical concepts. As reminded both by the CJEU in *SAS* and by Judge Alsup in *Oracle v. Google*, ideas and functions cannot be monopolized by way of copyright protection.
- 42 Of course, the idea/expression dichotomy and the banning of functionalities from copyright protection apply to methods in APIs as well. Thus, as explained in nicely plain language by the U.S. District Court judge, everybody is free to write her own code to carry out a function (i.e. comparing two numbers and returning the greater) “so long as the implementing code in the method body is different from the copyrighted implementation” (p. 34). Especially after the *SAS* decision, there should be little doubt that, under EU law, a court applying the crucial idea/expression distinction to APIs is bound to come to roughly the same conclusion as the U.S. judge. Moreover, AG Bot also drew a clear distinction between data files as “blank forms which are to be filled with the customer’s data by the SAS System and which

contain specific locations in which particular information must be written in order for the system to be read and write the file correctly” (para. 79) and the “the elements which create, write and read the format of said SAS data files” which are “expressed in source code in the program,” and concluded that SAS source code implementing the data format could be copyrightable (paras. 81-82). Similarly, one could argue that the idea represented by the API is not copyrightable, whereas the source code implementing the API in principle is protected.

- 43 However, as seen above, Google went further, and its actions raised in particular the question whether the SSO of the API could be copyrightable.
- 44 First, Google replicated the *method specification* as set forth in the declaration. However, Judge Aslup ascertained that under the Java rules, the declaration must be precise; otherwise it would carry out some other function. Therefore, to this “part” of the broader API issue, the judge decided to apply the merger doctrine, which bars the claiming of copyright ownership in an expression if there is only one way to formulate something.
- 45 Under EU law, it is not sure whether the conclusion on this specific point would be the same. For once, the status of the merger doctrine under EU law is considered to be uncertain.²⁴ It should be reminded, however, that the already mentioned Software Directive’s original proposal²⁵ contained a rather explicit reference to that doctrine where it said that “(i)f similarities in the code which implements the ideas, rules or principles occur as between inter-operative programs, due to the inevitability of certain forms of expression, where the constraints of the interface are such that in the circumstances no different implementation is possible, then no copyright infringement will normally occur, because in these circumstances it is generally said that idea and expression have merged.” Moreover, the CJEU in *Bezpečnostní softwarová asociace*, while discussing the issue of “additional” protection for graphical user interfaces under general copyright law, held that “where the expression of those components [which form part of the graphic user interface, SV] is dictated by their technical function, the criterion of originality is not met, since the different methods of implementing an idea are so limited that the idea and the expression become indissociable” (para. 49). The Court’s explanation, however, did not refer to the idea/expression dichotomy, but to the lack of originality, when in the following paragraph it explained that “(I)n such a situation, the components of a graphic user interface do not permit the author to express his creativity in an original manner and achieve a result which is an intellectual creation of that author” (para. 50).²⁶
- 46 Going back to the U.S. decision, Judge Aslup further held that the copying of the *method and class names* could not give rise to copyright liability, for under U.S. law, names and short phrases cannot be copyrighted in the first place. Again, under EU law the conclusion on this aspect of the broader API issue could turn out to be different than in the U.S. In *In-fopaq International A/S v. Danske Dagblades Forening* the CJEU held that copying short phrases could invite copyright liability so long as those fragments demonstrated the author’s intellectual creation.²⁷
- 47 At least as uncertain under EU law would be the situation with regard to the copyright assessment of grouping of methods as found in the Java APIs. It should first be reminded that the drafters of the Software Directive included preparatory design materials within the concept of computer programs. It follows that it would normally give rise to a copyright infringement for a program to be based on another program’s preparatory design materials. This inclusion can be read as a revealing indication that the drafters of the Software Directive intended to grant copyright protection to the detailed SSO of the internal design of program writings.²⁸ Further guidance could be drawn from the CJEU holding that, while elements described in the SAS manual—including keywords, syntax and commands—could not be copyrighted individually, their “choice, sequence and combination” may warrant copyright protection as an intellectual creation of the author (para. 66-67) under general copyright law.
- 48 However, the functional character of APIs, being even stronger than with computer programs in general, would very often place them well below the originality threshold,²⁹ and the general support in favour of interoperability expressed by the Software Directive could possibly present a further counterargument. As a very tangible sign of that support, art. 6(1) of the Software Directive states that reverse engineering by way of decompilation of program object code is permitted solely when it is the only way to obtain the information necessary to achieve interoperability with other programs. Thus, it could be held that copyright protection should be denied to the SSO of an API in case this hampers interoperability. A further question would be, however, if this applies *also* in the case of interfaces reaching a level of imperfect interoperability, as it happened with the reproduction of the SSO of the 37 Java APIs. In other words, the question could be raised whether the type of imperfect compatibility between the Java and the Android platforms achieved via the replication of the SSO of Java APIs would still be in line with the Software Directive’s strong *pro*-interoperability stance. Of course, both *SAS v. WPL* and *Oracle v. Google* can be seen as promoting *horizontal* interoperability and, by that, increasing *interplatform* competition. This effect is apparent especially in the EU case. In fact, SAS users are no longer discouraged from mo-

ving to a new, better (i.e. cheaper and/or more innovative) platform. Thanks to WPL's efforts, they can easily migrate their data and scripts to a competing, alternative environment. In the *Oracle v. Google* case, however, the result of Google's interoperability efforts is quite different. Applications written in Java can run on the competing Android platform only to the extent in which they call the functionalities of the 37 Java API packages whose SSO were replicated by Google. It follows that the level of interplatform competition between Android and Java made possible by Google's interoperability efforts is much less intense than that between the SAS and WPL platforms. On the other hand, it would not seem advisable to burden the copyright analysis of these issues with the difficult assessment of the suitable, pro-competitive level of interoperability under the circumstances of each specific case.



