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Consumer Protection**

Liability of Online Service Providers for Copyrighted Content – Regulatory Action Needed?

In-Depth Analysis for the IMCO Committee

DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY

Liability of Online Service Providers for Copyrighted Content – Regulatory Action Needed?

IN-DEPTH ANALYSIS

Abstract

This paper looks at liability of online providers for copyright infringements.

The liability privileges in Articles 12 to 15 E-Commerce Directive can remain unchanged; they seem to be sufficiently flexible to adopt to new business models, which also make them in general future proof.

These privileges do not, however, establish liability. With regard to injunction claims, Article 8(3) Copyright Directive provides for a satisfactory solution. EU rules establishing liability beyond injunction (e.g. damages) should be harmonised following the requirements (1) sufficient intervention by the internet provider and (2) breach of an adequate duty of care by the internet provider.

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EXECUTIVE SUMMARY

This paper looks at liability of online service providers with regard to infringements of copyrighted content.

The first part of this document is dedicated to the assessment of the necessity of a reform of the liability privileges in the E-Commerce Directive. Although Articles 12 to 15 E-Commerce Directive are more than 15 years old, there seems to be no pressing need for a reform. The provisions seem to be sufficiently flexible to adopt to new business models, which also make them in general future proof. Of course, certain legal questions arising with regard to Articles 12 to 15 E-Commerce Directive have not been finally answered yet by the CJEU. But such open legal questions do not justify a reform, as it can be expected that the case law will answer the questions adequately respecting the different rights and interest at stake.

While false hosting providers (Art. 14 E-Commerce-Directive) may have emerged as a new category of hosting providers, not envisaged at the time of the adoption of the E-Commerce Directive in 2000, the E-Commerce Directive has proven fit to treat the issue adequately. The delineation between passive service providers caught by Article 14 and active role providers remains an issue for the Court, without it being necessary to change the article. Concerning non-sufficiently collaborative hosting providers running a dangerous business model, which fosters infringements, the case law still has to find final answers if and to what extent such hosting providers should profit from the liability privilege. But the concept and wording of Article 14 E-Commerce Directive seems to be sufficiently flexible to allow an adequate case by case result in such scenarios. No change of Article 14 E-Commerce Directive is deemed necessary.

Concerning access providers, there seems to be no need to change the liability privilege of Art. 12 E-Commerce-Directive. Upstream providers, which operate at the borderline between access and hosting providers, may be adequately treated by the liability privilege.

The liability privilege for caching providers (Art. 13 E-Commerce-Directive) lacks practical importance. Therefore, there is no pressing need to change it.

Linking providers are important players on the internet, which in principle deserve regulatory attention. So far, it has only been clarified by the CJEU that search engines may enjoy the liability privilege of Article 14 E-Commerce Directive as far as they provide links against remuneration for advertising purposes. It can be expected that the CJEU will clarify in the near future if Article 14 also applies to editorial links provided by search engines. As the Court has developed a flexible system of adequate duties of care to establish liability of linking providers in case of links to illegal content, there seems to be no need, however, to further refine the liability privileges of the E-Commerce Directive to linking providers. The system of duties of care seems to be sufficiently flexible to provide for just results in all different linking scenarios.

On the prohibition to impose general monitoring duties (Article 15 E-Commerce Directive) the CJEU case law is abundant. But it still lacks a final word from the Court with regard to such an important question as the delineation between general monitoring obligations (prohibited by Article 15 E-Commerce Directive) and specific monitoring duties, which may be imposed on providers in particular to prevent infringements notified.

But as Article 15 E-Commerce Directive pursuant the CJEU case law is strongly dominated by a balancing of fundamental rights, it can be expected that any solution provided by case law will respect all relevant interests in an appropriate way. No legislative action seems to be necessary concerning Article 15 E-Commerce Directive.

The second part analyses the existence of a need for pan-EU liability rules. The EU legal framework provides for harmonised law concerning liability privileges in Articles 12 to 15 E-Commerce-Directive. They do not, however, establish liability. Concerning liability rules to establish liability, the EU system does not seem readily developed yet.

With regard to injunction claims, Article 8(3) Copyright Directive provides for a flexible and satisfactory solution with regard to internet providers.

With regard to other claims, in particular damage claims, EU law only provides for a harmonised answer in cases of primary infringements, i.e. unauthorised uses of the harmonised exploitation rights in copyright. For the (secondary) liability of other persons, until now different national secondary liability concepts apply, which may lead to different results from member state to member state. This is unsatisfactory against the background of European harmonisation; in particular, this does not create a level playing field, e.g. for damage claims for right holders in the EU. But there is a development from CJEU case law to harmonise secondary liability within the primary liability rules of EU law in the series of judgments *GS Media/Sanoma*, *Filmspeler* and *BREIN/Ziggo*.

The last part consists of a proposal for a copyright sector specific regulation of liability. The liability of internet providers for damages would typically be seen as a form of secondary liability. Nevertheless, the CJEU is already starting to develop such an EU liability rule within the harmonised field of primary liability. The further development in Luxembourg at the CJEU may be waited for. Or the legislator can also take the initiative, but such legislative initiative should go into the same direction as the CJEU: EU rules establishing liability beyond injunction and in particular establishing liability for damages, should require(1) a sufficient intervention by the internet provider and (2) a breach of an adequate duty of care by the internet provider.

1. STARTING POINT

The internet and its blessings have become part of our daily lives. And so are certain downsides of the internet, particularly violations of law. The reasons why law is breached so extensively on the internet are comparable in many countries of the world. A key reason relates to the nature of the internet itself. It is possible to commit the violating act anonymously, and investigating the identity of the person or persons responsible is a costly, time-consuming process and is often even impossible. Moreover, prosecuting individuals means that they have to be prosecuted individually. Looking at the sheer number of legal violations on the internet, this process can be very burdensome and expensive.

Consequently, it makes sense to consider not only taking action against the internet user breaking the law, but also, or only, against internet intermediaries used for the breach of law. Legal action against the providers used may have a much greater effect than against individual users as recognised already a decade ago by courts.¹

However, internet service providers also have great significance, in respect of the prosecution of rights infringements on the internet, for other reasons: the trust, on which every legal system is based, can be created in an offline world using personal relationships. In an increasingly anonymised world, such personal relationships are almost impossible to achieve. Therefore, there have to be institutions which replace this trust and make the increasingly anonymous communication on the internet possible. That explains the significance but also the responsibility of the intermediaries.²

This study will merely look at the liability of online service providers for violations of law, as far as they concern an infringement of intellectual property rights. It will not explore other violations of law such as right to privacy, defamation, unfair competition or other torts.

Concerning infringements of intellectual property rights, copyright is the main focus. Copyright infringements have formed the most prominent part of intellectual property rights infringements on the internet, because copyrighted content is easy to digitise and upload onto the internet. Other intellectual property rights, such as trademarks, designs, patents, also play a role. This is in particular true for protected products which are distributed on the internet through digital platforms such as *eBay*, but are sold in a non-digital material form. But quite likely, we will see more genuine digital trademark, design or patent infringements on the internet. The reason is 3D printing and the development of digital business models beyond copyrighted content on the internet. With 3D printing technology, it is possible to infringe IP rights, other than copyright, in the same way as copyright, by illegally reproducing and illegally making digital files available on the internet. One example would be the unauthorized offering of files for plastic toy bricks branded *LEGO* on the 3D printing platforms.³

Nevertheless, this paper will focus on copyright infringements on the internet as today's most relevant example in the intellectual property world, when it comes to the shaping of the liability of internet providers. In the mid-1990s, the copyright law world was gathered in Geneva to modify the revised Berne Convention, taking account of the innovations of the internet. Following that, amongst other things, the WIPO Copyright Treaty was adopted in 1996.

