

## Civil law responsibility for links

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### Simultaneously a comment on the decision of the Hamburg Regional Court dated 12.5.1998<sup>[1]</sup>

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*This article takes a recent decision on the responsibility for infringements of personality rights in the Internet as the starting point for a contribution to the theoretical classification and construction of the new German responsibility legislation for the online sector in Sec. 5 of the Teleservices Act (TDG) and Sec. 5 of the Interstate Convention on Media Services (MDStV), using liability for links as an example. The questions of construction and classification raised by these regulations are at present largely uncertain, and the courts are hesitant in applying the new legislation. This contribution assembles current opinion concerning its application to the particularly disputed issue of responsibility for links, develops a solution approach that applies the general principles of the construction of Sec. 5 of the TDG and Sec. 5 of the MDStV to the problem of links, and in this connection compares the German model with the future US regulation as contained in the draft Digital Millennium Copyright Act of 1998.*

#### I. Introduction

As far as can be seen, the decision of the Hamburg Regional Court is the first decision by a German court to deal with the civil law liability for links. The question of the liability for links is a cause of conflict between fundamentally opposing positions. According to one view, links are merely neutral references to the opinion of a third party, and represent a contribution to the freedom of speech. Another point of view argues that the link to an unlawful content, by participating in the dissemination of such content, represents a not insignificant contribution to the breach of the law by a third party. This controversy on links by no means only concerns infringements of personality rights in the Internet. The question of civil law (co-)responsibility, which allows the injured party claims for injunction, abatement and damages, affects other aspects of tortious and quasi-tortious liability, in particular liability for breaches of copyright on the Internet, to a similar extent and in the same way.

#### II. Facts of the case and decision

The case decided by the Hamburg Regional Court concerned an alleged infringement of the plaintiff's personality rights by a satire that an Internet magazine had made available on the Internet.<sup>[2]</sup> The plaintiff decided to institute proceedings against the defendant, who was resident in Germany, and who had placed a link on his home page to the satire concerning the plaintiff.<sup>[3]</sup> In response to the plaintiff's warning notice for breach of personality rights, the defendant issued a declaration of discontinuance and removed the link, but refused to recognise an obligation to pay damages, with the consequence that the plaintiff lodged a principle action for damages at the Hamburg Regional Court.

The Hamburg Regional Court upheld the action. It held that the claim for damages was based on Sec. 823 Para. 1, Sec. 823 Para. 2 of the Civil Code in conjunction with Sec. 186 of the Criminal Code, and Sec. 824 of the Civil Code. In its reasons, it held, without further details, that the allegations about the plaintiff on the linked Internet page were unlawful both as an allegation of facts and as an expression of opinion,

since even taking into account the freedom of opinion protected by Art. 5 of the Federal Constitution, they were insulting and defamatory. The fact that the defendant had included a link to these pages in his home page meant that he had adopted these allegations as his own. In reliance on the Federal Supreme Court's case law on the liability of the media for the dissemination of allegations infringing personality rights, the Regional Court justified this conclusion on the grounds that the defendant had neither sufficiently distanced himself from the allegations on the linked page nor could he rely on the claim that he only opened up a so-called market of opinions. For the reference to the specific author's own responsibility did not represent a distancing from his allegations, and the assumption of a market of opinions was in conflict with the fact that the defendant had only prepared a list of derogatory articles about the plaintiff and had not been interested in presenting assertions concerning a matter affecting the general public in as comprehensive a manner as possible and going into depth in all possible directions so as to assist the determination of the truth.

Leaving aside the fact that the reasons for the decision completely ignore the differentiated and fundamentally favourable attitude to satirical statements as required by the established case law of the Federal Constitutional Court and the Federal Supreme Court,<sup>[4]</sup> the decision will be of increased interest and, at least in its justification, encounter criticism because in the result it upholds the referring person's co-responsibility for unlawful contents referred to by means of a hyperlink on a WWW page in the Internet, but makes no mention whatsoever of Secs. 5 of the TDG and the MDStV. On the contrary, the court solved the question by applying the Federal Supreme Court's case law on the responsibility of the media for the dissemination of third-party statements infringing personality rights to the maintenance of links in the WWW. Before the entry into effect of the TDG and the MDStV, such an approach may have been indeed possible,<sup>[5]</sup> but the legal situation on this point has changed. Thus the decision concerns the fundamental problem of links in the Internet above and beyond the case actually decided.

### **III. Liability for links pursuant to Sec. 5 of the TDG and Sec. 5 of the MDStV**

#### **1. General**

The Regional Court rightly took as its starting point the view that the maintenance of a link is a (joint) dissemination of the contents available in the sense of a pertinent actus reus of the right of free expression, and is an act that is as a matter of principle capable of infringing general personality rights as "other rights" within the meaning of Sec. 823 Para. 1 of the Civil Code. For in the majority of cases contents are called up by the individual user not directly by entering the URL of the storage location in the browser but by clicking on links. Thus, in the light of the socio-typical use of this media, the creation of an indirect access possibility by maintaining a link appears to be just as typical an act of dissemination as the provision for direct access on a server.<sup>[6]</sup>

For the rest, however, the responsibility of the party providing the link is to be determined by application of Sec. 5 TDG and Sec. 5 of the MDStV, as is always the case for the determination of responsibility for contents transmitted in telecommunications and media services. For these provisions regulate in general terms the circumstances under which providers of services and suppliers are "responsible" for their own and third-party contents. The term "responsible" was deliberately chosen instead of the terms "punishable" or "liable", which are specific to their own fields of law, and according to the wording covers every kind of responsibility, whether criminal liability or civil law liability with its legal consequences of liability to damages, injunction and abatement in all aspects of civil liability law; thus it covers liability for contents that infringe personality rights as well as liability for contents infringing copyright or trademark rights, or for anti-competitive contents. The purpose of the Acts, namely to eliminate existing legal uncertainties in this field, also necessarily requires a comprehensive application of one of the two identical provisions, and allows no scope for the determination of responsibility according to "conventional rules", which continue to be the topic of precisely the dispute that caused the

legislature to regulate the issue expressly by statute.<sup>[7]</sup> The Hamburg Regional Court, however, apparently overlooked these regulations.<sup>[8]</sup>

## **2. Application of Sec. 5 of the TDG and Sec. 5 of the MDStV to civil law liability**

If Sec. 5 of the TDG and Sec. 5 of the MDStV now determine who bears (co-) responsibility for unlawful contents in the Internet, it is also these provisions that determine the responsibility for links to such contents. In order to achieve the practical implementation of these regulations, it is then necessary to classify the new responsibility rules dogmatically within the existing *acti rei* for liability, which, subject to the new regulations, now also apply to links.