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- 1 See Urs Gasser and John Palfrey, "Mapping Cloud Interoperability in the Globalized Economy: Theory and Observations from Practice," National Centres of Competence in Research, Working Paper No 2012/25, 9.
- 2 Thus, for instance, the relationships between Twitter and its ecology of app developers have started becoming rather tense as of August 2012, see "Twitter horrifies third-party developers with warnings of cutoffs," *The Guardian* 17.08.2012.
- 3 Ex-post, antitrust policy plays a very important role, in particular by prohibiting what in EU competition policy terms would be called abuses of dominant position as to Art. 102 TFEU. Thus, in the well-known EU Microsoft five-year investigation, the issue of software interoperability had been central to the decision to impose a €497 fine and the obligation to disclose interoperability information, see Commission Decision of 24.03.2004, Case COMP/C-3/37.792.
- 4 See Proposal for a Council Directive on the legal protection of those computer programs, COM(88) 816 final, OJ 12.4.89, No C 91/4, at § 3.7, available at [http://aei.pitt.edu/13138/1/COM_\(88\)_816_final.pdf](http://aei.pitt.edu/13138/1/COM_(88)_816_final.pdf). With regard to the details of the three-year process leading to the adoption of the Software Directive see Alan K. Palmer, Thomas C. Vinje "The EC Directive on the Legal Protection of Computer Software: New Law Governing Software Development" (1992), 2 DUKE JOURNAL OF COMPARATIVE AND INTERNATIONAL LAW, 65.
- 5 Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, replaced by European Parliament and Council Directive 2009/24/EC of 23 April 2009 (consolidated version, partial renumbering). The CJEU in *SAS v. WPL* refers to the text of the 1991 Directive.
- 6 Pamela Samuelson, Randall Davis, Mitchell D. Kapor, & J.H. Reichman, "A Manifesto on the Legal Protection of Computer Programs" (1994), 94 COLUM. L. REV. 2308, 2320.
- 7 *SAS Institute Inc v. World Programming Ltd* [2010] EWHC 1829 (Ch).
- 8 While decompilation, i.e. the conversion of the machine-readable object code back to source code, involves a significant manipulation of the original software, black box analysis is much less burdensome. Solely the source code of the target program (the exterior of the "box") is put to intensive observation by executing a series of tests.
- 9 Opinion of AG Bot, delivered on 29 November 2011, Case C-406/10, *SAS Institute, Inc v. World Programming Ltd*.
- 10 [2010] ECR I 3971.
- 11 See the 1989 Proposal (n. 4), para. 1.1 ("a set of instructions the purpose of which is to cause an information processing device, a computer, to perform its functions").
- 12 Pamela Samuelson, "Why Copyright Law Excludes Systems and Processes from the Scope of Its Protection," (2007) 85 Texas Law Review, 1921, 1934.
- 13 TRIPs art. 9(2); WCT art. 2.
- 14 *Supra* (n. 4).
- 15 Pamela Samuelson, Thomas Vinje, And William Cornish, "Does Copyright Protection Under the EU Software Directive Extend to Program Behaviour, Languages and Interfaces?" (2011) 34 European Intellectual Property Review, 156, 163.
- 16 Cfr. Sally Weston "Software Interfaces – Stuck in the Middle: The Relationship Between the Law and Software Interfaces in Regulating and Encouraging Interoperability" (2012) International Review of Intellectual Property and Competition Law (IIC), 427, 442. Contrary to AG Bot's restrictive approach, the question should be raised whether it would be advisable to revise the Software Directive in order to significantly broaden the decompilation provision, see Andreas Wiebe, "Interoperabilität von Software" (2011) 2 Journal of Intellectual Property, Information Technology and E-Commerce Law (jipitec), 89, 95, available at <http://www.jipitec.eu/issues/jipitec-2-2-2011/3081>.
- 17 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).
- 18 Jochen Marly, "Der Schutzgegenstand des urheberrechtlichen Software-schutzes" (2012) GRUR, 773, 778.
- 19 The Oracle/Sun merger raised in Europe some serious competition concerns, eventually cleared by the Commission, see Carl-Christian Bühr et. al., "Oracle/Sun Microsystems: The Challenge of Reviewing a Merger Involving Open Source Software" (2011) Competition Policy Newsletter, 20; Simonetta Vezzoso, "Open Source and Merger Policy – Insights from the EU Oracle/Sun Decision (2011) International Review of Intellectual Property and Competition Law (IIC), 344. None of those concerns, however, explicitly referred to Oracle's acquisition of the Java development environment created by Sun.
- 20 Final Judgment. Throughout this article reference will be made to Judge Alsup's Order re copyrightability of certain replicated elements of the Java application programming interface, available at <http://docs.justia.com/cases/federal/district-courts/california/candce/3:2010cv03561/231846/1202/0.pdf?ts=1338544292>.
- 21 The Court of Appeals for the Third Circuit, which, analogizing to the plot of a book, originally stated that the SSO of computer programs are protected as long as they do not qualify as an idea, adopted a very broad standard, declaring that only the basic purpose of the program is unprotected, see *Whelan Assocs., Inc. v. Jaslow Dental Laboratory, Inc.* 797 F.2d 1222 (3d Cir. 1986). The broad (pro-copyright) Whelan standard, however, was mostly disregarded by subsequent court decisions, see Josef Drexel, "What is Protected in a Computer Program?" *Studies in Intellectual Property and Copyright Law*, Vol. 15. New York: VCH Publishers Inc, 1994, 20 et seq. Still, the general trend in the U.S. has been to endorse some form of copyright protection of SSO.
- 22 For instance, the Oracle chief Java architect testified during the trial that it took him and his team of engineers two years to develop the *java.nio* package.

- 23 *Satava v. Lowry*, 323 F.3d 805, 812 n.5 (9th Cir. 2003).
- 24 Christian Heinze, “Software als Schutzgegenstand des Europäischen Urheberrechts” (2011) 2 *Journal of Intellectual Property, Information Technology and E-Commerce Law* (jipitec), 97, 101, available at <http://www.jipitec.eu/issues/jipitec-2-2-2011/3082>.
- 25 *Supra* (n.4), para. 3.13.
- 26 Heinze (n. 24), at 101.
- 27 *Case C-5/08, Infopaq Int’l A/S v. Danske Dagblades Forening* [2009] ECR I-6569, paras. 37-51. See for a U.S./EU comparison on this issue Connor Moran “How Much is too Much? Copyright Protection of Short Portions of Text in the United States and European Union after *Infopaq International A/S v. Danske Dagblades*” (2011) 6 *WASH. J.L. TECH. & ARTS* 247, available at <https://digital.lib.washington.edu/dspace-law/handle/1773.1/563>.
- 28 Heinze (n. 24), at 101.
- 29 Marly (n. 18), at 779; Ashwin Van Rooijen, “The Software Interface between Copyright and Competition Law: A Legal Analysis of Interoperability in Computer Programs”, *Kluwer Law International*, 2010, at 79.

Spanish Supreme Court Rules in Favour of Google Search Engine... and a Flexible Reading of Copyright Statutes?