¹ See for example German Federal Supreme Court (Bundesgerichtshof – BGH), *Jugendgefährdende Medien bei eBay*, file no. I ZR 18/04, 17 July 2017, GRUR 890, 894 note 40 (2007); further Jan Bernd Nordemann 59 (no. 4) Journal Copyright Society of the USA (2012), 773.

² Czychowski/Jan Bernd Nordemann GRUR 986 (2013).

³ See for example <https://www.turbosquid.com/3d-models/lego-bricks-3d-model/798443>.

Almost at the same time, however, the negotiations on the EU Directive 2001/31/EC of the European Parliament and of the Council of certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (so-called "E-Commerce Directive"). The intermediaries had understood how they could enforce a liability privilege which was sweepingly enshrined in law. After the E-Commerce Directive was adopted in 2000, the aforementioned WIPO Copyright Treaty was implemented into European copyright law through Directive 2001/29/EC of the European Parliament and the Council on the harmonisation of certain aspects of copyright and related rights in the information society in 2001 ("Copyright Directive"). While the E-Commerce Directive provided for a harmonised pan-EU framework for liability privileges of internet providers, the Copyright Directive in particular provided a harmonised pan-European copyright for the making available of copyrighted works on the internet (Article 3(1) Copyright Directive). Furthermore, the Copyright Directive in Article 8(3) harmonised injunctions claims against internet intermediaries, which will be discussed in more detail below.⁴

Today, more than 15 years after the E-Commerce Directive 2000/31 and the Copyright Directive 2001/29 were adopted, two questions arise. Firstly, is it necessary to reform the liability privileges for internet providers in the E-Commerce Directive, in particular to adapt it to the evolution of providers from 2000 to 2017(See no. 2 below)? Secondly, since the E-Commerce Directive provides for no pan-European liability rules and the Copyright Directive only provides for a pan-European liability rule for injunction claims for intermediaries, is there a need for further pan-EU liability rules? This question will be answered below under no. 3. Lastly, this paper will make a copyright specific proposal for pan-EU liability rules under no. 4.

⁴ See no. 3.1 below.

2. IS IT NECESSARY TO REFORM THE LIABILITY PRIVILEGES IN THE E-COMMERCE DIRECTIVE?

KEY FINDINGS

There is no pressing need to reform the liability privileges in the E-Commerce Directive.

The E-Commerce Directive has provided pan-EU harmonised rules for liability privileges for access providers (mere conduits) in Article 12, for caching providers in Article 13 and for hosting providers in Article 14. These liability privileges shield the providers against liability under civil, criminal or administrative law. But they do not provide protection against injunction claims. Recital 45 E-Commerce Directive reads as follows:

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

Consequently, Article 12(3) for access providers, Article 13(2) for caching providers and Article 14(3) for hosting providers confirms the exclusion of injunction claims in civil and administrative matters. In its case law, the CJEU has ruled that the liability privilege for damage claims not only provides for a shield against damage claims as such, but also against annex claims such as claiming the reimbursement of costs of giving formal notice or court costs in court in relation to the damage claim.⁵ In contrast, as the liability privilege does not shield against injunction claims, the E-Commerce Directive does not preclude annex claims to injunction claims such as reimbursement of costs of giving formal notice and court costs incurred in a claim to raise injunction claims.⁶

While Articles 12, 13 and 14 E-Commerce Directive do not regulate injunction claims against internet providers, Article 15 E-Commerce Directive remains applicable to injunction claims. Article 15 contains the prohibition to impose general monitoring duties upon internet providers. The CJEU in its case law had no problem in applying the prohibition of Article 15 even in case of injunction claims.⁷

It is important to note that Articles 12 to 14 E-Commerce Directive do not provide for a basis to hold internet providers liable. Rather, Articles 12 to 14 E-Commerce Directive only provide for a liability privilege or liability shield in cases where internet providers would be liable under the applicable civil, criminal or administrative law regime.

Below, it will be examined whether Articles 12, 13, 14 and 15 E-Commerce Directive are still up to date for the different types of providers existing today.

⁵ CJEU of 15 September 2016, C-484/14, para. 75 – Tobias McFadden/Sony Music Entertainment Germany GmbH.

⁶ CJEU of 15 September 2016, C-484/14, para. 78 – Tobias McFadden/Sony Music Entertainment Germany GmbH.

⁷ CJEU of 14 April 2011, C-70/10, para. 36 et seq. – Scarlet/SABAM for access providers; CJEU of 15 September 2016, C-484/14, para. 87 – Tobias McFadden/Sony Music Entertainment Germany GmbH.

2.1. Hosting providers (Article 14 E-Commerce-Directive)

Article 14 E-Commerce Directive provides a liability privilege for hosting providers. The provision reads as follows:

Hosting

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

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

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

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

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

Since the E-Commerce Directive was adopted in 2000, two new groups of hosting providers have emerged, which do not seem to have been foreseen by the drafters of directive: the first group is made by the so-called false hosting providers or false intermediaries; the second group is made by non-sufficiently collaborative hosting providers/non-sufficiently collaborative intermediaries.⁸

1st Group: False Hosting Providers

In the year 2000, the E-Commerce Directive followed the model of a neutral hosting provider, whose activity “*is of a mere technical, automatic and passive nature*” (see recital 42 E-Commerce Directive). The CJEU understood Article 14 as applying only to providing services neutrally by a merely technical and automatic processing of data provided to its customers.⁹

Not all hosting providers have confined themselves to such a passive role. Rather, some hosting providers have played an active role concerning the information stored in particular by indexing, suggesting and branding.

Example 1: *eBay is in general categorised as a hosting provider. But eBay has been found to provide assistance which entailed, in particular, optimising the presentation of the offers for sale in question or promoting those offers, for example through advertising third party eBay offers with own advertisements on the Google search engine. The CJEU found that eBay in such cases played an “active role” and would no longer come under the liability privilege of the hosting provider in Article 14 E-*

⁸ See Rosati, Why a Reform of Hosting Provider’s Safe Harbour is unnecessary under EU Copyright Law; CREATE Working Paper 2016/11 (August 2016) page 4; see also Sirinelli, Benazeraf, Bensamuun, Mission to Link Directives 2000/31 and 2001/29, Report and Proposals, 3 November 2015, pages 3, 5, 8.

⁹ CJEU of 23 March 2010, joined cases C-236/08 to C-238/08 para. 114 - Google and Google France; CJEU of 12 July 2011, C-324/09 para. 113 - L’Oréal/eBay.

Commerce-Directive.¹⁰ The CJEU made clear, however, that it is not sufficient to exclude the application of Article 14 E-Commerce-Directive if the service provider is remunerated for the service and provides general information to its customers.¹¹

Example 2: In a German case, the Hamburg Court of Appeal confirmed that YouTube would no longer come under Article 14 E-Commerce Directive, as YouTube would give individualised music recommendations to interested users and would suggest next to the viewed videos further (presumably) interesting videos.¹² Furthermore, YouTube would play an active role excluding Article 14 E-Commerce Directive when providing extensive user friendly functions for the use of the music provided on YouTube such as search, categories with genres, filtering, marking, playlists, playing functions, recommendations to third parties etc.¹³

It seems justified not to apply the liability privilege for hosting providers in Article 14 E-Commerce Directive to “active role” hosting providers. Mere passive technical providers are so distant from the infringement that it seems justified to let them enjoy the liability privilege of Article 14. In contrast, active role hosting providers leave this passive role and intervene in favour of the infringing act. Thus, it seems justified to impose the risk of being liable for infringements to active role providers.¹⁴

Against this background, Article 14 E-Commerce Directive has proven fit to treat the new form of active role hosting providers in an appropriate manner. Therefore, active role providers, so-called false hosting providers, do not justify the changing of Article 14 E-Commerce Directive.