### *a) Classification of links*

There is scarcely any serious doubt, and the literature is at least also unanimous, that the maintenance of links in any event falls as a whole within either Sec. 5 of the TDG or Sec. 5 of the MDStV. A literal interpretation and an unprejudiced point of view would indicate that the provider of access is the access provider while the making available of third-party contents for use is a feature of the host service provider who operates a server and makes available memory space for third-party contents. However, in this interpretation, links would not fall within the scope of application of Sec. 5 of the TDG or Sec. 5 of the MDStV at all. Co-responsibility of the linking party for the contents linked could only, as previously, result under the conditions for aiding and abetting the unlawful action of the provider of the linked page pursuant to Sec. 830 Para. 2 of the Civil Code.<sup>[9]</sup> However, on the basis of the aim of the TDG and the MDStV to achieve comprehensive<sup>[10]</sup> legal clarity for the responsibility for one's own and third-party contents, it is in Sec. 5 of the TDG or of the MDStV that the answers must be sought. For on the basis of the previous law, responsibility would have been possible, even if the conditions for aiding and abetting were not met, within the framework of the liability of the infringing party or as an indirect infringement of rights. The preconditions for this basis for liability are now specified clearly in Sec. 5 of the TDG and Sec. 5 of the MDStV with respect to links. Consequently, however, either the concept of providing access or the concept of the provision of contents for use must be construed more broadly beyond the direct wording.<sup>[11]</sup>

### *b) Application of Sec. 5 of the TDG or Sec. 5 of the MDStV*

Whether the maintenance of a link is subject to the application of Sec. 5 of the TDG or Sec. 5 of the MDStV depends on whether there is a teleservice within the meaning of Sec. 2 of the TDG or a media service within the meaning of Sec. 2 of the MDStV.<sup>[12]</sup> This first of all raises the question whether the distinction is to be based on the content of which the link itself is a part, or the content to which the link refers. It is only then that the classification of the relevant content can be clarified. However, it is never necessary to clarify this issue with respect to liability pursuant to Sec. 5 of the TDG and Sec. 5 of the MDStV, since both provisions, with the exception of the insignificant difference between "service provider" and "provider" are word-for-word identical. The fact that Sec. 5 of the MDStV lacks a paragraph corresponding with Sec. 5 Para. 4 of the TDG is due to an editorial oversight<sup>[13]</sup> and can be remedied by analogous application of Sec. 5 Para. 4 of the TDG to media services. For it is clear from the historical background that the Federal and State legislatures wished to ensure the same regulation of responsibility in the matter.<sup>[14]</sup>

### *c) Classification of Sec. 5 of the TDG and of the MDStV within the existing liability law*

The new responsibility rules are not to be reviewed by means of a so-called two-stage examination outside the relevant substantive *acti reus* of liability.<sup>[15]</sup> For this would lead to the coexistence of new positive law responsibility rules and the previously unwritten criteria of responsibility, despite the content-related overlap of the accountability criteria to be examined, and thus would only transfer the

classification problem instead of solving it.<sup>[16]</sup> Nor is a construction of the concept of intent sufficient in the light of Sec. 5 of the TDG or MDStV,<sup>[17]</sup> which is completely unsuitable for strict liability claims. On the contrary, Sec. 5 of the TDG and Sec. 5 of the MDStV have an effect on the existing *acti rei* of liability at the level of the *actus reus* itself. In the case of *acti rei* such as Sec. 823 Para. 1 of the Civil Code or Sec. 97 Para. 1 of the Copyright Act, as well as, by its very nature, the so-called competition law and trademark law liability for infringement in analogy with Sec. 1004 of the Civil Code, the cost of which is justified by the (joint) causing of an unlawful result, these provisions must be regarded as the conclusive, positive law regulation of the “valuing imputation of the result” test supplementing the *conditio sine qua non* formula. As such they replace the unwritten principles for the establishment and simultaneous limitation of the liability of an infringing party in the field of prohibitory claims as previously applied by case law and ultimately resulting in the imputation of the unlawful result under the criterion of the general duties of care, and the application of the same principles within the framework of Sec. 823 Para. 1 of the Civil Code. In the case of *acti rei* based on “dissemination” (i.e. of libellous content), they reduce, likewise on the level of the *actus reus* and ultimately in the same manner, the concept of “dissemination” to a more narrow “dissemination giving rise to responsibility”.

### **3. Classification of links within Sec. 5 of the TDG and of the MDStV**

Within the framework of construction, the responsibility of a person providing a link to a page with unlawful contents raises the question whether such person makes available the linked contents as his own contents, whether he makes them available for use as third-party contents or whether he merely mediates access to their use.<sup>[18]</sup> This must also be considered against the background of the legal consequences. Responsibility pursuant to Sec. 5 Para. 1 of the TDG or MDStV always applies to the making available of one’s own contents for use, as a matter of principle never to provision of access to third-party contents pursuant to Sec. 5 Para. 3 of the TDG or MDStV, and to the making available of third-party contents for use pursuant to Sec. 5 Para. 2 of the TDG or MDStV only if the provider knows the content and it is technically feasible and he can reasonably be expected to prevent the use of this content. In this, “responsibility” for various forms of distribution of one’s own and third-party contents in Sec. 5 Paras. 1 to 3 of the TDG or the MDStV means in each case both intent-dependent and strict liability legal responsibility. Sec. 5 Para. 4 of the TDG is to be read as an exception to the preceding Sec. 5 Para. 3 of the Act, restricting the latter provision’s complete exemption from liability for the provider of access with respect to specific claims defined on the basis of the legal consequences. The view that the first two paragraphs only concern liability for damages and that rights to prohibitory claims are only to be determined on the basis of the fourth paragraph, a view that is obviously based on an ambiguous wording in the Explanatory Memorandum to the official draft, is not supported in the higher-priority wording and the systematic analysis of the legislative text itself. In particular, the liability for an injunction and abatement as legal (co-)liability is also a form of being “responsible”. In addition, according to the systematic analysis, which is also expressed in the choice of wording, three paragraphs regulate three fundamental levels of (joint) responsibility, graded according to the different relationship between the provider and the contents (own – third-party) and according to the different intensity of his participation in the dissemination of the contents (making available – provision of access), while the following fourth paragraph can only be interpreted as an exception to the principle set out in the previous third paragraph.

The classification of links into the various categories of forms of participation in the dissemination of contents within Sec. 5 of the TDG or of the MDStV is currently disputed, and all possible alternatives are argued.