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Abstract: On 3 April 2012, the Spanish Supreme Court issued a major ruling in favour of the Google search engine, including its 'cache copy' service: Sentencia n.172/2012, of 3 April 2012, Supreme Court, Civil Chamber.*

The importance of this ruling lies not so much in the circumstances of the case (the Supreme Court was clearly disgusted by the claimant's 'maximalist' petition to shut down the whole operation of the search engine), but rather on the court going beyond the text of the Copyright Act into the general principles of the law and case law, and especially on the reading of the three-step test (in Art. 40bis TRLPI) in a positive sense so as to include all these principles.

After accepting that none of the limitations listed in the Spanish Copyright statute (TRLPI) exempted the unauthorized use of fragments of the contents of a

personal website through the Google search engine and cache copy service, the Supreme Court concluded against infringement, based on the grounds that the three-step test (in Art. 40bis TRLPI) is to be read not only in a negative manner but also in a positive sense so as to take into account that intellectual property – as any other kind of property – is limited in nature and must endure any *ius usus inocui* (harmless uses by third parties) and must abide to the general principles of the law, such as good faith and prohibition of an abusive exercise of rights (Art. 7 Spanish Civil Code).

The ruling is a major success in favour of a flexible interpretation and application of the copyright statutes, especially in the scenarios raised by new technologies and market agents, and in favour of using the three-step test as a key tool to allow for it.

Keywords: Limitations, Three-step test, Fair use, *Ius usus inocui*, Abuse of right, Good faith, Safe harbors, Links, Search engines, ISP liability, Temporary copying

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A. The case

1 In 2006, the owner of a web page (<www.megakini.com>) sued Google Spain for the unauthorized reproduction and making available of its contents by means of the Google search engine and the Google Cache service, seeking damages for an amount of 2,000 euros as well as an injunction to prevent

Google Spain from further operating its search engine service.

2 The courts had to decide whether either one or both of these unauthorized uses qualified as an infringement:

- the reproduction and display of some fragments of the web page contents ('snippets') under the

links resulting from the operation of the search engine by the users,

- and the reproduction and making available of the whole web page contents under the ‘Google Cache service’.

- 3 There was yet another unauthorized act of exploitation, namely the reproduction of the web pages’ html code (and contents) in order for the search engine to operate; both parties agreed that this was exempted under the temporary copies limitation of Article 31.1 TRLPI (ex Art. 5.1 InfoSoc Directive),¹ and all the courts (at first instance, on appeal and now the Supreme Court) agreed to that.
- 4 For the rest, both the lower court, (*Juzgado Mercantil n.5 de Barcelona*, ruling of 30 March 2007) and, on appeal, the Provincial Audience of Barcelona (sec.15, ruling of 17 Sept. 2008) concluded against the claimant on both counts – albeit on different grounds. The Supreme Court also ruled in favour of Google and had the opportunity to confirm and expand on some of these arguments.

I. The first instance ruling

- 5 The lower court, Commercial Court n.5 of Barcelona, concluded against the claimant, finding that by posting the webpage on the Internet, the claimant had implicitly consented to its use by search engines. Indexation by search engines is a socially tolerated use, and it is implicitly sought by the author when posting a website to achieve the widest availability since indexation by the Google search engine could easily be prevented. The court mentioned that the exercise of copyright must be constrained by the general law principles of good faith and prohibition of an abuse of right, and considered that only small fragments of the webpage were being reproduced in a temporary and provisional form (as exempted under Art. 31.1 TRLPI, ex Art. 5.1 EUCD), and to the extent that was necessary for the functioning of the search engine. Together with an ‘integrated interpretation’ with the conditions in the ISP liability safe harbors for ‘proxy caching’ (Art. 15 LSSICE,² ex Art. 13 e-Commerce Directive³) and for ‘search engine/links’ (Art. 17 LSSICE), the Court concluded that the unauthorized reproductions done by Google through the search engine and cache service did not infringe the copyright on the claimant’s website. Furthermore, the Court expressly rejected an infringement of the moral right of attribution because Google was not claiming authorship on the webpages listed.

II. The appeal court ruling

- 6 On appeal, the court also refused to find infringement for the unauthorized uses done by both the Google search engine and cache services.
- 7 The Court concluded that the search engine uses (reproduction and making available of fragments of the webpage contents as displayed under the resulting links) were ‘so temporary, incidental and minimal’ that they lacked any infringing stature.
- 8 As to the cache service, the court denied that the temporary copies limitation in Article 31.1 TRLPI (ex Art. 5.1 EUCD) could exempt it, since this kind of reproduction was neither technically necessary for the functioning of the search engine nor ‘temporary’ (in fact, the ‘cache service’ offers access to ‘old’ web pages, no longer available online). Furthermore, the Court acknowledged that the cache copying done by Google could neither be exempted under the ‘proxy caching’ safe harbor (Art. 15 LSSICE, ex Art. 13 e-Commerce Directive) because it was not done within the provision of ‘a transmission service’ (Google is not an Internet access provider), nor under the search engine/links safe harbor (Art. 17 LSSICE) because – despite being indeed applicable to the Google search engine – it only exempts liability for infringing content of the linked website, not for the unauthorized acts of exploitation of any copyrighted material done by the ISP itself.
- 9 Nevertheless, the court refused to qualify the unauthorized uses done by Google (reproduction and making available) under its cache service as infringing, because these were not substantial enough to amount to an infringement. Several reasons were given for that. According to the appeal court, the three-step test (Art. 40bis TRLPI), which must guide the interpretation of all the statutory limitations to the exclusive rights, must be read both in positive and negative terms, since the intellectual property rights cannot be deemed absolute. The court went as far as drawing a parallelism with the ‘fair use’ doctrine and even examined the circumstances of this case under the four factors in Sec. 107 US Copyright Act.
- 10 In addition, the court concluded that the *ius usus in oculi* (a traditional limitation to real state property which allows for harmless uses of property by third parties) must also be applied to intellectual property to the extent that it is a natural limit to property rights aimed at preventing an absurd and abusive exercise.
- 11 The Court considered that ‘common sense’ must prevail to avoid turning an activity, the cache service, into an infringement, since it only involves an ‘ephemeral and incidental’ reproduction and communication to the public. It is a ‘socially tolerated’ use

that has been implicitly accepted by any author who posts his work online in order to achieve the widest possible divulgation and access by Internet users, and thus benefits the interests of the claimant/author.