A change of Article 14 E-Commerce Directive also does not seem to be justified in order to provide a solution for the so-called “good Samaritan’s paradox”. Some commentators argue that a “good Samaritan” protection for providers should be explicitly included into the EU legislative framework.¹⁵ The “good Samaritan paradox” is meant to describe the problem that Article 14 E-Commerce Directive with its provider model of a neutral and passive provider may dis-incentivise the provider from taking precautions against infringements for fear of losing safe harbour protection.¹⁶ In particular, the fear is expressed that the aforementioned *L’Oréal/eBay* case law of the CJEU¹⁷ and the prohibition to play an active role as a hosting provider may lead to hosting providers turning a blind eye on infringements in order not to get too close to an active role.¹⁸

That said, available case law does not support this fear. Rather, for example German courts have found that the most prominent “good Samaritan” filtering system, YouTube’s content-ID, does not lead to YouTube playing an active role concerning the provision of its users’ content:

"In light of this, the fact that the Defendant (YouTube) continuously checks its stock of videos using content-ID processes and in certain cases blocks them cannot be used against it. This is because those checks are, firstly, also a measure which the

¹⁰ CJEU of 12 July 2011, C-324/09 para. 114 - *L’Oréal/eBay*.

¹¹ CJEU of 12 July 2011, C-324/09 para. 115 - *L’Oréal/eBay*.

¹² Court of Appeal (Oberlandesgericht) of Hamburg 1 July 2015, 5 U 87/12 juris para. 338.

¹³ Court of Appeal (Oberlandesgericht) of Hamburg, op cit., juris para. 346.

¹⁴ This should also lead not only to an exclusion of the liability privilege, but also to a primary liability of the hosting provider according to the latest CJEU case law, see below no. 3.4.

¹⁵ Angelopoulos, Online Platforms and the Commission’s New Proposal for a Directive on Copyright in the Digital Single Market, January 2017, pages 43, 44, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947800.

¹⁶ See for example Angelopoulos, op cit., page 11, with further references.

¹⁷ CJEU of 12 July 2011, C-324/09 para. 113 et seq. - *L’Oréal/eBay*.

¹⁸ For example : Angelopoulos, op cit., page 11.

*Defendant (YouTube) does not undertake solely in its own business interest but which the Defendant (YouTube) uses to meet its legal responsibility so that the content recognised as rights infringing no longer remains available to the public ... That type of knowledge cannot, by its very nature, lead outside the scope of Article 14 E-Commerce Directive because otherwise any type of prevention or removal would inherently be impossible for the service provider because the provider would not be allowed to obtain knowledge of the information hosted on its service, without jeopardising its status as hosting provider. Such a consequence cannot have been intended by the legislature."*¹⁹

The delineation between passive hosting providers falling under the liability privilege of Article 14 E-Commerce Directive and the active role of hosting providers will always be a tricky one.²⁰ But this is no reason to change Article 14 E-Commerce Directive, which has proven fit to be able to exclude false hosting providers from its application.

In conclusion, while false hosting providers may have emerged as a new category of hosting providers not envisaged at the time of the adoption of the E-Commerce Directive in 2000, the E-Commerce Directive has proven fit to treat the issue adequately. The delineation between passive service providers caught by Article 14 and active role providers remains an issue for the court, without it being necessary to change Article 14 E-Commerce Directive.

2nd Group: Non-sufficiently collaborative hosting providers/non-sufficiently collaborative intermediaries

When adopting the E-Commerce Directive, the model for a hosting provider assumed good faith behaviour on the side of the hosting provider. Recital 46 E-Commerce Directive reads as follows:

"In order to benefit from a limitation of liability, the provider of an information society to service, consisting of the storage of information, upon obtaining actual knowledge or awareness of illegal activities has to act expeditiously to remove or to disable access to the information concerned; the removal or disabling of access has to be undertaken in the observance of the principle of freedom of expression and of procedures established for purpose at national level..."

Article 14(1) lit. a) only includes providers into the privilege which do not have actual knowledge of illegal activity or information and – as regards claims for damages, are not aware of facts or circumstances from which the illegal activity or information is apparent. Article 14(1) lit. b) further requires that the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

The CJEU has not yet decided on the criterion of knowledge within Article 14 E-Commerce Directive. The CJEU interprets Article 14 (1) (a) and (b) E-Commerce Directive in such a way, however, that a hosting provider loses its privilege and in particular is liable for damages if it does not act as a "*diligent economic operator*". The hosting provider is thus denied the privilege in cases where the hosting provider had been aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality in question and did not act expeditiously in accordance with Article 14 (1) lit. b E-Commerce Directive.²¹ As such, it seems doubtful that "knowledge" within the meaning of Article 14 (1) E-Commerce Directive can really be equated with the active awareness of the unlawfulness.

¹⁹ Court of Appeal (Oberlandesgericht) of Hamburg 1 July 2015, 5 U 87/12 juris para. 198.

²⁰ Angelopoulos, op cit., page 11.

²¹ CJEU of July 12, 2011, C-324/09 para. 120 et seq. – L'Oréal/eBay.

Rather, an active knowledge of the individual information and its unlawfulness (thus of the specific infringement) may no longer be used as a criterion for losing the privilege.

In recent years, hosting providers have come up with a dangerous business model with regard to infringements. Such hosting providers stay entirely passive, but turn a blind eye to repeated infringements, while the service may still be used to a considerable extent for legal applications.

Example 1: *As held by the German Federal Supreme Court (BGH) for the Sharehoster "Rapidshare", the services of this hosting provider could be used to considerable extent for legal applications. Still, Rapidshare fostered through own measures the dangerous infringing use of the services. In particular, Rapidshare provided – against remuneration – so-called premium accounts – enabling the user to download attractive files stored on Rapidshare with a higher speed, which would in particular be attractive to the download of illegal content. Furthermore, the completely anonymous use of the services fostered infringing use, in particular for repeated infringements after takedown.*²²

Example 2: *According to a decision by the Court of Appeal of Munich, the sharehosting service "Uploaded" was also designed in a way to foster infringements, while the possibility to use the service for legal applications remained. In that case, a very successful motion picture was stored and made available (via a linking site) through the services of Uploaded. The rightholder had sent several takedown requests to Uploaded, which all resulted in takedowns, but the motion picture kept on popping up on Uploaded. According to the Court of Appeal of Munich, Article 14 E-Commerce Directive would shield Uploaded against damage claims by the rightholder, in cases where uploads after the first notice and takedown were made by different users. Only in cases where the initial user uploaded the motion picture again could Uploaded be held liable for damages.*²³ *This decision has been criticised as being too generous with dangerous business models allowing anonymous use, where it is not possible to identify the infringing uploader.*²⁴

The example of sharehosters running a dangerous business model shows that courts will have to further refine the type of knowledge on the side of the hosting provider, which excludes Article 14 E-Commerce Directive. It seems too narrow to ask for actual knowledge of the specific infringement committed (specific file) in order to dis-apply Article 14 E-Commerce Directive. Rather, in particular if hosting providers are running a dangerous business model fostering infringements of their users, the standard of knowledge should be lowered in order not to let bad faith hosting providers profit from the liability privilege of Article 14 E-Commerce Directive. This needs to be clarified by the CJEU. The wording of Article 14 E-Commerce Directive should give sufficient room to treat such dangerous business models adequately, as not only the absence of actual knowledge is required for the liability privilege, but also that the service provider *"is not aware of facts or circumstances from which the illegal activity or information is apparent"*.²⁵

However, in order to come to just results, the facts of every case need to be evaluated and weighed. While – as stated above – the courts have to further refine their case law in order to treat dangerous hosting provider business models properly, the language of Article 14 E-

²² German Federal Supreme Court (Bundesgerichtshof – BGH) GRUR 1030 note 39 et seq. (2013).

