Server Liability

Authors:
Helena Alves
Sina Gomell
Manuela Jahr
Heidrun Rauert

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I. Introduction

The work with the Internet increases to meaning daily. Even letters, private as also business nature, are sent with the help of the Internet.
The Internet is an important perhaps the most important information source nowadays.
Daily, an active commercial traffic takes place on the electronic way.
Many people fear that the electronic commercial traffic as well as the information obtaining in this way takes place in an unlegislated room.
And who should have the responsibility for that? And who is liable?
And in which cases?
How are the legal relationships between the Internet, the insight of the PC, and the user, the person in front of this PC, regulated?

Who takes part in the electronic commercial traffic?
Especially for electronic commercial traffic new concepts were created which already exists in the daily usage.

II. Definitions

In the following chapter the most important terms of the presentation will be defined. At first the Server will be defined, than the different kinds of Provider and at last the different Links.

1. Server

The Server is a system which provides files from the internet to the users.[1]

[1] Compare Sieber, „Verantwortlichkeit im Internet“, Rn 17

1.1. Proxy Server

Proxy Server develop controlling measures and Firewalls for the isolation of closed parts of the Internet[2].

1.2. IP-Address

The award of IP numbers is a process which already finds itself again in the standard settings at all servers on the Internet.
The users of the information access, get the IP-addresses at the moment of using the Internet.
with the help of these numbers it can be evaluated, how frequently a certain web site was invoked, which way was preferred and how long the user stayed respectively on these pages.
The Access providers distribute these IP numbers especially to those customers who want to access the Internet and therefor need a number.[3]

2. Access Provider

Access providers make the indirectly or immediately access to computer networks possible for the user particularly to the Internet.
The Access provider installs the necessary hardware and software, in which it rents before, and makes the necessary net capacities available.
This indicates that the access to the Internet is technically created with the help of this provider.
A liability is carried out in accordance with § 5 III TDG.
Because Content providers shall only liable for the contents in the future.[4]

[2] compare Sieber, „Verantwortlichkeit im Internet“, Rn 23
[3] compare Script Dr. Ivo Geis, « Vertiefung Vertragsrecht », S. 22
[4] compare Sieber, „Verantwortlichkeit im Internet“, Rn 14

2.1. Content Provider

Content providers exclusively offer the access to their own contents or make foreign information to own information on servers of service providers or own computers.
The liability arises from § 5 I TDG.[5]

2.2 Service Provider

Service providers do not offer any services.
These offer merely technical services, in that way that they make own server capacities of their available (e.g. storage and line frequency ranges).
Foreign information is then spread or foreign data is saved.
No influence is taken on the contents of these data.
Service providers are used in different Internet services because accessibilities are provided just on servers.[6]

2.3 Caching

Caching is the intermediate delimited storage. This means the foreign information is transmitted to other users on enquiry.

3 Link

A protocol of transmission establishes connections between the different Web-Sites. Also selected Web-Sites sometimes are described as a link.[7]

3.1. Simple Link

[5] compare Sieber, „Verantwortlichkeit im Internet“, Rn 14 and A. v. Netzer in Kröger, S. 125
[6] compare Bleistürmer, „Rechtliche Verantwortlichkeit im Internet, S. 56
[7] compare file://A:\onl-23.html

This is a kind of a Link-Method.
A Simple Link is also called “Hyperlink”.
This kind of link establishes a simple perceptible utilisation for the users to get the information of other files.
The text/word is underlined and you can activate this with a Mouse-Click.[8]

3.2. Deep Link

The Deep Line Link is a subspecies of the Hyperlink. A feature is that a more profound Web-Site of the other supplier is referred directly. This has the consequence that the real Homepage of this supplier is circumvented.[9]

3.3. Inline Link

Inline Links bind the referring page permanently. This has the consequence that the third party contents are integrated into the particular supplier page. The integration of the contents already starts at the opening of the appropriate page by the browser of the user.[10]

3.4. Frame

At this Link Method the display of the user is subdivided. And although different third party contents can be involved at the same time. A special attention has to be taken into account, that it is not always recognisable that a third party displayed these contents. It is not recognisable for the user, whether third party offers are called.[11]

III. Historical Development

Among other things the IuKDG has developed from the complete work of a federation country working group "Mulitmedia".