#### *a) Links as the provision of access to third-party contents*

In some cases, links are globally regarded as providing access within the meaning of Sec. 5 Para. 3 of the TDG or of the MDStV.<sup>[19]</sup> The reasoning is that “providing access” should not be used synonymously access providing, but that the decisive factor should be the making available according to the wording of

the law;[20] the distinction must be made on the basis of the individual case and the specific contents, [21] whatever this might mean. However, a person who makes contents available for use also makes these contents accessible. If this were to be the basis, there would be no scope of application whatsoever for the rules concerning the provision for use and the distinction in the law would appear pointless. It is not apparent to what extent this would change anything “on the basis of the individual case and the specific contents”. [22]

Rightly, the term providing access only covers so-called access providing or comparable telecommunications services.[23] According to the justifications of the two regulations, an access provider is a person who merely opens the way to the contents without being able to exercise any influence over them. He should not be treated differently than a supplier of telecommunications services.[24] This is meant in the technical sense. Common to both is the fact that they provide a technical service with unspecified contents. They “send, transmit, mediate, receive, regulate and control”[25] the electro-magnetic signals that are identified by the user and by the provider providing contents for use as messages in the form of characters, language, images or sound. This identification plays no role in their services, they merely transmit signals.[26] Moreover, the fact that according to the system of the law there is no provision of access to one’s own contents can only be understood from the point of view represented here. For if the providing access only covers access providing but not other forms of dissemination (such as by maintaining a link), there is no reason to tie responsibility for content to the provision of access, since the responsibility will always result from Sec. 5 Para. 1 of the TDG or of the MDStV, because these providers simultaneously, such as by means of a link, also make available their own content for use. Moreover, from a systematic point of view a purely technical approach is also supported by the highly technical nature of the inclusion of proxy-cache intermediate storage systems within the scope of access mediation in Sec. 5 Para. 3 second sentence[27] by means of a fiction[28], and hence the systematic argument. Finally, in particular there is no reason in the statutory purpose why someone who makes a major contribution to the dissemination of unlawful contents by, for instance, maintaining a link in a prominent position, should be excluded from liability for damages as a matter of principle even if he is guilty of gross negligence or even intent, and even if he knows these contents and it would be easily and reasonably feasible for him to remove this link. Under these conditions, such behaviour is hardly likely to be regarded as socially acceptable and worthy of protection. For unlike the provider of telecommunications services, a person maintaining a link can indeed make a selection on the basis of contents with respect to the link.[29] In addition, conclusions based on the location of the storage ignore an elementary feature of the networked online world. The use or the making useable of contents no longer depends on where the original is physically stored. From the point of view of the dissemination of (lawful or unlawful) contents, the link to a third-party server is functionally absolutely equivalent to a link to a storage location on one’s own server.[30] Consequently, classification of links as providing access can thus be eliminated.

#### *b) Links as the making available of one’s own contents*

The other extreme is to be found in the recent opinion that linking is always the provision of the linked contents for use as one’s own contents within the meaning of Sec. 5 Para. 1 of the TDG or of the MDStV.[31] This view is argued on the grounds that the link is not the product of accident but the link-providing party includes it deliberately and specifically in the design of his WWW page, and thus adopts the contents behind the link as his own “in terms of content or technically”. It is no longer a question of the mere technical making available of a third party’s contents, and instead a direct and intended relationship in the sense of an own performance is established between one’s own performance and the originally third-party contents.

It is true that this applies to the extent that linking involves the making available of contents for use, but goes too far and is also hardly compatible with the purpose and objective of the Act by globally assuming that the linked contents are adopted merely by placing the link. The arguments used can only show that

the reference as such is made under the link-maker's own responsibility or as his "own performance", but cannot show a relationship to the linked contents in such a way that these are the equivalent of contents designed by the link-maker. In particular, this could be used to subject almost all forms of participation in the dissemination of third-party contents in the Internet to Sec. 5 Para. 1 of the TDG or MDStV, with the effect that there would hardly remain any scope of application for Sec. 5 Para. 2 of the TDG or of the MDStV. Moreover, this opinion is also contradictory to the extent that, despite the application of Sec. 5 Para. 1 of the TDG or MDStV, which leads to the application of the "general laws", on the question of liability as perpetrator or only as accessory it distinguishes between actually third-party content and only originally third-party content which, through the context in which the link is located, becomes the link-maker's own contents. This distinction, and here the law is clear, must, however, be made when deciding to classify under Sec. 5 Para. 1 or Sec. 5 Para. 2 of the TDG or the MDStV.

*c) Links as providing access to third-party contents or as the making available of own contents*

Others prefer to differentiate according to the character of the specific link. If it is the "technical" short cut to other information contents, a responsibility pursuant to Sec. 5 Para. 3 of the TDG or MDStV will not apply. If the link is located within a context that clearly demonstrates that the link-providing party adopts the contents underlying the link and embeds it in his contents, his responsibility will be determined according to Sec. 5 Para. 1 of the TDG or the MDStV.<sup>[32]</sup> It is not expressly stated when a link is to be interpreted as the making available of third-party contents pursuant to Sec. 5 Para. 2 of the TDG or of the MDStV. By analogy, this would have to be the case if the link does more than "merely" point out the shortest way but where nevertheless the link-providing party does not adopt the contents underlying the link as his own.

However, even this does not permit an unambiguous distinction. For a link is always the "short cut". If it does more than "merely" this, the problem can only partly be solved by holding that the person placing the link and adopting the underlying contents as his own falls within Sec. 5 Para. 1 of the TDG or the MDStV. It still remains uncertain how the case should be judged where the link-placing party does not adopt these contents. Does the link then always fall within Sec. 5 Para. 3 of the TDG or the MDStV as providing access, or can placing a link be a case of the making available of third-party contents pursuant to Sec. 5 Para. 2 of the TDG or the MDStV? It is true that according to the wording "provide access for use" it is also possible to subsume a link within Sec. 5 Para. 3 of the TDG or of the MDStV. However, a person who provides or maintains a link to third-party contents is in a different situation with respect to these contents than the provider of purely telecommunications services (see above). As a matter of principle, he can at any time, like any other user, follow up this link and evaluate the specific third-party contents.<sup>[33]</sup> The mere fact that, particularly in the case of global branching, e.g. to the top-level home page of another server, the number of such contents is too large to make regular verification reasonable, does not require a classification as providing access.<sup>[34]</sup> For, also according to the Explanatory Memorandum of the draft<sup>[35]</sup>, it is precisely this that should apply to the making available of third-party contents on one's own server. However, if the privilege already covers the distribution of third-party contents if and although they are stored within the sphere of influence of the supplier, it will apply all the more so to the use of a link to disseminate third-party contents stored outside the scope of influence of the provider. However, if this form of dissemination is already covered by Sec. 5 Para. 2 of the TDG or of the MDStV, there is no need to force it artificially into the scope of application of Sec. 5 Para. 3 of the TDG or the MDStV. Sec. 5 Para. 2 of these regulations satisfies the state of interests by subjecting responsibility to a positive knowledge of the contents and in particular to the reasonableness of the prevention of the use.

*d) Links as the making available as one's own or third-party contents*

The maintenance of links is rightly always to be regarded as the making available of contents for use.<sup>[36]</sup> As a result, claims for both an injunction and abatement can be used to obtain the removal of the link and the refraining from the reference by link in the future.