²³ Court of Appeal (Oberlandesgericht) of Munich GRUR 619, 621 et seq. (2017).

²⁴ Jaworski/Jan Bernd Nordemann, Gehilfenhaftung von Intermediären bei Rechtsverletzungen im Internet. BGH-Rechtsprechung und neueste Entwicklungen in den Instanzen (Accessory Liability of Intermediaries for rights infringements on the internet. BGH case law and latest developments in lower court levels), GRUR 577 et seq. (2017).

²⁵ See Jaworski/Jan Bernd Nordemann, op cit. GRUR 569 at 571 (2017).

Commerce Directive seems to be fit for this purpose. The wording including the abovementioned recitals of Article 14 E-Commerce Directive seem to be sufficiently elaborate in order to find a flexible solution when it comes to dangerous business models of non-sufficiently collaborative hosting providers.

In conclusion, concerning non-sufficiently collaborative hosting providers running a dangerous business model, which fosters infringements, the case law still has to find final answers if and to what extent such hosting providers should profit from the liability privilege. But the concept and wording of Article 14 E-Commerce Directive seems to be sufficiently flexible to allow an adequate case by case result in such scenarios. No change of Article 14 E-Commerce Directive is deemed necessary.

2.2. Access Providers

For access providers, Article 12 E-Commerce Directive provides for a liability privilege under the following requirements:

"Mere conduit"

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:

(a) does not initiate the transmission;

(b) does not select the receiver of the transmission; and

(c) does not select or modify the information contained in the transmission.

2. The acts of transmission and of provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.

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

As is apparent from the wording, Article 12 E-Commerce Directive assumes a neutral "mere conduit". Since the E-Commerce Directive was adopted, however, new business models of access providers have emerged at the borderline between access providers and hosting providers. For example, access providers play an important role in disseminating live streams for certain customers. In the non-live world, such providers would be seen as providers hosting offline content and providing the technical facilities for their customers to make it available to internet users. When it comes to live streams, one may consider the provision of the technical facilities to disseminate the live streams as access providing.

Example: *The right to make available live streams of football (soccer) matches of the German Bundesliga has been exclusively granted to a German Pay-TV broadcasting station Sky. Infringing users make this Pay-TV signal available for free through retransmission. The infringers use upstream providers to be able to disseminate the live stream to a larger German audience. The upstream providers have been found to*

*have a duty of care to takedown the illegal live stream after notification by rightholders and to prevent further similar clear infringements.*²⁶

In cases of such *upstreams*, the access provider seems to be not in the typical role of a mere conduit envisaged by Article 12 E-Commerce Directive. Rather, the contractual link (maybe through several other contractual partners) to the infringer pushed them closer to the application of the liability privilege of hosting providers, which also usually have a contractual link to the infringer.

That said, it is not apparent that Articles 12 and 14 E-Commerce Directive would not be fit to treat such scenarios adequately. In particular, Article 12 excludes from the liability privilege a deliberate cooperation between the access provider and the infringer (recital 44). Furthermore, knowledge on the side of the access provider about the infringement may exclude the requirement of Article 12(1) lit. c) E-Commerce Directive that the access providers must not have selected the information transmitted. This is in particular true in case of contractual links between the infringing uploader and the access provider in the aforementioned upstream provider cases.

In conclusion, there seems to be no need to change the liability privilege of Art. 12 E-Commerce-Directive. Upstream providers, which operate at the borderline between access and hosting providers, may be adequately treated by the liability privilege.

2.3 Caching Providers

For caching providers, Article 13 E-Commerce Directive provides for the following liability privilege rule:

"Caching"

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that:

(a) the provider does not modify the information;

(b) the provider complies with conditions on access to the information;

(c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry;

(d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and

(e) the provider acts expeditiously to remove or to disable access to the information it has 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 removal or disablement.

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

²⁶ District Court (Landgericht) of Frankfurt/Main ZUM 2016, 67.

So far, caching providers have had no larger practical importance with regard to the liability privileges in the E-Commerce Directive. Only in the context of the so-called “Usenet”, court decisions found the scenario of caching providers²⁷, while others treated Usenet providers as access providers.²⁸

Therefore, the liability privilege for caching providers lacks practical importance, and there is no pressing need to change it.

2.4 Link providers

Since the early days of the internet, linking has been important technology widely used in particular to help internet users easily find certain content. Numerous services are dedicated to producing, collecting or indexing links. The most important examples for such services are search engines, which provide links to internet users to find the content they are looking for. *Google’s* search engine is a striking example for a search engine, providing links to internet users to help them find content.

Despite the large importance of linking providers on the internet and in particular of search engines, the application of the liability privileges of Article 12 to 14 E-Commerce Directive is still to a certain extent unclear.

It has been clarified by the CJEU that search engines – called “referencing service providers” – fall within Article 14 E-Commerce Directive for their paid-for links, i.e. the links advertising third party products and services.²⁹ A lot speaks in favour of applying Article 14 E-Commerce Directive also to editorial (non-advertising) links made publicly available in search engines.

However, this is contested.³⁰ One of the most common arguments is that Article 21(2) E-Commerce Directive requires the Commission to regularly examine and analyse “*the need for proposals concerning the liability of providers of hyperlinks*”, which implied that providers of hyperlinks are not regulated by the E-Commerce Directive. This argument is not entirely convincing, as Article 21(2) E-Commerce Directive also mentions “notice and takedown” procedures to be examined and analysed regularly by the Commission, while it is a common view that in particular Article 14 E-Commerce Directive already allows such notice and takedown procedures and is even the liability privilege basis for it. It can be expected that in the future the CJEU will answer the question. This is in particular true, if Article 14 E-Commerce Directive also applies to editorial link providing by search engines.

Such a clarification, however, seems less pressing now, since the CJEU has developed own liability rules for linking providers through its case law in *GS Media/Sanoma*³¹, *Filmspeler*³² and *Ziggo/Brein* (“*The PirateBay*”).³³ Some voices have argued that in particular these new liability rules require the introduction of liability privileges as a shield against a too far reaching liability of linking providers and more specifically search engines.³⁴ But this view is not convincing.

²⁷ Court of Appeal (Oberlandesgericht) of Düsseldorf ZUM 2008, 332.

²⁸ Court of Appeal (Oberlandesgericht) of Hamburg ZUM-RD 2009, 439 – Usenet II.

²⁹ CJEU of 23 March 2010, joined cases C-236/08 to C-238/08 para. 110 – Google and Google France.

³⁰ German Federal Supreme Court (Bundesgerichtshof – BGH) GRUR 209 para. 12 (2016) – Haftung für Hyperlink (Liability for Hyperlink); in favour of a possible application of a liability privileges *mutatis mutandis* Leistner GRUR 1145 at 1154 (2014); Jani/Leenen GRUR 362 at 363 (2014); Ohly GRUR 1155 at 1157(2016).

³¹ CJEU of 8 September 2016, C-160/15 – GS Media/Sanoma.

³² CJEU of 26 April 2017, C-527/15 – Brein/Wullems (Filmspeler).

³³ CJEU of 14 June 2017, C-610/15 – Ziggo /Brein (The PirateBay).

³⁴ Gruenberger ZUM 905 at 918 (2016); see also Ohly GRUR 1155 at 1157(2016).