[8] ibid
[9] ibid
[10] ibid

With the adoption of the IuKDG the medium service international treaty was put into operation also.

1. IuKDG

A central regulation component of the IuKDG is the TDG.
This is not a justifying of the liability but rather around a liability restrictive norm.
In accordance with the MDStV this law does not apply to telecommunications services, broadcast and medium services.

A strict delimitation therefore must be carried out here.
For this reason the TKG was then passed, too.
This law regulates the technical aspects of the data transmission and data transfer.
The TDG however regulates the contents of these data.

The legislator treats the Access provider as a supplier of tele-services which offers telecommunications services.

With respect to the MDStV there is a collision of the concepts tele-services and medium services.
To avoid this Dualismus exclusion clauses were included in the TDG and the MDStV.
Medium services are, therefore "journalistic editorially arranged offers to contribute to the formation of opinion with the target".
Tele-services are all other things, that is information "without similarity as regards content to press and broadcast".[12]

2. e-commerce directive

Then the e-commerce directive was passed on 6-8-2000.

[11] ibid
[12] compare www.afs-rechtsanwaelte.de/egg.htm

This directive should guarantee a high standard of the legal integration of the community.
With that directive an actual space shall be come true without internal frontiers for the services of the information society.
A certain uncertainty about the legal position is still exists to which extent the member states may perform control over the services from another member state.

This directive should not create additional rules in the area of the international civil law.
The directive creates a balance between the different interests and fixes the principles on which agreements and standards should base in this line of business.[13]

3. The EGG

The EGG was passed on 12-21-2001.
This law strongly reflects the e-commerce directive.
This means this law is technically oriented.
This exclusion of liability should only relate to the contents suppliers.
According to the EGG a complete intermixing of the concepts regulated in the IuKDG for telecommunications services and medium services takes place.

The future will show whether consequences will arise in the liability and responsibility.
These consequences already arise alone from the interpretation of the concepts.[14]

4. Result

[13] compare „Amtsblatt der Europäischen Gemeinschaft“
[14] compare www.afs-rechtsanwaelte.de/egg.htm

The countries work in parallel on a changed international treaty ("Änderungsstaatsvertrag"), which shall make the MDStV similar to the TDG.
An uniform European regulation would be desirable here.

IV. The implementation of the E-Commerce Directive into German law

1. Introduction

8th June 2000, the European Commission ratified the E-Commerce Directive[15] (2000/31/EG), which came into force on 17th July 2000.
The European member states had to implement the Directive into national law until 17th January 2002.
In Germany, the ECD was transplanted in the Elektronischer Geschäftsverkehr-Gesetz (EGG), which was introduced 14th December 2001. The German EGG took over many aspects of the Directive. Only a few regulations have been extended.
The ECD includes measures to establish the country origin principle, limitations of the liability of online service providers, a legal recognition of electronic contracts, a promotion of self regulation, transparency measures and out-of-court dispute settlements.
The most important regulation of the ECD for this work should be the responsibility of service providers for their services. Art. 12 to 15 describe the responsibility in particular cases.

2. The implementation of the ECD

2.1. General regulations

[15] afterwards ECD

The ECD includes the maxim of the complete harmonisation[16]. That means that the member states are not allowed to introduce more narrow or wider national regulations than the ones stated in the ECD. This maxim can be found in ratification reason NR 50.

Art. 2-3 of the ECD determine the circle of the concerned service providers, which should be liable under the regulations of the ECD.
The Directive states that only commercial service providers should be covered. The German law does not know such a restriction (§ 2 II TDG). The German law also includes private service providers.
According to Art. 3 ECD, the EU member states agree to recognise the individual regulations of each state. It is known as the country origin principle ("Herkunftslandprinzip"). Tele-service provider are put under the regulations of that country, where they have their settlement. In conclusion: if the Tele-service providers conform to the regulations of one state, they do not have to fear stricter regulations in other EU-member states.