A distinction must still be made for links between the linked content as the link-providing party's own contents and as third-party contents, according to the general rules applicable to the construction of Sec. 5 of the TDG and Sec. 5 of the MDStV.<sup>[37]</sup> The link provider's own contents can be assumed if he had a decisive influence on the contentual configuration. This is equivalent to the situation where it follows from objective facts that the provider of the link himself had no influence on the contentual configuration, but does have a specific commercial or other interest in the dissemination of the originally third-party contents in precisely the form in question. For in such a case he has adopted the third-party contents as his own. Since the provider of the link selects the object of his link but as a rule has no influence on the contentual configuration of the linked page, in the normal case the linked contents remain third-party contents for him. Of course, the situation is somewhat different if the provider of the link has an influence on the configuration of the linked contents in terms of content. For then he would have the decisive influence on the contentual configuration with the result that according to the general rules this would become his own content. Simply shifting the contents and then providing a link does not therefore permit the evasion of the responsibility for one's own contents. Own contents, or contents adopted as one's own also occur where the provider of the link (also) has a particular interest of his own in the contentual configuration of the linked page in question, which can be manifested in the specific configuration of the link. This applies for instance to so-called deep links.<sup>[38]</sup> In these, the provider of the link replaces his own contentual configuration of his own page by adopting the third-party contentual configuration in such a way that for the user it is not distinguished from the provider's own configuration. In this way he demonstrates a specific interest in the specific contentual configuration of the third-party page, and not merely in the reference to it.

In the case in question, the court ought to have examined whether there were objective circumstances to persuade it that the defendant himself also had a certain interest of his own in the dissemination of the statements on the linked page concerning the plaintiff, the defamatory nature of which and the infringement of personality rights by which is assumed here. Conclusions on this issue could have been drawn from the dispute concerning the domain "emergency.de" that preceded the placing of the link, the defendant's own critical statements about the plaintiff on his own home page, or from a possible list of links all referring to unlawful disparagements of the plaintiff. If the court had upheld such an adoption, the defendant would have had to be regarded as co-responsible for the linked contents pursuant to Sec. 5 Para. 1 of the TDG or of the MDStV. Consequently, the court would have had to hold that the defendant's actions amounted to the actus reus of the dissemination and the infringement of general personality rights as "other rights" within the meaning of Sec. 823 of the Civil Code, and would then have had to discuss the question of fault.

If, on the other hand, it had denied such adoption, it could only have regarded the defendant as co-responsible within the meaning of Sec. 5 Para. 2 of the TDG if he had known of the contents of the linked page and if it had been technically feasible and reasonable for him to prevent the use of this content.

### **3. Construction of Sec. 5 Para. 2 of the TDG and of the MDStV**

If a link falls within Sec. 5 Para. 2 of the TDG or of the MDStV, the provider of the link is only co-responsible for the linked contents if he knows of these contents and if it is technically feasible and reasonable for him to prevent their use.

#### *a) Knowledge of the contents*

The question of the knowledge of the contents of the linked page is again a question of fact. The wording leaves no doubt that this can only be the purely actual and specific knowledge of the manner of the contentual configuration of the linked page and that there is no requirement of an awareness of the unlawfulness for co-responsibility pursuant to Sec. 5 Para. 2 of the TDG or the MDStV.<sup>[39]</sup>

*b) Technical feasibility and reasonableness of the prevention of use*

Finally co-responsibility pursuant to Sec. 5 Para. 2 of the TDG or of the MDStV is also subject to the condition that it is technically feasible and reasonable for the provider who maintains the link to prevent the use of the third-party content known to him and linked by using his link. Here it should first be determined whether prevention is at all feasible and, if so, the effort it requires. Then a comprehensive weighing of interests based on the role of the provider in the network must determine whether this effort is reasonable for him in the light of the protectable interests of the injured party, his own protectable interests and any interests of the general public affected, and taking into consideration the opportunities for rescuing the infringed object of legal protection.<sup>[40]</sup> The effort on the part of the provider to be taken into account must also and in particular include the effort that he must apply in order to determine, assuming his knowledge of the third-party contents, whether these contents are unlawful or legally unobjectionable. It is true that this is not expressly set out in the law but it is a necessary consequence of the reasons for the law that there can of course be no protectable interest in preventing the use within the meaning of Sec. 5 Para. 2 of the TDG or of the MDStV and blocking within the meaning of Sec. 5 Para. 4 of the TDG if the disseminated contents are lawful. On the other hand, it would not be justifiable to determine the issue on the purely factual effort, since in many cases, as in the case of the problem of links, the actual technical prevention of use is not a problem once the provider has recognised the unlawfulness of the contents. However, this requires legal considerations that as a rule are not within the competence of a layman, which would then require the employment of specially trained personnel or the consultation of attorneys at law. It is here that the main burden often falls on the provider and makes the prevention of use and ultimately co-responsibility unreasonable.

In the case of links, the provider of the link is technically able to prevent the third-party content being used – at least via the link of the party in question, the sole means at issue – by removing the link from the source code of his WWW page. Like any change to the source code of a WWW page, this can be carried out with a minimum of technical effort practically as “actus contrarius”<sup>[41]</sup> using the same HTML editor as the one he uses to create and update his pages.

Thus the effort to remove the link is minimum. Nor do conventional WWW pages, unlike search machines and directories, contain thousands of links, with the result that, in conjunction with the necessary knowledge and the fact that as a rule only a fraction of the linked pages will give rise to objections, a legal review of the pages objected to appears indeed feasible.

However, only a rough check will be deemed to be reasonable with respect to the scope of the legal review of the linked contents, as is the case for the competition law liability of the electronic press in the advertising sector.<sup>[42]</sup> For linking is fundamentally a socially desirable behaviour, a world-wide connecting of information that has created one of the basic features of the Internet. No-one should be afraid of placing links for fear of global warning notices if he as a layman has no cause for doubting the honesty of the linked contents. In defence of the link provider, account should also be taken of the fact that he does not receive any remuneration for maintaining the link, and particular that he cannot recover his losses by means of recourse to the person responsible for the linked contents pursuant to Sec. 5 Para. 1 of the TDG or of the MDStV. It is this that distinguishes him from the host service provider, who mostly only provides his services for payment and who above all has a contractual right of recourse against his client or can have such included in his standard terms of business if a claim is made against him by third parties as a result of his client’s contents. This applies clearly and with even stricter requirements of reasonableness to links in WWW directories and to the contents generated on the results pages of search machines. For these tools that store thousands or millions of links or link information in their databases are of essential importance for every web user for finding information and contents – the overwhelming majority of which is entirely legal. It is therefore in the general interest not to make their activity excessively difficult through the risk of liability and the obligations to check that would necessarily result. On the other hand, in extreme cases, for instance if measures are indeed legally possible against both the

“actual” person responsible within the meaning of Sec. 5 Para. 1 of the TDG or of the MDStV and against his host service provider, but are practically doomed to failure, it must be possible by means of the threat of legal penalties to demand that these privileged operators remove the link from their database. For this is then the only remaining, and in the light of the key position of these providers the only effective means of stemming the dissemination of unlawful contents in the Net. The result is that as a last resort, an action for injunction and abatement may also lie against directories and search machines combined with a restrictive finding of their co-responsibility within the meaning of Sec. 5 of the TDG or of the MDStV. On the other hand, claims for damages directed against them will as a rule fail on the question of fault, which must still be examined outside Sec. 5 of the TDG or of the MDStV. Responsibility here does not necessarily indicate fault, since the framework of the accountability for the actus reus requires a more general and at the same time stricter concept of reasonableness than that within the framework of the concept of negligence.<sup>[43]</sup>