- 12 However, the Court added that this conclusion did not exempt Google from complying with some minimum requirements when providing this cache service, and expressly referred to the conditions listed for the proxy-caching safe harbor in Article 15 LS-SICE (ex Art. 13 e-commerce Directive); namely, that the provider does not modify the information, complies with conditions on access to the information and with rules regarding the updating of the information, does not interfere with the use of technology to obtain data on the use of the information, and acts expeditiously to remove or to disable access to the information stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such a removal or disablement.

III. The Supreme Court ruling

- 13 The claimant further appealed to the Supreme Court. The Supreme Court denied the appeal, confirming and rephrasing the grounds used by the appeal and lower courts and enjoining the claimant to cover Google's fees.
- 14 Before examining the claim, the Supreme Court had to decide on its admissibility. Claims are only admitted to be examined by the Supreme Court in specific circumstances – among them, that the law applied had been issued within the previous five years. Google opposed its admissibility because (among other reasons) the temporary copy exception in Article 31.1 TRLPI (introduced by Act 23/2006) had not been applied by the appeal court. The Supreme Court concluded that precisely because the application of Article 31.1 TRLPI had been rejected in favour of the three-step test in Article 40bis TRLPI (which founded the appeal ruling), it granted sufficient grounds for admissibility.
- 15 Once admitted, the Supreme Court examined all the claims raised by both parties in full detail.
- 16 According to the Supreme Court, the reference to the *fair use* doctrine made by the appeal court was not a decisive factor of that ruling; rather, it is the doctrine of *ius usus inoqui* (the right to make a harmless use of someone else's property) which was decisive in the appeal ruling (Fund. 5 ruling #1). The court explained that the claimant intends to exercise his right in strict observance of the statutory language only – 'as if anything that is not written does not exist' – and concluded that general principles of the law must be applied to overcome the deficiencies in statutory language, especially in case of incoherence (antinomies) or in circumstances which are not specifically regulated by statutes, as happens in this case (Fund. 5 ruling #2). The Supreme Court took the opportunity to state that the more written statutes there are, the more relevant the principles of law become, and expressly questioned whether 'a statute should be so detailed – even when dealing with a closed list of exceptions – as to envision what is obvious and elementary' (Fund. 5 ruling #3).
- 17 The Supreme Court held that although the temporary copying limitation (Art. 31.1 TRLPI, ex Art. 5.1 EUCD) – interpreted according to the three-step test (Art. 5.5 EUCD) – would not allow for the cache copy service offered by Google, the same result would not be true regarding the reproduction of fragments of the linked websites because of its insignificance and informatory purposes (Fund. 5 ruling #5). The court also reminded us that the requirement that the temporary acts of reproduction do not have an economic significance (ex Art. 5.1 EUCD) must apply to the acts of reproduction *per se* (that is, reproduction of fragments and cache copying), not to any other activities that Google may entertain on its website, namely, advertising (Fund. 5 ruling #7).
- 18 Furthermore, the Supreme Court explained that the three-step test (Art. 40bis TRLPI) is not only to be used as a 'negative' interpretation criterion but also in 'positive' terms, incorporating the specificities of the general principles of the law into the copyright statute: namely, the doctrine of the *ius usus inoqui*, the principle of good faith (Art. 7.1 Civil Code), the prohibition of abuse of right (Art. 7.2 Civil Code), as well as the Constitutional construction of property as a limited (non-absolute) right. Specifically, the court examined the terms 'normal' exploitation and 'legitimate' interests in the three-step test within the specific circumstances of this case and concluded that the claim was ultimately aimed at causing harm to Google, and even acquiring some fame, rather than at the protection of any copyright interests (Fund. 5 rulings #5-6). In short, although the limitations and exceptions must be narrowly interpreted, neither the temporary copying exception (Art. 31.1 TRLPI) nor the three-step test (Art. 40bis TRLPI) excludes the application of the *ius usus inoqui* doctrine and the general principles of abuse of right and good faith (Fund. 5 ruling #6).
- 19 Furthermore, the Supreme Court made clear that it intended neither to introduce a new statutory limitation nor to validate all of Google's activities. Rather, the ruling was based on the grounds that the protection of copyright and its limitations do not allow for abusive claims (against any legitimate interests or the normal exploitation of works); that the closed regime of statutory limitations should

not lead to ‘absurd scenarios’; and that copyright law must be exercised to protect copyright interests rather than to foster ‘arbitrary claims’ aimed solely at harming the defendant (Fund. 5 ruling #8).

- 20 The Supreme Court expressly stated that the ruling extends only to the specific circumstances of this case (it has no effect on ‘other circumstances or previous judicial rulings’). Furthermore, it stressed the fact that the claim was not restricted to the unauthorized use of the claimant’s website (i.e. to delete the cache copy or the fragments of his website appearing in the search results), but rather attempted to stop the whole operation of the search engine because Google is making profit with advertising (Fund. 5 ruling #6).⁴ According to the Supreme Court, it is precisely this ‘maximalist’ claim which explained both previous rulings on first instance and on appeal (Fund. 4) and, obviously, its own.

B. Comments

- 21 The rulings in this case offer multiple grounds for comments; we will focus on three: on the scope of ISP liability safe harbors, the scope of the temporary copy exception and the role of the three-step test. Each must be evaluated within the specific circumstances of this case, which were not always clearly distinguished in the rulings: on the one hand, the search engine service provided by Google (comprising the prior indexing and reproduction for the functioning of the search engine, and the subsequent display of the results by means of reproducing an extract and by linking to the original website) and, on the other, its complementary cache copy service.

I. The scope of the safe harbors

- 22 On the scope of the ISP safe harbors, both the first instance and appeal rulings provided for some interesting reading.
- 23 The lower court did an ‘integrated interpretation’ of the temporary copies exception (Art. 31.1 TRLPI, *ex Art. 2.1 EUCD*) and the ISP safe harbors for ‘proxy caching’ (Art. 15 LSSICE, *ex Art. 13 e-commerce Directive*) and search engines/links (Art. 17 LSSICE)⁵ and concluded that the unauthorized reproductions done by Google through its search engine, as well as the cache service, did not infringe the claimant’s copyright on his website.
- 24 The appeal court reached the same conclusion albeit on different grounds. On the one hand, it found that Article 17 LSSICE was indeed applicable to the Google search engine, but only to exempt liability for any infringing content in the original linked website, thus rendering it useless in this case. On the other,

it found that the use of fragments of websites listed as a result of the search engine operation and the cache service were exempted, not as temporary copying (Art. 31.1 TRLPI) but rather because these acts lack the minimal significance to be deemed infringing as long as they remained within the scope of the three-step test (*ex Art. 40bis TRLPI*).⁶