Furthermore, Art. 4 ECD states that Tele-service providers do not need a particular permission for offering their services. The regulation reflects the German § 4 TDG.

2.2 Liability according to the TDG after the implementation

a) General principles § 8 TDG
aa)§ 8 I TDG
According to § 8 I TDG (former § 5 I TDG), a service provider is liable for its own information. That means that only foreign information are exceptions of this liability principle.
The principle is not as easy as it seems to be, because information from third parties are treated as equivalent to own information if the provider a) identifies with the foreign data so that it takes the responsibility for it or b) elects and uses the data with the knowledge of the content.

[16] compare Köhler/Arndt, „Recht des Internet", page 178

bb)§ 8 II S.1 TDG

§ 8 II S.1 TDG implemented Art. 15 I ECD. According to that regulation, service providers do not have an investigation or supervision duty towards illegal activities of the foreign content, transmitted or saved by them. That means that the Host-Provider do not have to check the web sites of his clients for illegal content.

But according to ratification reason NR. 48 ECD, the Host-Provider can be demanded to use the expected duty of care to discover illegal activities and prevent them. In conclusion: Host-providers have a supervision duty towards illegal content of their clients, but not more than the expected care of duty.

cc) § 8 II S.2 TDG

According to § 8 II S.2 TDG, service providers, which provide illegal contents for public use, are obliged to stop and remove this content.
The German law extends in this case the ECD. Art. 12 III, 13 II, 14 II ECD demands that the member states have to make sure that official or judicial regulations are followed, which require a termination of the illegal activities.

§ 8 II S.2 TDG reflects the former § 5 IV TDG. In the new version, there is no advice that the duty to terminate the illegal activities must be technically possible and to be expected from the provider. This requirement is already stated in the general principle of the ECD. It is not allowed to demand a technical impossibility, nor an unexpected activity from the provider[17]. This was basis of the AOL case.

b) The passing of information § 9 TDG

Art. 12 ECD is implemented nearly word by word by § 9 TDG.
It regulates the technical requirements of the passing of information and how providers are prevailed from being liable for that.

[17] the same, page 181 and MMR 2000, 617

This regulation was formerly stated in § 5 III TDG. It has changed in that way, that not only access provider should fall under this regulation (like in the former § 5 III), but also network providers.
According to § 9 I TDG, service provider are, under certain requirements[18], not liable for contents, for which they only offer the access to. The requirements are: a) the service provider did not cause the transfer
b) he did not select the addressee of the transferred information
c) he did not select or alter the transferred information.
With this implementation, ratification reason NR. 42 is considered, where it is said, that providers are not liable for contents, if "the activities of the provider are only limited to make the access technically possible for a third party".
In addition, ratification reason NR. 43 states that the service provider is not liable, if he is in no relation to the transferred information.

§ 9 II TDG implemented Art. 12 II, where it is said that the transfer of information is to be treated equivalent to an automatic shortly intermediate saving, if it is technically necessary.

c) Caching §10 TDG

All intermediate saving times which go further the time required for the passing are not to be treated after § 9, but after § 10 TDG. The later (former § 5 III S.2 TDG) implemented Art. 13 ECD.
§ 10 TDG includes an automatic short-termed intermediate saving of information, which is used to make the transmission of the information more effective to the user. In the internet, proxy server are used. The service provider is not liable if some requirements are fulfilled[19]:

a) the information may not be altered
b) the access regulations have to be considered (for ex. if there are passwords required in relation to children's protection, the intermediate saving may not relate to neglect this protection)
c) the industry standards have to be considered
d) the collection of data may not be impaired

[18] the same, page 182

e) immediately removal or blocking (if the illegal content was removed or blocked on the original server, the proxy server has to do it too).

Again, the service provider should not be in relation to the transferred information or change them.

d) Saving of information (Hosting) § 11 TDG

According to § 11 TDG, service provider are not liable for foreign contents they save for clients. This principle was formerly states in § 5 II TDG. In the new version "content" is replaced by "information", which now also includes software and copyright.