If only a rough legal review is reasonable, and if the infringement of the law is not obvious to the layman, the claimant must submit to the provider information and proof to show that the linked contents are unlawful, of such accuracy, completeness and evidential force that the provider can determine the unlawfulness without carrying out his own checks on the facts or having to clarify difficult legal issues. This must be considered in particular if, as regularly the case in copyright and trademark infringements, the person making the decision must know whether and if so which license relationships exist. In the case of infringements of personality rights, the question of reasonableness must include, in continuation of the value judgements hitherto worked out in case law, whether the link provider only creates a so-called market of opinions through his link. If this is the case, it follows that the removal of the link is unreasonable. The removal of the link is also unreasonable if the injured party maliciously fails to take measures against the direct provider pursuant to Sec. 5 Para. 1 of the TDG or of the MDStV as the “actual” infringing party, although this would easily be possible and with prospects of success.

In the case decided by the Hamburg Regional Court, judicial measures against the originator of the satirical magazine itself or its host service provider were hardly possible with any prospects of success. There is no need to answer here whether the satire infringed or infringes the plaintiff’s rights in a manner obvious to a layman. The facts set out in the decision lack appropriate findings that could support this assumption. If this is not the case, the plaintiff would, on the basis of the above, have had to demonstrate the infringement to the defendant providing the link. There is no lack of literature and case law that is also understandable to the layman and on which the injured party could have relied. The injured party who wishes to be on the safe side is therefore advised to formulate his warnings and other objections in such a way that the alleged infringement of his rights is already clear at this point to a provider wishing to stay within the law. If the construction of Sec. 5 of the TDG or of the MDStV also achieves this, it would be a contribution against dubious warning methods and in favour of a co-operative approach in the prevention of unlawful contents in the Internet.

## **IV. Digital Millennium Copyright Act of 1998**

### **1. General**

Finally, it is worth comparing the liability provisions of Sec. 5 of the TDG and Sec. 5 of the MDStV and the many construction questions particularly with respect to the problem of hyperlinks, with American law. In America, the adoption of the Digital Millennium Copyright Act of 1998 (DMCA) represents a comprehensive reform of copyright law that is about to complete its passage through the legislature and, alongside other regulations concerning copyright infringements in the Internet, also includes specific provisions for copyright law liability for hyperlinks.<sup>[44]</sup> The bill, whose object is to “transport American copyright law into the digital age” regulates four aspects. In Part I, the WIPO Copyright Treaty and the WIPO Performance and Phonograms Treaty are adopted into American law. Part II contains

comprehensive restrictions on the copyright law liability of online and Internet service providers. Parts III and IV cover the regulation of restrictions for computer programs and contain provisions on ephemeral interim storage, distance teaching, digital libraries and archives.

## **2. Liability for links according to the DMCA**

Like the TDG and the MDStV, the DMCA also provides liability law relief for the function exercised by the Internet participant, and differentiates between 4 online services as possible *acti rei* of an infringement of copyright: the mere provision of access (“transmitting, routing or providing connections”), host service providing (“information stored on service providers”), system caching and the provision of information location tools.

### *a) Liability for damages*

The restrictions on liability concerning the establishment and maintenance of hyperlinks are contained in Sec. 512 (d) of the DMCA, which reduces the risks of liability for providers of so-called information location tools.[\[45\]](#)

The regulation of “liability for monetary relief”, i.e. essentially liability for damages, which largely lays down the same liability provisions as Sec. 512 (c) of the DMCA for the provision of information by the host service provider, covers all “service providers” that use hyperlinks or other reference techniques to link the user with an online service. According to the legal definition in Sec. 512 (j) of the DMCA, which regulates the personal scope of application of Sec. 512 of the Act generally, i.e. for all the services addressed in the individual subsections, the concept of service provider covers all providers of online services, network access and the operators of the corresponding facilities. According to the Explanatory Memorandum of the Act, these include not only access providers but all providers of e-mail, chat rooms or web page hosting, and, with respect to the problem of the hyperlink, in particular also providers of search machines and Internet directories.[\[46\]](#)

Of note in the US regulation is that, as follows from the restrictive features of the regulation, a complete exemption from liability as applies to the access provider according to Sec. 512 (a) of the Act is not provided for the provider making reference by means of a hyperlink. His exemption from liability depends on compliance with three conditions.

- No knowledge of unlawfulness

According to Sec. 512 (d) (1) of the Act, the provider referring by link to material in breach of copyright is only in a liability law “safe harbour”, to quote the Explanatory Memorandum, if he does not have actual knowledge of the unlawfulness of the material and does not close his eyes to the knowledge of the unlawfulness although the latter is apparent in the circumstances. In this context the Explanatory Memorandum speaks of a so-called “red flag test”. A liability privilege to the benefit of the provider linking by means of a hyperlink is only to be refused if the latter “turned a blind eye to “red flags” of obvious infringement”. As mentioned in the Explanatory Memorandum, such a case is to be assumed, for instance, if the copyright holder can prove that the website referred to by the link was, at the time of the setting of the link, recognisably a “pirate page”, providing music, software or books for access without authorisation. The objective of the regulation was primarily to subject the publishers of online journals and magazines and providers of Internet catalogues, who, in the light of the large number of links these maintain and the huge importance of the provision of such information location tools for the operation of the Internet, should only be subject to a very restricted obligation to check, to liability only in such cases where the infringements of copyright are obvious.

- No direct or indirect commercial benefit

Sec. 512 (d) (2) of the Act contains a restriction on liability privilege necessary for reasons of value judgement. The liability privilege is also denied to the provider even if he neither actively knows of the infringement of copyright nor closes his eyes to such knowledge despite its obviousness, if he himself profits directly from the activities infringing copyright and at the same time had the right and ability to control such activity. The regulation is based on the principle that where the provider derives either direct or indirect commercial benefit from an infringement of copyright and at the same time can prevent such, there is no occasion for a restriction of liability.