- 25 In other words, the safe harbor for search engines and links does not amount to a limitation to copyright. Of course, the restrictive scope of this safe harbor⁷ would not be a problem if the provision of links was not found to be in itself a direct copyright infringement (as the court ultimately did). However, when combined with the recent tendency of some national case law⁸ to conclude that the mere copying of fragments of the linked website to be used as the pointer of the link qualifies as an act of reproduction, then the functioning of search engines, and of the Internet altogether, will inevitably qualify as infringing. At this point,⁹ either we find other solutions,¹⁰ such as the implied consent (or license) that some courts have already accepted,¹¹ or we revise the scope of exclusivity granted by copyright laws so as to allow for some insignificant uses to be done online without the authors’ consent.¹²

II. The scope of the temporary copy exception

- 26 The Supreme Court had no need to deal with the scope of the ISP safe harbors; rather it focused on the scope of the temporary copy exception in Article 31.1 TRLPI (*ex Art. 2.1 EUCD*). Despite clearing both acts of reproduction from infringement ‘within the circumstances of this case’, the Supreme Court made clear that only the copying of fragments of the located website by means of the search engine could indeed be exempted under Article 31.1 TRLPI (because the reproductions were ‘temporary and informative’), not the cache copying.¹³ Hence, the lawfulness of cache copying (such as done by Google cache service) under Spanish law is still open. It remains to be seen whether this reasoning may (or may not) be followed by upcoming rulings, in similar or different circumstances.

III. *Ius usus inoqui* and the three-step test

- 27 Last but not least, the Supreme Court ruling¹⁴ is especially interesting for concluding that copyright – as any other property right – is neither an absolute right (i.e. the owner must endure any *ius usus inoqui* by third parties) nor immune to the general principles of the law (i.e. good faith, prohibition of abuse of right), and that the three-step test must be read not

only as a 'restrictive' instrument for the interpretation and application of the limitations but rather as a flexible clause to allow for these doctrines and principles of law to be taken into account when interpreting and applying the copyright law.

- 28 One may, then, wonder whether any fair use clause is needed at all in Europe to afford for a balanced application of the statutory provisions to future unknown uses and means of exploitation. After all, the general principles of the law – such as the abuse of right and good faith – and the property doctrine of the *ius usus inoqui* (which the Supreme Court compared to what could be seen as a fair use that the property owner must tolerate) may also have a role to play for copyright purposes, as they have always had in legal history. And perhaps the three-step test, as pointed out by the Spanish Supreme Court, may be the door to allow for it.
- 29 It is difficult to predict the impact that this ruling may have in successive case law, but it is certainly an important milestone in adding flexibility in the application of the copyright statutes within technologically changing contexts.¹⁵



* Available at <<http://pdfs.wke.es/8/6/1/5/pd0000078615.pdf>> (in Spanish).

- 1 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (hereinafter, EUCD).
- 2 Spanish Law 34/2002 of 11 July 2002, on Information Society Services and Electronic Commerce (hereinafter LSSICE, the Spanish abbreviation).
- 3 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 ('e-commerce Directive').
- 4 The Supreme Court noted that on appeal the original claims for infringement of the author's moral right of withdrawal and for compensation of moral damages had been dropped.
- 5 The safe harbor for search engines and links in Spanish law (Art. 17 LSSICE) allows information society service providers to be exempted from liability under the same circumstances and conditions as provided for the hosting safe harbor (Art. 16 LSSICE, *ex* Art. 14 e-commerce Directive).
- 6 In short, the appeal court ended up *de facto* applying the proxy caching safe harbor (Art. 15 LSSICE, *ex* Art. 13 e-commerce Directive) to exempt the cache copy service subject to the same conditions set for the proxy caching service. To that extent, this decision reaches the same conclusion as its US counterpart [see *Field v. Google Inc.*, 412 F.Supp.2d 1106 (D.Nev. 2006)] albeit by different means, since the US court found that Google Cache service could be directly exempted under the 'system caching' safe harbor in sec. 512(b) USCA. See Miquel Peguera, 'When the Cached Link is the Weakest Link: Search Engine Caches under the Digital Millennium Copyright Act,' *Journal of the Copyright Society of the U.S.A.*, Vol. 56, Winter 2009, available at <http://ssrn.com/abstract=1135274>.
- 7 The language of Art. 17 LSSICE indeed only covers indirect liability (for infringements at origin) and subjects the exemp-

tion of liability for links and location tools to the same conditions as under the hosting safe harbor.

- 8 See, for instance, *Copiepresse SCRL v. Google Inc.*, Tribunal de Première Instance de Bruxelles, 13 February 2007; confirmed by Cour d'Appel de Bruxelles (9eme Ch.), 5 May 2011.
- 9 It makes no sense that the ISPs may be exempted from liability for any infringement at origin committed in the linked located websites, yet they may still be liable for direct copyright infringement for providing the link for locating the website.
- 10 Whether it would be advisable to reformulate the wording of the safe harbor in Art. 17 LSSICE or simply to avoid qualifying the uses involved in linking and search engine activities as unauthorized acts of exploitation (hence, infringing) remains a matter of preference and, probably, opportunity.
- 11 See, for instance, *Vorschaubilder*, BGH I ZR 69/08, 29 April 2010.
- 12 For instance, the scope of Art. 2 EUCD could be restricted by allowing minimal and non-substantial copies, or the scope of Art. 5.1 EUCD could be interpreted more widely, aligning the requirement of 'no separate economic significance' with the scope of the 'lawful use', in the sense that 'if a specific use of a work is lawful, technical reproduction necessary to enable such use would be deemed as not having independent economic significance' – as proposed by the IVIR (2007) Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society. Institute for Information Law, University of Amsterdam, p.7. Available at <<http://www.ivir.nl>>.
- 13 As far as cache copying, a similar conclusion was reached by the Belgian Court of Appeals in *Copiepresse*: the cache copying done by Google was not an integral and essential part of a technological process to enable a transmission by an intermediary and cannot qualify as transitory (see *Copiepresse SCRL v. Google Inc.*, Tribunal de Première Instance de Bruxelles, 13 February 2007; confirmed by Cour d'Appel de Bruxelles (9eme Ch.), 5 May 2011, rulings #25-26).
- 14 Notice that both the appeal and first instance rulings fully coincide on this matter with the Supreme Court's.
- 15 In that sense, this ruling is very good news for the recent doctrinal attempts to bring some flexibility in the way copyright laws are being interpreted and applied, such as the Declaration on a Balanced Interpretation of the "Three-Step-Test" in Copyright Law, coordinated by Geiger, Hilty, Griffiths and Suthersanen (Munich, 2008), and the report *Fair Use in Europe*. In *Search of Flexibilities*, by Hugenholtz and Senftleben (Amsterdam, 2011).