The CJEU liability rules for linking providers follow a flexible approach establishing adequate duties of care for linking providers, which in particular involves a balancing of interests between the link providers, internet users and right holders. As a result, the CJEU liability rules should provide for fair results in all specific linking scenarios.³⁵ This is confirmed by a look at case law since the CJEU *GS Media/Sanoma* decision. This decision is more than a year old, and no other cases have been reported where an over-extensive liability of linking providers, and more specifically search engines, which would endanger legitimate business models.

Anyway, such duties of care also would provide for a sound interface with the liability privilege in Article 14 E-Commerce Directive.

In conclusion, linking providers are important players on the internet, which in principle deserve regulatory attention. So far, it has only been clarified by the CJEU that search engines may enjoy the liability privilege of Article 14 E-Commerce Directive as far as they provide links against remuneration for advertising purposes. It can be expected that the CJEU will clarify in the near future if Article 14 also applies to editorial links provided by search engines. As the CJEU has developed a flexible system of adequate duties of care to establish liability of linking providers in case of links to illegal content, there seems to be no need, however, to further refine the liability privileges of the E-Commerce Directive to linking providers. The system of duties of care seems to be sufficiently flexible to provide for just results in all different linking scenarios.

2.5 Prohibition to impose general monitoring duties (Article 15 E-Commerce Directive)

Art. 15 E-Commerce Directive provides for a prohibition to impose general monitoring duties upon internet providers. It reads as follows:

No general obligation to monitor

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

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

The provision plays an important role in particular to determine the scope of injunction claims. In contrast to Article 12 to 14 E-Commerce Directive, Article 15 E-Commerce Directive applies to injunction claims, in particular to injunction claims which are raised pursuant Article 8(3) Copyright Directive in the field of copyright and pursuant Article 11 third sentence Enforcement Directive for other IP rights. Pursuant Article 8(3) Copyright Directive and Article 11 third sentence Enforcement Directive, right holders can ask providers to take measures to prevent future rights infringements. This can establish duties of care by internet providers, for example filtering duties by hosting providers³⁶ or blocking duties by access providers³⁷.

³⁵ See below no. 3. 4 for details.

³⁶ See below no. 3.1.

³⁷ See below no. 3.1.

In this regard, Article 15 E-Commerce Directive helps to balance the fundamental rights at stake by the internet provider, its users and the right holders.³⁸ For example, the CJEU has found that an injunction imposed on a hosting provider requiring it to install a filtering system obliging the hosting provider to actively monitor almost all the data relating to all of its service users in order to prevent any future infringement of intellectual property rights is incompatible with Article 15 E-Commerce Directive.³⁹

But as Article 15 E-Commerce Directive is an open provision which requires a careful balancing of rights, it does not stand in the way of more specific monitoring duties in particular by hosting providers. For example, *sharehosters* for the prevention of future infringements have been obliged by German and Italian courts to apply word filters, after having been notified about a specific title of a copyrighted work, made illegally publicly available by a user.⁴⁰

This interpretation of Article 15 seems convincing. As the filtering is confined to a specific title, it is not in conflict with the prohibition of general monitoring duties by internet providers. Recital 47 E-Commerce Directive in particular mentions that “*monitoring obligations in a specific case*” are not prohibited by Article 15 E-Commerce Directive.

Nevertheless, a clear delineation between prohibited general monitoring obligations and allowed specific monitoring obligations has not been finally found yet in the absence of relevant CJEU case law. It is interesting to note that the French Federal Supreme Court (*Cour de Cassation*) has rejected stay down obligations for hosting providers as conflicting with the prohibition of general monitoring duties.⁴¹ This has been acclaimed as the correct interpretation of Article 15 E-Commerce Directive, as stay down obligations “*can only be achieved by screening all (even non-infringing) content passing through its servers for infringing copy, i.e. practicing general monitoring.*”⁴²

It does not seem convincing that stay down and even more prevention duties for specific works are always stopped by the prohibition of general monitoring duties pursuant Article 15 E-Commerce Directive. In the end, it is a question of the technical solution used by the provider. For example, if the filtering relates only to files of a certain (suspicious or dangerous) type and thus only filters such (suspicious or dangerous) files, one cannot talk of general monitoring. The same seems to be true for word filters, which merely look at the name of a file. If one would apply Article 15 E-Commerce Directive in all cases that involve any processing of general data, no room for the disapplication of Article 15 E-Commerce Directive for specific monitoring duties would be left. What also speaks in favour of an extensive room for specific monitoring duties to ensure prevention of infringements is the recognition of a balancing of rights by the CJEU specifically for Article 15 E-Commerce Directive. If any prevention duties for hosting providers came under Article 15 E-Commerce Directive, this would make prevention duties for hosting providers non-existent and would

³⁸ CJEU of 14 April 2011, C-70/10, para. 69 et seq. – Scarlet/SABAM; CJEU of 16 February 2012, C-360/10, para. 39 et seq. – SABAM/Netlog; CJEU of 15 September 2016, C-484/14, para. 87 – McFadden/Sony Music.

³⁹ CJEU of 16 February 2012, C-360/10, para. 38 et seq. – SABAM/Netlog.

⁴⁰ German Federal Supreme Court (Bundesgerichtshof – BGH) of 15 August 2013, I ZR 79/12, para. 56 – File-Hosting-Dienst II; BGH, I ZR 85/12, para. 61 – File-Hosting-Dienst III; Court of Appeal of Hamburg of 1 July 2015, 5 U 87/12, juris para. 547; Jan Bernd Nordemann in Fromm/Nordemann, Urheberrecht Kommentar (Commentary to the German Copyright Act), 11th Edition 2014, Article 97 German Copyright Act, note 163a. Same opinion in Italy: Court of Rome, Verdict no. 8437/16.

⁴¹ Cour de Cassation Arrêt no. 831, 11-13.669, 12 July 2012 – Google France/Bach films; Cour de Cassation Arrêt no. 828 of 12 July 2012 – Google France/Bach films.

⁴² Angelopoulos, op cit., page 27.

reduce the duties of hosting providers to a mere takedown, although the CJEU has in several cases recognised prevention duties of hosting providers.⁴³

The courts, and in particular the CJEU, will have to finally decide on where specific filtering duties end and general monitoring duties start. Without a final word from the CJEU, there seems to be no pressing need to clarify Article 15 E-Commerce Directive concerning the differentiation between the prohibition of general monitoring duties and allowed specific monitoring duties. In particular, due to the strong impact on a fair balancing of fundamental rights on the interpretation of Article 15 E-Commerce Directive, it can be envisaged that any solution by court case law will respect the relevant fundamental rights of right holders, providers and users.

Article 15 E-Commerce Directive has seen some case law by the CJEU. But it still lacks a final word from the Court with regard to such an important question as the delineation between general monitoring obligations (prohibited by Article 15 E-Commerce Directive) and specific monitoring duties, which may be imposed on providers in particular to prevent infringements notified. But as Article 15 E-Commerce Directive pursuant the CJEU case law is strongly dominated by a balancing of fundamental rights, it can be expected that any solution provided by case law will respect all relevant interests in an appropriate way. No legislative action seems to be necessary concerning Article 15 E-Commerce Directive.

Conclusions: Is it necessary to reform the liability privileges in the e-commerce directive?

Although Articles 12 to 15 E-Commerce Directive are more than 15 years old, there seems to be no pressing need for a reform. The provisions seem to be sufficiently flexible to adopt to new business models, which also make them in general future proof. Of course, certain legal questions arising with regard to Articles 12 to 15 E-Commerce Directive have not been finally answered yet by the CJEU. But such open legal questions do not justify a reform, as it can be expected that the case law will answer the questions adequately respecting the different rights and interest at stake.

⁴³ CJEU of 12 July 2011, C-324/09 para. 131 - L'Oréal/eBay; CJEU of 16 February 2012, C-360/10 para. 29 - SABAM/Netlog.