- Removal of the link immediately upon acquiring knowledge

The third restriction on the liability privilege, to some extent the core of the entire regulation of liability, is without parallel in German law and appears highly innovatory. Pursuant to Sec. 512 (d) (3) of the Act, the provider only enjoys the liability privilege if he removes the link immediately after acquiring notification of the infringement of copyright. However, this duty only applies if the notification satisfies the formal and content requirements of Sec. 512 (c) (3).<sup>[47]</sup> The meaning and purpose of this “notice and take down” procedure is on the one hand to make available to the injured copyright holder a fast-acting instrument to prevent the use of the infringing material in the global networks, but at the same time avoiding providers of so-called information location tools being obliged to remove the corresponding links or references on the basis of unsubstantiated or insufficiently substantiated or even intentionally wrong allegations of infringements of copyright, to the detriment of both the copyright holders and the providers and users.<sup>[48]</sup>

In order to satisfy the requirements made of the notification by Sec. 512 (c) (3) in conjunction with Sec. 512 (d) (3) of the DMCA, the injured copyright holder or a representative empowered by him must notify the provider whose link refers to the allegedly copyright-infringing material of the infringement of the copyright in writing or by means of an electronic message bearing a digital signature.<sup>[49]</sup>

If the notification meets the requirements and if the liability privilege already fails to apply on the basis of active knowledge of the copyright infringement, the “red flag test” or the “financial benefit” criteria in Sec. 512 (d) (3), the provider has a choice. If he decides to remove the link immediately, he enjoys the liability privilege with the consequence that he is not liable for damages. If, despite notification, he decides to maintain the link, the liability will be based on general liability principles, and from this time on he acts at his own full risk if he maintains the link.

#### *b) Injunctive relief*

If the provider of the link is liable for monetary relief according to the criteria of Sec. 512 (d), there are no restrictions provided in the DMCA on injunctive relief, i.e. judicial cease-and-desist orders and abatement orders. Otherwise<sup>[50]</sup> the particular rules of Sec. 512 (i) apply, or, in the case of information location tools within the meaning of Sec. 512 (d), the provisions set out in Sec. 512 (i) (1) (A) and (2). In the case of links according to Sec. 512 (i) (1) (A) (iii)<sup>[51]</sup> all measures can be imposed which in the view of the court are necessary to prevent or restrict the infringement of rights at a specific online storage location; provided that the measure, compared with comparably effective measures for the same purpose, is the measure that least burdens the service provider. In its decision, the court should take into account the extent of the burden on the service provider and the extent of the damage to be expected by the injured party without such measures. Account must also be taken of whether the execution of the measure is technically feasible and effective and does not impair access to lawful material at other storage locations, and whether milder but equally effective measures are available.

### 3. Comparison of the DMCA with Sec. 5 of the TDG and of the MDStV

A comparison of the liability regulations in the DMCA with the principles of liability for hyperlinks determined by means of construction of Sec. 5 of the TDG and of the MDStV shows parallels and differences. In formal terms, the German legislature has decided in favour of a fairly unspecific general-clause type of regulation, while it is hardly possible to exceed the level of detail in the US regulation. In substantive terms, both German law and the American regulatory concept assume with respect to links that there cannot be a complete exemption from liability for the provider of hyperlinks to infringing material, while at the same time the preventive control obligations, in the light of the major importance of the linking techniques, should not be excessive and should be restricted to cases of obvious infringement of rights.

- Sec. 512 (d) (1) eliminates the cases of direct and conditional intent from the liability privilege for links where, according to German law, as already previously, even after entry into effect of Sec. 5 TDG and Sec. 5 MDStV a liability for aiding and abetting pursuant to Sec. 830 of the Civil Code in conjunction with the liability actus reus in question would apply, with the effect that no privilege applies under German law either.
- The criteria in Sec. 512 (d) (2) eliminate the cases in which, according to the definition of one's own and a third-party content argued here, there is adoption and hence unrestricted responsibility pursuant to Sec. 5 Para. 1 of the TDG or of the MDStV primarily on the grounds of a direct own interest of a commercial nature and/or a decisive influence on the contentual configuration. Here too there are parallels in terms of value judgements
- The pioneering "notice and take down" regulation in Sec. 512 (d) (3) in conjunction with Sec. 512 (c) (3) and the requirements these contain concerning effective notification, finally, express the idea that in certain cases, e.g. in the case of information location tools, efforts to prevent the use of third-party unlawful contents can only be expected if the provider is given a fair opportunity to satisfy himself of the unlawfulness of these contents. This opportunity is only provided by the communication of information and substantiation thereof in the notification required by the US regulation. The same notion is also contained in German law, where "notice of these contents" is required, and where above all the question of reasonableness examines whether the provider, with the sources of information available to him, can reasonably be expected to recognise the unlawfulness of the contents.
- The injunctive relief regulation has in common with German law that claims for damages and abatement act in parallel to the extent that the latter in any event applies if the conditions for the former are met. However, while the US regulation also contains more comprehensive and more extensive provisions for the other cases, in German law this parallel approach is only set aside in the case of Sec. 5 Para. 4 of the TDG as an exception to Sec. 5 Para. 3 of the TDG or of the MDStV.[\[52\]](#)

### V. Summary and prospects

The above discussion has shown that the application of Sec. 5 Para. 2 of the TDG or of the MDStV to determine liability for links or, in the case of the adoption of the linked contents, Sec. 5 Para. 1 of the TDG or of the MDStV, leads to results based on value judgements. Nor do these deviate from the results that followed from the application of the previously unwritten rules to Internet contents and to comparable contents in conventional sectors to such an extent that it would be possible to speak of a break with previous liability law or would justify fears that the new responsibility regulations practically deprive the injured party of any rights, with the result that it is necessary to apply all possible artifices of argumentation to achieve the unaltered continued application of previous law. On the contrary, if correctly and consistently applied, the new German responsibility rules are capable of contributing to a legal certainty (that had only been insufficiently achieved despite decades of development by case law) in

the field of responsibility for making and distributing statements in breach of personality rights, and particularly the - by no means uniform – responsibility for infringement in copyright, trademark and competition law in the conventional off-line sector. This is in particular due to the fact that for the first time the distinction, necessary on the basis of value judgements, between one's own and third-party contents and hence between the commitment of an infringement of the law oneself and causal participation in that of a third party, has been actively specified in the law. In addition, the requirement of knowledge for co-responsibility for third-party contents has put a final end to the construction of an active obligation to check in the Internet in order to establish liability for a failure to act.

These values, and, on the whole, and in any event with respect to liability for links, the results of the examination for responsibility are confirmed and shared by the US model, which requires considerably less construction. In the light of the fact that ultimately the question of responsibility for unlawful contents in the Internet extends beyond national borders and at least in principle requires uniform solutions, this is a welcome situation. Direct effects can be expected on the EU Directive currently in preparation concerning responsibility for acts in the network environment, and on the bilateral discussions between the EU and the USA on this issue. The regulatory concept of the notice and take down procedure, supplemented by liability for misrepresentation<sup>[53]</sup> and a (conditional) exemption from liability for the provider with respect to his customers in the event of a blocking or deletion of material objected to by notification<sup>[54]</sup> can indeed act as a model for the coming European law, and hence in the medium term German law within the framework of implementation. The regulatory concept, which makes sense not only for the problem of hyperlinks but also in particular for the liability of the host service provider, creates, through the prospects of a possible exemption from liability, a stimulus for the provider to remove the link immediately after acquiring notice thereof, and thus facilitates measures against infringements of the law at a speed and hence effectiveness required in particular in the Net. At the same time it also ensures that the reference techniques necessary for the effective use of the networks are not hindered by excessively strict examination obligations. This is the correct path towards a co-operative approach against unlawful contents in the Net.