Timo Rosenkranz, Open Contents – Eine Untersuchung der Rechtsfragen beim Einsatz „freier“ Urheberrechtslizenzmodelle

Mohr Siebeck, Tübingen 2011, 290 p., ISBN 978-3161508264

Book Review

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- 1 Die vorliegende Monographie aus der Feder von Timo Rosenkranz, entstanden als Dissertation an der Bucerius Law School in Hamburg unter der Betreuung von Karsten Thorn, reiht sich ein in die jüngeren Monographien zu den Rechtsfragen von Open Source Lizenzen und sonstigen auf die freie Verbreitung und Bearbeitung ausgerichtete Lizenzmodelle.¹ Der Zuschnitt der Thematik ist gut gewählt und schließt zwei Lücken in der bisherigen Forschung. Erstens legt Rosenkranz anders als die bisherigen Arbeiten den Schwerpunkt nicht auf die Softwareentwicklung im Open Source-Modell, sondern auf freie Lizenzmodelle bei anderen Werkarten, insbesondere auf Creative Commons-Lizenzen und die GNU Free Documentation License. Zweitens liegt der Fokus der Arbeit auf den international-privatrechtlichen Fragestellungen, die bislang nur wenig untersucht sind.
- 2 Ausgangspunkt der Arbeit ist eine eingehende Eingrenzung der Lizenzmodelle Open Source und Open Content unter beispielhafter Beschreibung der Entwicklung von Wikipedia (Kapitel 1, 10-38). Die Darstellung ist gut recherchiert und geschrieben – auffällig ist allerdings, dass die bereits erwähnten jüngeren Dissertationen nicht berücksichtigt wurden, obwohl dies der „Redaktionsschluss“ Ende Januar 2011 (so das Vorwort) zugelassen hätte. Das zweite Kapitel untersucht die Open Content Lizenzierung am Maßstab des deutschen Rechts (39-126). Verf. kann hier auf die umfangreichen Vorarbeiten zu den parallelen Problemen im Softwarebereich zurückgreifen, arbeitet aber dennoch eine Reihe interessanter und für die Praxis erheblicher Unterschiede heraus, die die Studie lesenswert machen. Hier können beispielhaft nur drei Punkte herausgegriffen werden.
- 3 Von Interesse ist erstens die Behandlung von Verletzungen des Urheberpersönlichkeitsrechts bei der Bearbeitung von Open Content: Verf. weist – entsprechend dem bisherigen Stand in der Literatur – darauf hin, dass Verletzungen hier deutlich wahrscheinlicher als im Softwarebereich sind, weil die Bearbeitungsfreiheit der Lizenznehmer eben auch zu entstellenden oder sonstigen das Urheberpersönlichkeitsrecht berührenden Beeinträchtigungen der Werkintegrität führen kann. Verf. geht aber einen Schritt weiter und arbeitet heraus, dass die Nachvollziehbarkeit der verschiedenen Versionen auf Wikipedia und die gewollte kollektive Arbeit an Artikeln eine Verletzung des § 14 UrhG eher unwahrscheinlich erscheinen lassen (51-52).
- 4 Ein zweiter Punkt von besonderem Interesse ist die Auseinandersetzung mit der „Relizenzierung“ von Wikipedia gemäß den Creative Commons-Lizenzen im Jahr 2009 (102-107). Die hierdurch aufgeworfenen Rechtsfragen wurden bislang kaum untersucht,² Verf. äußert gegenüber der rechtstechnischen Durchführung des Lizenzwechsels zu Recht Zweifel, lässt aber auch Verständnis für das Dilemma entsprechender Communities erkennen.

- 5 Ein dritter Punkt, der besondere Hervorhebung verdient, betrifft die Lizenzierung von Inhalten als Open Content, für die ein Wahrnehmungsvertrag mit einer Verwertungsgesellschaft abgeschlossen wurde. Verf. wählt hierfür als Beispiel die Wahrnehmungspraxis der GEMA und kommt zu dem Ergebnis, dass gegenwärtig eine parallele Wahrnehmung und Freigabe nicht möglich ist. Hier wäre ein vergleichender Blick in die Praxis der VG Wort von Interesse gewesen; dort ergibt sich ein differenziertes Bild, insbesondere wenn Urheber – wie in der Praxis häufig – keinen echten Wahrnehmungsvertrag abschließen, sondern als Bezugsberechtigte an den Ausschüttungen partizipieren.³ Der Forderung nach einer Änderung der Vertragspraxis der GEMA ist gleichwohl zuzustimmen.
- 6 Das dritte Kapitel der Arbeit ist dem US-amerikanischen Recht gewidmet (131-155). Die Arbeit schließt hier Lücken der bisherigen Diskussion, insbesondere wird die Problematik der fehlenden „consideration“ nach US-amerikanischen Vertragsrecht en detail aufgearbeitet und ein Lösungsweg über die Lehre vom „promissory estoppel“ vorgeschlagen. Das US-Recht ist für die internationalen Rechtsfragen der freien Lizenzmodell von nicht zu unterschätzender Bedeutung, weil die Lizenzmodelle zuerst in den USA entwickelt wurden und in ihrer Gestaltung oft erst vor dem Hintergrund des US-Rechts verständlich werden. Künftige Arbeiten werden die gut recherchierte Untersuchung gerne zur Hand nehmen.
- 7 Einen ganz eigenen thematischen Schwerpunkt setzt Kapitel 4, welches den international-privatrechtlichen Aspekten bei Open Content gewidmet ist (156-231). Die Untersuchung bezieht auch die aktuellen Reformvorschläge der verschiedenen internationalen Forschungsprojekte mit ein (ALI-Principles, CLIP-Principles). Mit nachvollziehbaren Argumenten plädiert Verf. für das Ursprungslandprinzip hinsichtlich der ersten Inhaberschaft des Urheberrechts, konzediert ansonsten aber die Geltung der *lex loci protectionis* für die anderen urheberrechtlichen Fragestellungen. Für das internationale Vertragsrecht ist von besonderem Interesse, welches Recht anzuwenden ist, wenn es – anders als in den deutschen Creative Commons-Lizenzen Version 3.0 – an einer Rechtswahl durch die Parteien fehlt. Dies ist im Bereich der Open Source und Open Content-Lizenzen der Regelfall. Rosenkranz plädiert hier trotz der praktischen Probleme für die Anwendung des Rechts des Lizenzgebers. Dies ist vertretbar und würde von den Gerichten im Anwendungsbereich der Rom I-Verordnung wahrscheinlich auch so entschieden. Die praktischen Probleme dieser Lösung werden in der Arbeit aber benannt, ohne dass eine Lösung für sie angeboten wird. Eine mutigere Lösung des Problems bestünde in der Anerkennung einer *lex mercatoria* der „freien“ Urheber-Communities.⁴
- 8 Fazit: Es ist das Verdienst von Timo Rosenkranz, die erste Monographie zu alternativen Lizenzmodellen mit einem international-privatrechtlichen Schwerpunkt vorgelegt zu haben. Die Arbeit wird ohne jeden Zweifel Eingang in die künftige Diskussion der Rechtsfragen von Creative Commons, Wikipedia und anderen „freien“ Urhebergemeinschaften finden. Natürlich bleiben viele Fragen unbeantwortet, gerade auch im Hinblick auf die international-privatrechtliche Behandlung der Lizenzverträge. Für eine abschließende Klärung ist es vielleicht aber auch noch zu früh, weil die Entwicklung international ausgerichteter Lizenzmodelle erst in den letzten Jahren in Gang gekommen ist. Die Communities und ihre Rechtsberater sollten sich vor der Verabschiedung neuer Lizenzversionen jedenfalls mit der Untersuchung von Timo Rosenkranz eingehend auseinandersetzen. Für sie und alle an der Rechtsfragen der Open Source und Open Content-Bewegung Interessierte ist das Buch Pflichtlektüre. ■