§ 11 TDG implemented Art. 14 I, II ECD, where foreign information is described as "from the user imputed information". The German law remains at the old expression "foreign".

Own information can be treated equivalent to foreign (see above II. 2. a) aa)).

According to § 11 Nr.1 1st half-sentence, service providers are not liable for foreign information as long they "do not have any knowledge of the illegal activity or information".

If the service providers get the knowledge of illegal activities, they have to immediately block the access to the information (§ 11 S.1 NR. 2). In the old version of § 5 IV the blocking must be expectable for the provider. The new version of § 11 S.1 NR.2 TDG dos not know this principle. But it is not allowed to demand a technical impossibility, nor an unexpected activity from the provider (see above II. 2. a) cc)).

e) Unregulated aspects

Art. 21 II ECD clearly states that questions of the liability for hyperlinks or searching machines are not regulated yet and that these questions will be

[19] compare Helmut Hoffmann, „Zivilrechtliche Haftung", in MMR 5/2002

discussed in the Commission again. There is no regulation in the TDG either.

V. The implementation of the E-Commerce Directive into Spanish law

1. Introduction

The ECD had to be implemented into national law until 17th January 2002. But hardly any European country is compliant in implementing the ECD[20]. Most countries have not implemented the ECD at all. In many cases, the implementation is not to be expected at short notice.
Out of the EU-member states, only Luxembourg, Austria and Germany have fully implemented the ECD into national law.
Finland, France, Portugal, Spain and Belgium have notified draft laws to the Commission.

2. Service provider liability

Despite of the fact, that the ECD is not implemented into Spanish law yet, a short overview should be given about the liability of service providers after current Spanish law.

In Spain the internet service providers are only liable for the violent, damaging and illegal contents of the web sites, if it is possible to prove a direct knowledge of these contents. For instance, a service provider is liable for the hosting of a web site dedicated to the sale of pirate software once he officially notified the infringement. That means, if they are aware of the existence of illegal contents of a web site hosted in it's server, the service providers are liable.

[20] compare www.ecomlex.com

VI. Liability for Own and Third-Party Content

It is obvious that liability arises for every illegal content that a party puts on its own account into the internet which is also stated under art. 8 sec. 1 TDG.

More difficult however, is the question which circumstances makes one party be liable for third-party content. This is the case when one party acknowledges a content in a way that shows that the party accepts it like an own opinion[21]. It is different if the party makes clear that he takes a different approach and puts a clear distance between himself and the content in question (see art. 9 and the following TDG). This can be compared to the situation that newspapers are faced with. If an article or an opinion is published in a newspaper it is assumed to be showing the attitude of the publishing house, unless it is clearly stressed that this opinion is not the view of the publishing house.

One case that came up in this field was Steffi Graf v. Microsoft GmbH that was decided by the OLG Cologne[22] on 28th May 2002. Microsoft GmbH is the owner of an internet domain on whose homepage a platform was offered titled as “communities” where members could integrate own pictures and texts. Under the title “Prominente” a private user had put fake, partly pornographic pictures of famous people with the subtitle “a lot of nacked stars… you’ve never seen them like this before!!!”. Among these pictures was also a picture of Steffi Graf. Microsoft was demanded by her to clock these communities what Microsoft did in the following. What Microsoft refused to do however was to deliver a guarantee of omission. The legal issue here was if Microsoft GmbH is to be regarded as acknowledging this content as their own like stated in art. 5 sec. 1 TDG (former version) which as a result leads to Microsoft’s liability. The court decided that this in fact was the case since Microsoft had prepared the infrastructure for the communities, had created main topics for them, had

[21] compare Säcker, „Die Haftung von Diensteanbietern nach dem Entwurf des EGG“, in MMR, 9/2001, S. 2 - 4

[22] compare www.olg-koeln.nrw.de/home/presse
(OLG Köln, Aktenzeichen 15 U 221/01)

embedded these communities into their own websites and had made publicity for their own products within these websites.
This is an example of liability for own content that originally was or is a third-party content. In the next section liability for third-party content will be examined in more detail. To start an important case in this field, the "compuserve case" will be discussed.