3. PAN-EU LIABILITY RULES?

KEY FINDINGS

The liability privileges of the E-Commerce-Directive do not establish liability. With regard to injunction claims, Article 8(3) Copyright Directive provides satisfactory solution for internet providers. But EU rules establishing liability beyond injunction (e.g. damages) should be harmonized. The CJEU case law in the series of judgments *GS Media/Sanoma*, *Filmspeler* and *BREIN/Ziggo* should be taken as a starting point.

As pointed out above, the E-Commerce Directive in Articles 12 to 14 only provides for liability privileges. This means the E-Commerce Directive protects internet providers from being held liable in cases where they would be liable under the applicable liability doctrine. Articles 12 to 14 E-Commerce Directive have the function of a liability shield, they do not themselves establish liability.⁴⁴ In order to assess liability of internet providers on the EU level, it is therefore indispensable to also look at the liability rules, which exist or do not exist on the European level.

3.1. Existing pan-EU liability rules (sector specific)

Pan-EU liability rules only exist to a limited extent. They only exist sector specific and only for injunction claims.

In the Copyright Directive, Article 8(3) needs to be mentioned:

3. Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.

For other IP rights, Article 11 3rd sentence Enforcement Directive provides for the same remedy.

Recital 59 Copyright Directive provides for the reasoning of the aforementioned provisions. According to the Directive,

"in the digital environment, in particular the services of intermediaries may increasingly be used by third parties for infringing activities".

But it goes on to emphasise:

"In many cases, such intermediaries are best placed to bring such infringing activities to an end."

Correctly understood, this means that injunction claims may be raised under Article 8(3) Copyright Directive not because internet intermediaries have done any legal wrong.⁴⁵ The crucial fact is that they are in a good position to help.⁴⁶

⁴⁴ See above no. 2.

⁴⁵ British High Court 20th Century Fox Film Corp./British Telecommunications, PLC, [2011] EWHC 2714 (Ch.).

⁴⁶ Shapiro, Directive 2001/29/EC on Copyright in the Information Society, in: Copyright in the Information Society: A Guide to National Implementation of the European Directive 54 (Lindner/Shapiro, 2011).

This can be compared – at least to a certain extent – to helping duties existing in general civil law of the member states, e.g. known in English law as the *Norwich Pharmacal Jurisdiction*⁴⁷.

Precisely put, Article 8(3) Copyright Directive is not about a provider liability, but helping duties. *Husovec* called this “accountable, not liable”.⁴⁸

The prevention duties established by Article 8(3) Copyright Directive differ with regard to the type of provider at stake.

For hosting providers, Article 8(3) Copyright Directive establishes duties for takedown, staydown and prevention of similar clear rights infringements of the same kind. This is at least the established case law of the German Federal Supreme Court (BGH).⁴⁹ In its *L’Oréal/eBay* decision, the CJEU confirmed the German case law.⁵⁰ According to the court, the prevention duty included the duty to ensure that an online market place takes measures

*“which contribute, not only to bringing to an end infringements of these rights by users of the market place, but also to preventing further infringements of that kind”.*⁵¹

In particular, according to the German case law, such prevention duties by hosting providers can include the application of word filters.⁵² As outlined above, it needs to be clarified by the CJEU, if and to what extent Article 15 E-Commerce-Directive prohibits such filters in specific cases. But Article 15 E-Commerce-Directive does not generally rule out filters as such.⁵³

Concerning access providers, Article 8(3) Copyright Directive also provides for prevention duties.⁵⁴ One striking example for such prevention duties are duties of an access provider to block certain websites under a strict proportionality test of the fundamental rights involved.⁵⁵

3.2. No Pan-EU Liability Rules Sector Specific for Other Claims, e.g. Damages

But besides the aforementioned injunction claims under Article 8(3) Copyright Directive and Article 11 3rd sentence Enforcement Directive, there is no pan-EU concept of liability rules explicitly written down in any directive. This is in particular true for liability rules for damages. So far, national liability rules apply.⁵⁶

⁴⁷ *Norwich Pharmacal Co. V. Costumes and Excise Comm’rs* [1974] AC 133, see for further details British High Court 20th Century Fox paras 20 et seq. or the German Concept of Helping Duties in case of accidents; see further Jan Bernd Nordemann 59 (no. 4) *Journal Copyright Society of the US* (2012) 773, 776; Czychowski/Jan Bernd Nordemann GRUR 986 at 988 (2013).

⁴⁸ *Husovec*, Accountable, Not Liable: Injunctions Against Intermediaries, TILEC Discussion Paper No. 2016-012; see also *Husovec*, Injunctions Against Intermediaries in the European Union: Accountable But Not Liable? (Cambridge Intellectual Property and Information Law, Band 41), to be published in 2017.

⁴⁹ German Federal Supreme Court (Bundesgerichtshof – BGH) GRUR 1030 para. 46 (2013) – File-Hosting-Dienst I; German Federal Supreme Court (Bundesgerichtshof – BGH) GRUR 370 para. 29 (2013) – Alone in the Dark; see for a detailed analysis of the BGH case law Jan Bernd Nordemann 59 (no. 4) *Journal Copyright Society of the USA* (2012) 773 at 778 et seq.; Jan Bernd Nordemann Liability for Copyright Infringements on the Internet: Hostproviders (Content Providers) – The German Approach, 2 (2011) JIPITEC 37.

⁵⁰ For Article 11 3rd sentence Enforcement Directive.

⁵¹ CJEU of 12 July 2011, C-324/09 paras. 127, 128 to 134 – *L’Oréal/eBay*.

⁵² See above no. 2.5, also with regard to Article 15 E-Commerce Directive and the prohibition of general monitoring duties.

⁵³ See above no. 2.5.

⁵⁴ CJEU of 24 November 2011, C-70/10 para. 31 – *Scarlet/SABAM*; CJEU of 27 March 2014, C-314/12 para. 37 – *UPC Telekabel Wien*; CJEU of 15 September 2016, C-484/14 para. 81 – *McFadden/Sony Music*.

⁵⁵ CJEU of 27 March 2014, C-314/12 para. 42 et seq. – *UPC Telekabel Wien*.

⁵⁶ But see for the emergence of pan-EU liability rules for the making available right by the CJEU below no. 3.4.

Such national systems, however, do not provide for a sound interface with the liability privileges in Articles 12 to 14 E-Commerce Directive, and its EU harmonised rules.

Example: According to the Court of Appeal of Hamburg, YouTube due to certain functionalities played an active role making its uploaders' content available to its users.

Therefore, YouTube no longer came under the liability privilege of Article 14 E-Commerce Directive.⁵⁷ But German law did not provide for liability rules which would grant damage claims to rightholders in cases where such active-role hosting providers like YouTube provide infringing content to the public.⁵⁸ See also above 2.1.

This "gap" between the liability privilege of Article 14 E-Commerce Directive on the one hand and national liability rules on the other hand has sometimes been called a "value gap". The notion is meant to describe that certain hosting providers play an active role and leave the liability shield, but they do not have to take a licence, because there is no sufficient basis for a liability of such "false" hosting providers.⁵⁹ The issue has been addressed by several organisations and commentators.⁶⁰

The European Commission has tried to close this "gap" by including Article 13 and Recital 38 into its proposal for a directive on copyright in the digital single market.⁶¹

Without commenting on the Commission's proposals, it is surely worthwhile advocating in favour of harmonised pan-EU liability rules for internet providers. The current system, which provides only a liability privilege (shield) for internet providers, seems incomplete, as long as there are no pan-EU liability rules to establish liability. The digital single market will not be realised, in cases where national liability rules dominate the establishment of liability. Seen from the perspective of rightholders, it seems unsatisfactory that the liability in particular for damages of internet service providers may not be pushed beyond the pan-EU privileges in Article 12 to 14 E-Commerce Directive. But damage claims may be excluded from the start by different national liability rules, which do not provide for an EU level playing field for rightholders asking for damages.