However, this is no reason for waiting in Germany, but rather the persons responsible for the application of the law should now rapidly agree on a construction of Sec. 5 of the TDG and Sec. 5 of the MDStV that satisfies the requirements. Then the courts must finally take up the legislature's instruction and apply the new responsibility rules instead of seeking the results by analogous application of the unwritten rules applicable previously outside the Internet, with the result that the previous *lex incognita* becomes a *lex certa*.

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\* Thorsten Bettinger, LL. M. and Stefan Freytag are academic collaborators at the Max Planck Institute for Foreign and International Patent, Copyright and Competition Law in Munich. Thorsten Bettinger is an attorney at law in Munich. Stefan Freytag, in his thesis shortly to be published entitled “Haftung im Netz”, examined in depth the liability for copyright, trademark and copyright law infringements in the light of Sec. 15 of the TDG and Sec. 15 of the MDStV.

[1] Published in 1998 CR 565.

[2] The plaintiff and the defendant were already in litigation, the plaintiff demanding that the defendant cease using his Internet domain on the grounds of an alleged better title right.

[3] No doubt due to the fact that the Internet magazine was presented anonymously and without indication of an address for service of summons, and also because measures against the host service provider resident in the USA did not seem particularly promising.

[4] C.f. Federal Constitutional Court, 1992 NJW 2073 (2074); 1998 AFP 52 (53); c.f. also Federal Supreme Court, 1983 NJW 1194 and the Hamburg Regional Appeal Court 1994 NJW-RR 1373 (1374); for a summary see Löffler, Presserecht, 4<sup>th</sup> ed. 1997, Sec. 6 LPG Note 78c and Notes 49-51; c.f. also Federal Constitutional Court, 1992 NJW 2705; 1995 MJW 3303 (3305); Federal Supreme Court 1966 NJW 1917 (1919).

[5] C.f. Spindler, 1996 ZUM 533 et seq. and Waldenberger, 1997 ZUM 176 et seq.

[6] Similarly on the criminal law problem of links: Flechsig and Gabel, 1998 CR 351 (355).

[7] The continued existence of the doubtful issues, as encountered e.g. by Spindler, 1998 K & R 177 (179 et seq.), is typical, because he continues to argue for the continued application in certain sectors, unaffected by Sec. 5 of the TDG and Sec. 5 of the MDStV, of the rules concerning liability for infringement previously applicable.

[8] C.f. also Munich Regional Appeal Court, 1998 CR 300 with comment by Hackbarth; Frankfurt/M Regional Court, decision dated May 27, 1998 – 3/12 O 173/97. The tendencies such as the suspension order of the Federal Attorney General dated 26.11.1997, 1998 MMR 93 et seq., in particular 95, with critical comments by Hoeren are also questionable.

[9] For this it would be necessary that both the latter and the linking party are guilty of intent with respect to a tort. Since as a rule, the proof of such double intent would unreasonably disadvantage the injured party, it has always been possible within the framework of the liability of an infringing party to take into account the third party's infringement not only in the light of the conditions for aiding and abetting but also if the party claimed against has contributed causally to the act of a third party and had the de jure and de facto opportunity to prevent the infringement of the law in a reasonable manner (c.f. for instance Federal Supreme Court 1957 GRUR 352 (353); 1973 GRUR 203 (204); 1997 WRO 325 (326 and 328); 1964 GRUR 94 (96)). A similar responsibility for joint causation is now expressly regulated by Sec. 5 of the TDG and Sec. 5 of the MDStV. Liability for aiding and abetting continues to be possible in addition.

[10] For this reason a reduction of the unambiguous wording of the “contents” to statements within the meaning of press law torts is not convincing; for the contrary opinion, see Waldenberger, 1998 MMR 128 (126 et seq.) and Koch, 1997 CR 193 (196 et seq.).

[11] It may be that the analogous application may be possible if the limits of the wording – somewhat imprecise or predetermined on this point – are exceeded.

[12] In many cases, the distinction is hardly possible and the break-down of the regulated subject matter is consequently an error of legal policy. C.f. on the differentiation, for instance Hochstein, 1997 NJW 2977 et seq.

[13] The German states wanted a clarification in the MDStV draft that powers of action for public security purposes were also possible against purely access providers. For this reason a regulation corresponding to Sec. 5 Para. 4 of the TDG was included as a regulation permitting such measures in Sec. 18 of the MDStV (supervision), or rather was transferred there from the draft Sec. 5 of the Act. However, it was overlooked that this did not eliminate the need for a corresponding regulation in Sec. 5 of the MDStV, since the civil law liability of media service providers continued to require a corresponding exception in Sec. 5 of the MDStV to the fundamental exemption from liability of access providers in Sec. 5 Para. 3 of the Act. For Sec. 18 of the Act clearly only regulates powers of action for public security purposes.

[14] C.f. the Joint Declaration of the Federal Chancellor and the Minister Presidents of the States of 18.12.1996 (Text in Engel-Flechsigt, 1997 ZUM 231). This also affects the possible legal consequences of the often alleged unconstitutionality of Sec. 5 of the MDStV, to the extent that this concerns civil law, in particular copyright law, liability (assuming unconstitutionality: Koch, 1997 CR 193 (198); Gounalakis 1997 NJW 2993 (2995); Pichler, 1998 MMR 79 (80 et seq.)). Even if unconstitutionality is assumed, a view that is proposed with largely dubious arguments, on the grounds of the prior legislative jurisdiction of the Federal Government, the consequence would, given the support of the Federal Government for the regulation such as in Sec 5 of the TDG, never be that the previously applicable rules developed by case law would be revived, but that to this extent Sec. 5 of the TDG would also apply by analogy to so-called media services.

[15] Thus, however, Engel-Flechsigt et al., 1997 NJW 2981 (2984) and Engel-Flechsigt et al., Neue gesetzliche Rahmenbedingungen für Multimedia, p. 16.

[16] The same opinion in Waldenberger, 1998 MMR 124 (126).

[17] Thus Pichler, 1998 MMR 79 (87), but ultimately leaving the issue open (c.f. his footnote 137).

[18] In technical terms, a link is the entry of a URL of another WWW page in the source code of a WWW page, where it is ascribed to an element such as a word or a graphic. If the user clicks this element, the browser next shows the page whose URL is entered in the source code. In terms of appearance and use, from the point of view of the user it is irrelevant whether the linked page is stored on the same server as the link or on another server at a different location.

[19] Koch, 1997 CR 193 (200); Eichler et al., BB 12/1997, Supplement on communications and law, 23 (25).

[20] Koch, 1997 CR 193 (200).

[21] Koch, 1997 CR 193 (199).