CompuServe Case

The case was related to Compuserve Information Services GmbH, a German daughter company of the American Compuserve Incorporation, which acts as a service provider for its clients worldwide. Contracts were made only between Compuserve Incorporation and the clients in Germany.
Compuserve Information GmbH provides German clients with dial-up access to Compuserve Incorporation and gets a commission from Compuserve Incorporation for its services.
On the occasion of a search that the police made in the premises of Compuserve Information GmbH the managing director was told that Compuserve Incorporation had hard pornographic content on its server from newsgroups whose names indicated what they were about, like alt.sex.pedophilia, alt.sex.bestiality.barney etc.
The German local court (Amtsgericht München) held that the German managing director was liable for not preventing accessibility to these newsgroups after knowing about them. It was decided that as a 100 % daughter company, knowing about the content and acting as a telecommunication service provider Compuserve Information GmbH, i.e. the managing director, was responsible as an accomplice to the crime. Moreover, the court found that it was technically and reasonably possible for Compuserve Information GmbH to block the access.
In the next instance however, this decision was overruled. The regional court (Landgericht München) held that the accused only had had a minor influence on Compuserve Incorporation and had not had the means to close these newsgroups. An expert stated that in addition it was also technically not possible for Compuserve Information GmbH to prevent

access regarding these specific content for German clients using firewalls for example.

A point that is still not clear with respect to this case is if the TDG is applicable and more concretely if § 5 TDG is applicable. What has to be pointed out is that at the time that the case was decided (1998 + 1999) the TDG had only existed for about two years in Germany and since then it has already been altered. Therefore when reference is made to articles of this act, it is always a reference to the former version. Nevertheless, it can be said that the content of former § 5 TDG have been implemented under articles 9 to 11 of the present TDG.

§ 5 TDG in its former version stated that providers shall not be responsible for third-party content which they make available for use unless they have knowledge of the content and are technically able to block the use of such content. It furthermore stated that providers shall not be responsible for any third-party content to which they only provided access.

The predominant opinion in the specialized literature is that the TDG is not applicable since Compuserve Information GmbH was only providing constant telephone lines to their parent company within the company group. Contracts were in addition only made between the parent company and the clients. Consequently Compuserve Information GmbH can not be regarded as an access provider, instead it is a mere telecommunication service provider to which art. 3 no. 18 TKG has to be applied. As a result this would mean that Compuserve Information GmbH is not liable since mere telecommunication service providers are not liable under criminal law for content which are only transported via their telephone lines.

The court in the first instance held that Compuserve Information GmbH was not an access provider within the meaning of art. 5 sec. 3 TDG, not having its own customers nor providing access to the network, but merely connecting customers through local dial-up numbers with the mother company in the USA. Therefore they were held liable as to art. 5 sec. 2 TDG since service providers are responsible if they have knowledge of any illegal content and then do not block access to this content.

The court in the second instance however found that Compuserve Information GmbH is to be regarded as an access provider to which art. 5

sec. 3 TDG (in its former version) is applicable. The result is an acquittance of the accused since this article states that providers who merely offer access to information of third parties are not responsible for these content. A comparison that has often been made in this respect is that this is the same that is valid for a postman who is not held liable for illegal content that letters which he delivers may contain.
In short, Compuserve Information GmbH was acquitted, but this was mainly due to the specific circumstances of the case, i.e. the specific contractual relation between Compuserve Information GmbH and Compuserve Incorporation, but this cannot be regarded as a guarantee for other providers that they will not be held liable for their content in future.