- 1 Eine Rezension zu den Arbeiten von Olaf Koglin, *Opensourcerecht. Die urheber- und schuldrechtlichen Beziehungen zwischen Lizenzgeber und Lizenznehmer bei Open Source Software am Beispiel der General Public License*. Peter Lang, Frankfurt a.M. 2007, XIII, 252 S.; Fabian Schäfer, *Der virale Effekt. Entwicklungsrisiken im Umfeld von Open Source Software*. Universitätsverlag Karlsruhe, Karlsruhe 2007, XXX, 212 S. und Christian Teupen, „Copyleft“ im deutschen Urheberrecht. Implikationen von Open Source Software (OSS) im Urhebergesetz. Duncker & Humblot, Berlin 2007, 268 S. findet sich bei Metzger, *GRUR Int.* 2009, 780.
- 2 Siehe aber Wielsch, *Governance of Massive Multiauthor Collaboration: Linux, Wikipedia and other networks: Governed by Bilateral Contracts, Partnerships, or something in between?*, 1 (2010) *JIPITEC* 96, para. 1.
- 3 Siehe hierzu Metzger, *Die urheberrechtliche Gestaltung von Open Access Repositorien*. Gutachten im Auftrag des Projekts IUWIS, 2011, abrufbar unter <http://www.iuwis.de/publikation/die-urheberrechtliche-gestaltung-von-open-access-repositorien>.
- 4 Siehe dazu Metzger, *Transnational Law for Transnational Communities: The Emergence of a Lex Mercatoria (or Lex Informatica) for International Creative Communities*, 3 (2012) *JIPITEC* (erscheint im Dezember 2012).

Pablo A. Palazzi (ed.), *La Responsabilidad Civil de los Intermediarios en Internet*

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Book Review

by **Miquel Peguera**, Barcelona

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- 1 While a lot has been written about ISP liability in the last decade, it still proves to be a hot topic and one worth of ever more reflection and debate. If this is the case in jurisdictions where special statutes have been enacted, it is all the more so in countries lacking such rules. Hence scholarly initiatives such as the workshop held on this subject at the Universidad de San Andrés (Argentina) in May 2010 are certainly welcome. A result of that workshop is this book, published in March 2012. It contains 18 chapters from a total of 19 authors and has been compiled by one of the authors, the Argentinean legal scholar and lawyer Pablo A. Palazzi.
- 2 The book is structured in to parts. The first one, which accounts for roughly two thirds of the book, deals with the liability related to violations of personal rights – particularly privacy, the right to honor, and the right to one’s own image. The second part is devoted to liability arising from infringements of intellectual property rights. The book discusses not only the Argentinean legal framework and case law, but also takes into account, in a comparative approach, the situation in the U.S. and in the EU. It considers, in particular, the framework resulting from both Section 230 of the CDA and Section 512 of the DMCA in the U.S., and the liability limitations set forth in the European Directive on Electronic Commerce (ECD). Its more general title notwithstanding, the book focuses predominantly on search engines.
- 3 From the perspective of a foreigner, this book is a good opportunity to learn about the state of the debate on this topic in Argentina and how its case law has developed so far. While, as noted, specific rules covering the liability of Internet intermediaries have not yet been passed in that country, a fair amount of lawsuits concerning search engine liability have been brought in the last years. In this regard, the case of Argentina provides an interesting perspective on whether, and to what extent, a particular set of rules is needed to deal with these issues. In fact, most of the contributors of this book favor the adoption of such rules for the sake of legal certainty.
- 4 The eighteen chapters in which the book is divided are of different degrees of analysis. In this respect, the book is not homogeneous. Some contributions explore the issues more deeply than others. In particular, the illustration of the foreign laws turns out to be too vague in some occasions. In other cases, however, an in-depth examination of the foreign legislation and case law is provided. Furthermore, being independent contributions, the reader finds obvious overlap in some areas. In this regard, a future edition of the book would benefit from avoiding some repe-

titions. In particular, rather lengthy explanations about well-known aspects of how the internet functions, which can be found in some chapters, do not appear to add much to the comprehension of the issues presented. Moreover, also on the somehow negative side, the contents of the book, as frequently it occurs in printed books with several contributors, is not as up to date as the reader would expect – the latest case law developments considered do not seem to go beyond the last months of 2010 or the beginning of 2011. It must be said, though, that this certainly does not diminish the value of most of the analysis, albeit the inclusion of some of the latest developments – such as the case involving the linking website Taringa.net – would have enriched the text.