3.3 Secondary liability not harmonised on EU level

The "gap" seems to exist not with regard to primary liability, *understood as the liability of the person which fulfils all requirements of use of the rights*. It must be born in mind that all relevant rights used in connection with internet providers have been harmonised on the EU level. For example, this is true for copyright:

- Article 2 Copyright Directive harmonises the reproduction right;

⁵⁷ Court of Appeal (Oberlandesgericht) of Hamburg of 1 July 2015; 5 U 87/12 para. 346; see in more detail above no. 2.1.

⁵⁸ Court of Appeal (Oberlandesgericht) of Hamburg of 1 July 2015; 5 U 87/12 juris para. 163 et seq.

⁵⁹ See also above no. 2.1.

⁶⁰ See ALAI, Resolution, on the European proposals of 14 September 2016 to introduce fair sharing of the value when works and other protected materials are made available by electronic means (18 February 2017), available at <http://www.alai.org/en/assets/files/resolutions/170218-value-gap-en.pdf>; Sirinelli/Benazeraf/Bensamoun, Mission to Link Directive 2000/31 and 200/29, Report and Proposals (3 November 2015), op cit.; von Lewinski, Comments on the "Value Gap" provisions in the European Commission's Proposal for Directive on Copyright in the Digital Single Market (Article 13 and recital 36), Kluwer Copyright Blog (10 April 2017; Angelopoulos, Online Platforms and the Commission's New Proposal for Directive on Copyright in the Digital Single Market, January 2017, op cit.

⁶¹ The Proposal may be found here: <https://ec.europa.eu/digital-single-market/en/news/proposal-directive-european-parliament-and-council-copyright-digital-single-market>; see further ALAI op cit., von Lewinski op cit. and Angelopoulos op cit. for comments on this proposal.

- Article 3(1) Copyright Directive harmonises the right of communication to the public including the making available to the public of works in a way that members of the public may access them from a place and at a time individually chosen by them.

As far as persons fulfil all requirements of these rights without authorisation by the rightholder, such persons would be primarily liable. Such primary liability should be harmonised on the EU level according to the aforementioned provisions of the Copyright Directive.

The “gap”, however, in EU harmonisation seems to be secondary liability, *understood as the liability of persons who do not fulfil all requirements of using the respective rights, in particular the re-production right and the making available right*. This problem in particular comes up for internet providers, which provide the technical facilities for their users to use the reproduction and the making available right. Usually, internet service providers – for example mere passive and neutral hosting providers – do not themselves make the content uploaded available to the public and thus can only face secondary liability in this meaning.

For secondary liability, the national member states provide for a vast variety of different concepts, which also produce different results as to the persons secondarily liable. Such national concepts for secondary liability have different labels such as joint tortfeasor, accessory liability, authorisation or *Stoererhaftung*.⁶²

3.4 The Case law of the CJEU in *GS Media/Sanoma*, *Filmspeler* and *Ziggo/Brein* for Communication to the Public – towards sector specific pan-EU liability rules in copyright

As shown above, pan-EU rules only exist concerning liability privileges in Article 12 to 14 E-Commerce Directive and sector specific in copyright with regard to primary liability due to the harmonisation of the respective exploitation rights in Article 2 et seq. Copyright Directive.⁶³ Concerning secondary liability, the sector specific provision in Article 8(3) Copyright Directive is another step to harmonise EU rules for liability, but it only concerns injunction claims in particular with regard to prevention duties.⁶⁴

Seen from the market integrating viewpoint of the CJEU, it therefore does not seem very surprising that the court is trying to extend its harmonising reach into secondary liability in order to create harmonised EU liability rules also for secondary liability. With the decisions *GS Media/Sanoma*⁶⁵, *Filmspeler*⁶⁶ and *Ziggo/Brein*⁶⁷ the CJEU has opened the door with regard to the right of communication to the public which includes the making available right (Article 3(1) Copyright Directive) to also develop a pan-EU concept of secondary liability with regard to this exploitation right:

The *GS Media/Sanoma* case was about setting a link to a work illegally made available on the internet elsewhere.

⁶² See for a comparative analysis Dinwoodie, A Comparative Analysis of the Secondary Liability of Online Service Providers, in Dinwoodie (Editor), *Secondary Liability of Internet Service Providers* (2017) page 20 et seq.; see also Angelopoulos, op cit., page 23 et seq. with a comparative analysis of national approaches in the UK, France and Germany; further Rosati, The CJEU PirateBay judgment and its impact on the liability of online platforms, page 11, op cit.

⁶³ Primary liability in this sense is understood here as liability for the person who fulfils all requirements of the respective exploitation right, see above no. 3.3.

⁶⁴ See above no. 3.1.

⁶⁵ CJEU of 8 September 2016, C-160/15 – *GS Media/Sanoma*.

⁶⁶ CJEU of 26 April 2017, C-527/15 – *Brein/Wullems (Filmspeler)*.

⁶⁷ CJEU of 14 June 2017, C-610/15 – *Ziggo /Brein*.

The CJEU held that linking was a sufficient communication. Furthermore, it established duties of care. In cases where the linker “*knew or ought to have known*” that the link went to illegal content, the linker was liable for the communication to the public.⁶⁸

In *Filmspeler*, rightholders went forward against a media player, which i.a. by intent offered links to illegal audiovisual content. Again, the CJEU saw the provision of a link as a sufficient intervention of the linker.⁶⁹ As the linker by intent provided links to illegal content, the seller of the media player was fully liable for illegal communication to the public.⁷⁰

Ziggo/Brein (“*The PirateBay*”) concerned a website blocking claim raised against a Dutch access provider under Article 8(3) Copyright Directive. In this context, the CJEU analysed the website *The Pirate Bay* which is an online index for digital content, facilitating peer-to-peer file sharing among users of the BitTorrent protocol. The court held it to be a sufficient intervention for a communication that *The PirateBay* did not only serve the role of a search engine for online content within the BitTorrent protocol, but that *The Pirate Bay* also offered an index classifying the works under different categories, based on the type of works, their genre and their popularity, with the operators of *The PirateBay* checking to ensure that the work has been placed in the appropriate category. Also, the operators deleted obsolete of false Torrent files and actively filtered some content.⁷¹ This communication was also “to the public” as *The PirateBay*

*“could not be unaware that this platform provides access to works published without the consent of right holders, given that, as expressly highlighted by the referring court, a very large number of Torrent files on the online sharing platform The Pirate Bay relate to works published without the consent of right holders.”*⁷²

The role of *The Pirate Bay* as a platform to connect users of the BitTorrent protocol for infringing activity was evaluated by the CJEU as primary liability for communication to the public. Until then, under the national secondary liability concepts, the activity of *The Pirate Bay* was only judged as accessory liability under aidership.⁷³

Due to the general language in particular in *Ziggo/Brein*, the series of CJEU judgments could be interpreted as the starting point of EU liability rules for internet providers found with the liability privileges of the E-Commerce Directive. This concept would be constructed as follows.

The “communication” would be a sufficient intervention by the service provider. It can be taken from *Ziggo/Brein* that providing search functionalities, a differentiated indexing of works can be regarded as a sufficient intervention to fulfil the requirements of a communication. Quite likely, such requirements of an intervention run parallel with the requirements for an “active role”, which excludes hosting providers from the liability privilege of Article 14 E-Commerce Directive. This would also guarantee a sound interface without gaps between the EU liability rule for communication to the public and the liability privilege of Article 14 E-Commerce Directive.