[22] The demand for a content-specific distinction also mistakes the subject matter of the regulation in Sec. 5 of the TDG or of the MDStV. On the basis of their overall objectives, the TDG and the MDStV are intended to create the legal framework for multimedia services with respect to the contents used. This makes a distinction between providing access and provision impossible on the basis of specific contents, since Sec. 5 of the TDG and of MDStV both equally concern the responsibility for contents, unlike for instance responsibility for technical aspects such as the availability or the refusal of network access.

[23] Similarly Waldenberger, 1998 MMR 124 (128), who, however, apparently also wrongly considers search machines to be access providers.

[24] Explanatory Memorandum to Sec. 5 Para. 3 of the TDG.

[25] C.f. Sec. 3 Nos. 16 and 17 of the Telecommunications Act.

[26] C.f. Bortloff, 1997 ZUM 169, footnote 20; Spindler, 1996 ZUM 533 (541), footnote 82.

[27] C.f. Explanatory Memorandum to Sec. 5 Para. 3 of the TDG and Sec. 5 Para. 3 of the MDStV.

[28] Since proxy-caching is not simply a transmission of data on the transmission level, but also involves storage for access on the user level, this is initially a provision for use. In order to permit the inclusion of this means, commonly used by an access provider to reduce the network load, within the regulation of Sec. 5 Para. 1 first sentence, there is a need for a legal fiction. The reverse conclusion from the parameters of proxy-caching to the characteristics of providing access is therefore not possible. Hence Pichler, 1998 MMR 79 (87) is at least ambiguous.

[29] Thus correctly Spindler, 1997 NJW 3193 (3198).

[30] Thus also v. Bonin and Köster, 1997 ZUM 821 (823).

[31] Flechsig and Gabel, 1998 CR 351 (354).

[32] Engel-Flechsig et al., 1997 NJW 2981 (2985) and Engel-Flechsig et al., Neue gesetzliche Rahmenbedingungen für Multimedia, p. 19; similarly also Spindler, 1998 MMR 79 (87), in footnote 132.

[33] Similarly Spindler, 1997 NJW 3193 (3198).

[34] As argued by Spindler, 1997 NJW 3193 (3198).

[35] Explanatory Memorandum on Sec. 5 Para. 2 of the TDG; Explanatory Memorandum to Sec. 5 Para. 2 of the MDStV.

[36] Thus Waldenberger, 1998 MMR 124 (128).

[37] Consequently Waldenberger, 1998 MMR 124 (128 et seq.) is too global.

[38] C.f., with examples: Koch, 1998 NJW-COR 45 et seq.

[39] Here again, negligently ambiguous wording in the Explanatory Memorandum to the official draft is the cause of a widespread misunderstanding. Where general criminal law punishes the dissemination of certain contents only in the event of intent, this naturally continues to apply within the scope of application of Sec. 5 of the TDG and Sec. 5 of the MDStV.

[40] C.f. for more detail Sieber, 1997 CR 581 (585 et seq.).

[41] Flechsig and Gabel, 1998 CR 351 (354).

[42] However, it is by no means the case that only a rough check is always reasonable within the framework of Sec. 5 Para. 3 of the TDG or of the MDStV. Thus an unlimited check can be reasonably expected of the host server provider if he knows the specific contents. Of importance here is the fact that, unlike the provider of links, he has a possibility of a right of recourse against his customer or can have such granted by contract.

[43] C.f. the duty of care towards third parties to be included in the actus reus and comparable functionally with Sec. 5 of the TDG and Sec. 5 of the MDStV, see Larenz and Canaris, Schuldrecht BT II 2, 13<sup>th</sup> ed., Sec. 75 II 3d (p. 369 et seq.).

[44] The Senate has already adopted the bill unanimously. A decision by the House of Representatives is still pending.

[45] The relevant provision of Sec. 512 (d) of the DMCA reads: “Information Location Tools – A service provider shall not be liable for monetary relief, or except provided in subsection (i) for injunctive or other equitable relief, for infringement for the provider referring or linking users to an online location containing infringing material or activity by using information location tools, including a directory, index, reference, pointer or hypertext link, if the provider (1) does not have actual knowledge that the material or activity is infringing or, in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; (2) does not receive a financial benefit directly attributable to the infringing activity, where the service provider has the right and ability to control such activity; and (3) responds expeditiously to remove or disable the reference or link upon notification of claimed infringement as described in subsection (c) (3): Provided, That for the purposes of this paragraph, the element in subsection (c) (3) (A) (iii) shall be identification of the reference or link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate such reference or link”.

[46] This raises the question whether any provider of an Internet home page can rely on the liability privilege. If the concept of online services is interpreted narrowly, in theory, similar to the concepts of service supplier or supplier in the TDG and the MDStV, a restrictive constriction would be conceivable such that only access providers and host service providers enjoy the liability privilege, while all those who provide a collection of lists on their web site would be responsible according to general liability principles. However, such a restrictive construction is in conflict with the fact that its purpose, namely to promote the development and use of the information location tools essential for the use of the network, makes the regulation also appear reasonable for the private or commercial provider of home pages, while at the same time the notification procedure (see below) necessary for an effective protection of the copyright owner in the digital context also offers a solution that satisfies the various interests. In addition, according to the wording, the offering of access to a home page online and of the use of the information stored there is clearly a service offered on-line and hence an online service. In practical terms, a sharp distinction cannot be made of the point from which a simple home page with links (and not covered) becomes an (expressly covered) directory.

[47] C.f. Sec. 512 (d) (3): “Upon notification of claimed infringement as described in subsection (c) (3)”.

[48] On this see Sec. 512 (e) (1), which provides for liability for damages for misrepresentations if the notification deliberately wrongly alleges an infringement of a right. In particular this covers the costs incurred by the alleged infringer or of the service provider, and their attorney’s fees.

[49] The notification must in particular contain: 1. Identification of protected work whose infringement is alleged and is specified in detail. 2. Identification of the alleged infringing material and the link referring to it, together with the information necessary to find the link. 3. Sufficient information on the address, telephone number and, if appropriate, e-mail address under which the copyright holder or his representative can be reached. 4. A declaration by the objecting party that he has a good faith belief that the use of the contested material has not been approved by the author or his representative, and an assurance that the information in the notification is accurate and an affidavit that the objecting party is entitled to assert the rights of the alleged injured party.

[50] Sec. 512 (i): “The following rules shall apply ... against a service provider that is not subject to monetary remedies by operation of this section.”

[51] Sec. 512 (i) (1) (A) (i) and (ii) do not as a rule apply to links since they are primarily intended for host service and newsgroup service providers.

[52] Nor would any more extensive claim for injunction and abatement result if, as others argue, such claims should be based only on Sec. 5 Para. 4 of the TDG as a matter of principle, since here too “knowledge of these contents” and the possibility and reasonableness are preconditions for responsibility.

[53] C.f. Sec. 512 (e) DMCA.

[54] C.f. Sec. 512 (f) of the DMCA. This applies above all to host service providers. Corresponding rights to refuse performance and liability exemption clauses are possible in the standard terms of business according to German law. Providers are urgently recommended to use corresponding standard terms.