- 5 A general issue the book deals with is that of the rules governing intermediaries' liability. In the absence of a system of safe harbors such as that established by the ECD, the liability of intermediaries, particularly in the field of the violation of personal rights, hinges on the general tort law rules found in the Argentinean Civil Code. One of the questions arising here is whether or not intermediaries' activities could be regarded as "risky" in and of themselves, as this would trigger the regime of strict liability for the resulting harms. Such an approach was taken into account in the well-known case *Jujuy.com*, where the owners of the website were held liable for defamatory third-party postings. While the court actually found the defendants failed to react diligently upon notification of the unlawful contents, it seemed to support as well the theory of the risk inherent to the activity carried out by the defendants as a source of liability.
- 6 Contributors to the book generally deny the characterization of internet services as *per se* risky, and hold that intermediaries' liability must instead be judged according to the standards of fault-based liability. Therefore, some kind of fault in the part of the intermediary must be found for liability to arise, which I think is consistent with the European approach. Indeed, while the ECD has not harmonized the underlying rules of tort liability, intermediaries can only be held liable when they fail to comply with the requirements established to benefit from the safe harbors. It is worth noting, though, that the frequent references made in the book to the ECD safe harbors scheme do not always grasp the fundamental idea that the safe harbor provisions do not in themselves impose liability on those who fail to comply with their requirements; rather, they only provide liability limitations. The actual attribution of liability will depend on the material law governing the particular field considered, be it general tort law, defamation, privacy, copyright or any other area of the law.
- 7 Among the authors who consider the issue of fault-based liability, there are different opinions regarding what can be deemed fault or negligence, or

what is the reach of intermediaries' duties of care, particularly those of search engines. Some authors advance the position that a search engine provider must exercise some type of *ex ante* control so as to avoid certain unlawful results to show up in the first place, and that failing to do so would amount to negligence. Others take the stance that search engines can only be obliged to remove the links to the unlawful websites after being notified of the illicit character of the linked content. Within this group of authors, many consider that a sound notice provided by the aggrieved person would be enough to trigger the obligation to disable the link, while some others think that in order to enhance legal certainty and to protect freedom of expression, only a judge could impose such an obligation. Moreover, it is hotly discussed whether a search engine can be put under the obligation of preventing future instances of search results pointing to unlawful content, as this would entail a general duty of monitoring and an almost impossible task of assessing the legality of the linked content.

- 8 The bulk of cases dealing with search engines' liability in Argentina are the so-called "celebrities' cases". Most of them follow a similar pattern: famous persons, in many cases top models or actresses, find that when typing their name in Google or Yahoo, the search results include links to pages with sexual content that use their names or images without their authorization. In addition, the search engines use unauthorized images of these persons as thumbnails in their image search feature. The complaints against the search engines include claims for both moral and material damages. They also seek injunctions so that the search engines are ordered to remove the links and thumbnails, and to ensure that the plaintiff's name is not linked to any webpage of that kind in the future.
- 9 In most of these cases, the courts have ordered injunctions as precautionary measures against the search engines. However, the injunctions imposed are extremely broad, and thus rightly criticized by many of the contributors to this book. Interestingly, in at least two of the cases a final decision has already been handed down in the lower courts. The cases are *Da Cunha v. Yahoo de Argentina SRL et al.*¹ and *Rodríguez v. Google Inc. et al.*² In both cases the search engines were held liable and enjoined in very broad and vague terms. Nonetheless, the *Da Cunha* ruling was later reversed on appeal.³ Overbroad injunctions and heavy burdens of control imposed on search engines are problematic indeed. It is stressed by many authors in the book that search engine operators should not be forced to act as judges determining the legality of the content they index as this would amount to some sort of private censorship.
- 10 Thinking of our legal framework in Europe, it could be submitted that while in some other intermedi-

ary activities European law can be seen as better suited in terms of legal certainty thanks to the ECD safe harbors, this is certainly not the case regarding search engines. The Directive does not set forth a liability limitation for the provision of links and the operation of information location tools – albeit a few Member States have chosen to do so. In fact, even the most cited Art. 15 of the ECD, which prevents Member States from imposing general obligations to monitor, does not directly apply to search engines as it explicitly relates only to the mere conduit, proxy caching and hosting activities. The lack of safe harbor for search engines has led some courts to apply an arguably flawed overreaching interpretation of the hosting safe harbor, as in the appeal court ruling in the French case *SAIF v. Google*⁴. All this begs the question of whether the ECD should be amended to include a specific safe harbor for links and information location tools, which could also address the uncertainties regarding the search engines' use of thumbnails, the initial copying for indexing purposes, or the making available of cached copies.

- 11 The last third of the book is devoted to intellectual property. This part includes some contributions by non-Argentinean authors. One of them is an article by the Spanish professor Juan José Marín López, who comments on two French rulings as regards to the liability of online auction platforms for trademark infringement. This part also includes two articles written by the German lawyer Stephan Ott, who is well known for his research site linksandlaw.com, a rich source of resources about legal aspects of search engines, linking and framing. He provides a comparison of search engines' liability in Germany and the United States, and an analysis of German case law on the issue of search engines' thumbnails.
- 12 The rest of this part covers several issues regarding copyright and trademark infringements. In particular, the question of the unauthorized use of trademarked words as keywords for triggering sponsored links is analyzed, and a good overview of the U.S. and EU cases in this field is presented. With regard to this particular topic, maybe the book could have taken a more open view in order to find some room for acceptable instances of such uses by advertisers. Not every user who types a trademarked word into a search engine can be presumed to be actually looking for products or services of that brand. As it has been soundly argued, there is – at least to some extent – an objective opaqueness of the searcher's goals when she uses a trademark as a search query.⁵ Moreover, taking advantage of some positive externalities of trademarks should not immediately be characterized as unfair competition.

- 13 There are many other questions raised by this book which cannot be covered in this brief review. All in all it is indeed an interesting and stimulating read, digging into a complex field, which is still far from settled and deserves careful attention. ■

- 1 Da Cunha, Virginia c. Yahoo de Argentina SRL et al., Juzgado Nacional de Primera Instancia en lo Civil N° 75, 29 July, 2009.
- 2 Rodríguez, María Belén c. Google Inc. et al., Juzgado Nacional de Primera Instancia en lo Civil No 95, 4 March, 2010.
- 3 Cámara Nacional de la Apelaciones en lo Civil, Sala "D", 10 de Agosto de 2010 (Expte. N° 99.620/2006 "Da Cunha Virginia c/ Yahoo de Argentina SRL y otro s/ Daños y Perjuicios" Recurso N°541.482. Juzgado N° 75).
- 4 Cour d'Appel de Paris, Pôle 5 – Chambre 1, Judgment of 26 January 2011. Available at <http://www.juriscom.net/documents/caparis20110126.pdf>. Accessed 26 August 2012.
- 5 See E. Goldman (2005), *Deregulating Relevancy in Internet Trademark Law*, 54 *Emory L.J.* 507.

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