⁶⁸ CJEU of 8 September 2016, C-160/15 para. 49 – GS Media/Sanoma.

⁶⁹ CJEU of 26 April 2017, C-527/15 para. 38 et seq. – Brein/Wullems (*Filmspeler*).

⁷⁰ CJEU of 26 April 2017, C-527/15 para. 50 – Brein/Wullems (*Filmspeler*).

⁷¹ CJEU of 14 June 2017, C-610/15, para. 38 – Ziggo/Brein.

⁷² CJEU op. cit., para. 45, – Ziggo/Brein.

⁷³ See first instance decision: Stockholms Tingsrätt, Dom 2009-04-17, Mål nr B 13301-06; further Rosati, the CJEU “*The Pirate Bay*” judgment and its impact on the liability of online platforms, 2017, page 11, referring to the “*Dramatico*” judgment by the British High Court which held that the operators of *The Pirate Bay* are liable as accessories for users as infringements.

As to a communication “to the public”, this refers to duties of care as expressed by the CJEU with “*knew or ought to have known*”. If interpreted sufficiently flexibly, taking into account the fundamental rights at stake by right holders, providers and users such a duty of care would also be capable of producing just results for a liability of intervening providers. Such a system of flexible duties of care is already known from injunction claims pursuant Art. 8(3) Copyright Directive.⁷⁴

As stated above, such a system would also be in line with Article 14 E-Commerce Directive and would leave no gap between the privilege of Article 14 and the liability rule. This would be in particular true if an active role necessary to lose the liability privilege would run parallel to the interpretation of the intervention in order to establish liability.

All internet providers which do not perform an intervention in the form described above would be liable only pursuant Article 8(3) Copyright Directive⁷⁵. The dividing line between a full liability including damages on the one hand and liability for injunction pursuant Article 8(3) Copyright Directive on the other hand would be the criterion of intervention.

In conclusion, the EU legal framework provides for harmonised law concerning liability privileges in Articles 12 to 15 E-Commerce-Directive. They do not, however, establish liability. Concerning liability rules to *establish* liability, the EU system does not seem readily developed yet. With regard to injunction claims, Article 8(3) Copyright Directive provides for a flexible and satisfactory solution with regard to internet providers. With regard to other claims, in particular damage claims, EU law only provides for a harmonised answer in cases of primary infringements⁷⁶, i.e. unauthorised uses of the harmonised exploitation rights in copyright. For the (secondary) liability of other persons, until now different national secondary liability concepts apply, which may lead to different results from member state to member state. This is unsatisfactory against the background of European harmonisation; in particular, this does not create a level playing field, e.g. for damage claims for right holders in the EU. But there is a development from CJEU case law to harmonise secondary liability within the primary liability rules of EU law in the series of judgments *GS Media/Sanoma*, *Filmspeler* and *BREIN/Ziggo*.

⁷⁴ See above no. 3.1.

⁷⁵ And for other IP rights pursuant Article 11 third sentence Enforcement Directive.

⁷⁶ In this sense, primary liabilities understood in a way that the infringer needs to fulfil all requirements of the exploitation right. See also above no. 3.3.

4. PROPOSAL FOR A COPYRIGHT SECTOR SPECIFIC REGULATION OF LIABILITY

KEY FINDINGS

EU rules establishing liability beyond injunction and in particular establishing liability for damages should require (1) a sufficient intervention by the internet provider and (2) a breach of an adequate duty of care by the internet provider.

A sound liability system on the EU level seems to be necessary for the integration of the digital single market. With regard to intellectual property rights, the liability system on the EU level has been harmonised already to a certain extent.

For injunction claims, Article 8(3) Copyright Directive and Article 11 3rd sentence Enforcement Directive provide for harmonised liability rules with regard to injunction claims, where internet providers are in the best position to help to stop infringements and prevent new infringements. Article 15 E-Commerce Directive and its prohibition to impose general monitoring duties upon internet providers set the outer limit to impose prevention duties upon internet providers.

With regard to other claims, in particular to damage claims, the EU law framework has not been fully developed yet. There merely exists a set of liability privileges in Articles 12 to 14 E-Commerce Directive in order to shield internet providers from liability other than injunction claims. This set of rules, although already more than 15 years old, seems fit for the future and does not have to be changed.⁷⁷ What is missing, however, is a sound system of rules to establish liability on the EU level (beyond injunction claims). So far, liability rules for internet providers are dominated by national law secondary liability rules, which are not harmonised on the EU level. It is therefore desirable to introduce liability rules on the EU level, in particular for damages, for internet providers in order to create a level playing field on the digital single market.

When developing such EU liability rules for internet providers the following should be observed.

The rules should have a harmonised interface with Article 12 to 15 E-Commerce Directives. They should be flexible enough to take into account the nature of the business model, in particular the benefits and the dangers resulting from it and are open to adapt to new emerging business models. Furthermore, the rules need to motivate the providers to act with responsibility as to clear infringements and should be open enough to produce "just" results on a case-by-case basis. Generally speaking, a sufficient flexibility for the aforementioned tasks can be achieved through a model of duties of care, which is designed according to the aforementioned factors, but could also take into account other factors when weighing up all interests involved. Such a flexible system is already known in European law from injunction claims pursuant Article 8(3) Copyright Directive and Article 11 3rd sentence Enforcement Directive.⁷⁸

⁷⁷ See above No. 2.

⁷⁸ See CJEU of 12 July 2011, C-324/09 para. 135 et seq. - *L'Oréal/eBay*; for access providers CJEU 27 March 2014 C-314/12 para. 46 - *UPC Telekabel Wien*. See also above no. 3.1.

Accordingly, the proposal is to introduce such a system of duties of care also for EU liability rules beyond injunction claims.

However, such EU liability rules would provide liability beyond injunction claims, there needs to be a further criterion differentiating them from injunction claims. The proposal is to pick up the CJEU case law in the linking cases *GS Media/Sanoma*, *Filmspeler* and *Ziggo/Brein*⁷⁹ and require a sufficient intervention by the internet provider in order to be liable beyond injunction in particular for damages. Such intervention could justify a more extensive liability in particular for damages, as the internet provider leaves its role of a passive neutral provider, merely providing technical facilities. If interpreted parallel with the “active role”, which excludes the liability privileges in particular of Article 14 E-Commerce Directive, a sound system of liability for internet providers beyond injunction could be created.

The new EU liability rules could also provide for a satisfactory solution for another category of problematic providers, namely the category of the non-sufficiently collaborative hosting providers, running a dangerous business model so fostering infringement by its users. Setting up dangerous business models, fostering infringements, could be seen as a sufficient intervention in order to make such providers liable for damages where they do not comply with their (increased) duties of care. This would also match the CJEU interpretation of Article 14 E-Commerce Directive, because hosting providers, which have been aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality in question and which do not prevent the infringement from happening, cannot rely on the liability privilege of Article 14 E-Commerce Directive.⁸⁰

In conclusion, the aforementioned liability of internet providers for damages would typically be seen as a form of secondary liability. Nevertheless, the CJEU is already starting to develop such an EU liability rule within the harmonised field of primary liability.⁸¹ The further development in Luxembourg at the CJEU may be waited for. Or the legislator can also take the initiative, but such legislative initiative should go in the same direction as the CJEU: EU rules establishing liability beyond injunction and in particular establishing liability for damages, should require (1) a sufficient intervention by the internet provider and (2) a breach of an adequate duty of care by the internet provider.

⁷⁹ See above no. 3. 4.

⁸⁰ CJEU of July 12, 2011, C-324/09 para. 120 – *L'Oréal/eBay*.

⁸¹ See above no. 3.4.

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