Liability of Access and Service Providers

What regards liability in the internet in Germany a lot of different laws are applicable. There are the special laws which were created for this purpose, like the TDG or the MDStV, European Law like the e-commerce directive, but also general German law like art. 823 BGB for cases of infringement of the health or property of a third party. Also possible are infringements of general personal rights like the individual dignity if personal details of third parties are made public on the internet. But also criminal law is applicable. Especially the articles 184, 185 and the following articles are important when it comes to crimes regarding hard pornography or slander.
Since the TDG and the MDStV are similar in wording in their greatest part[23] reference will only be made to one of these regulations, because content and consequences are in both cases the same.
With regard to the TDG/MDStV it is important to distinguish the different types of providers.
On the one hand, access providers offer the user access to third party content, i.e. content which was produced and put in the internet by a third party. Access providers only provide for the mere technical communication proceedings and they do not provide any sort of information. For these cases art. 9 TDG (formerly art. 5 sec. 3 TDG) states that a provider who

merely offers access to information cannot be held liable for content from third parties. This is due to the fact that an access provider normally does not have any influence or information on the content that he offers access to. Should the access provider however be involved in the selection or offer of the content, liability for illegal content would arise automatically.
Another important point to mention is the "proxy-cache-privilege" implemented under art. 10 TDG. This article makes clear that if an access provider saves information on proxy-server for a short time this is still regarded as mere access providing service as long as the provider does not change the information, respects the conditions for access to these information, respects existing regulations as to the actualisation of the information and as to data protection and, which is the most significant point, the access provider has to block access to these information after knowing that for example a court ordered these information to be blocked.
On the other hand there are service providers. A service provider offers third party content on its own server. In comparison to the access provider a service provider already has a closer connection to the content that is offered. Nevertheless, liability for illegal content only arises if the provider actually knows about the illegal content as stated in art. 11 TDG (art. 5 sec. 2 former version). What is not very clear in this respect, is in which case knowledge can be assumed by the courts.
For the liability of the service provider to arise it is also necessary that the provider is technically able and that it is also reasonably possible for him to prevent the use of the information. To decide whether such an action is reasonably possible the economic consequences of an action to prevent the use of the information have to be examined and these consequences have to be compared to the consequences that arise if such actions are not taken.

VII. Consequences

Even if there are a lot of different laws regarding liability for (il-)legal content in the internet, it is still not very clear for every provider and even

[23] compare Säcker, „Haftung von Diensteanbietern nach EGG-Entwurf", MMR, Beilage 9/2001, S. 2 (S. 3)

for every court where the line has to be drawn between legal and illegal actions or between liability and no liability.
After the case in 1996 where a public prosecutor ordered blocking of a website due to content that seemed dangerous to the state's safety no such actions have been taken any more up till September 11th. After this date a lot of Islamic Djihad websites were ordered to be closed down.
For a provider the situation is difficult. On the one hand a provider may not be liable for a third party content, but if he fails to block access to an illegal content that he knows of, liability arises for him.
For a provider it is nevertheless not always easy to know on which legal grounds he may have the obligation to block access to an illegal content. Furthermore there is a collision between prosecution and data protection.
In order to discover the origin of some illegal actions in the internet data may be needed concerning the producer and these data may fall under data protection like IP-addresses do. The question here is if providers are responsible for saving these data in order to be able to help in cases of prosecution. On the other hand up till now there is no law which states that provider are obliged to supply these information. Up till today they are just bound to the general obligations that every normal witness is bound to. The consequence is that officials very rarely state legal grounds when they demand providers to deliver a specific information.
In addition data protection laws state that only obviously needed data may be saved and infringements against these regulations may be prosecuted as well.
As it has been shown there already is a lot of regulation for the internet, but there is not (yet) security as to all legal aspects.

VIII. Liability for links

1. Introduction

Links are the architecture of the internet. Without setting links there wouldn´t be the internet as mass media at all. Though, there is the possibility to be made liable for..

Basically, the service provider is liable for own contents. He is liable for foreign contens he knows or has the technical possibilities to know them and to stop the connection.[24]

In technical meaning a link isn´t more than a reference to another external page. However, it cannot depend on this, alone. Above this, there is always a certain motivation or intention to set off a link. This leads to the question if the content is one of your own or if it´s foreign.

2. Foreign or own contents?

According to jurisdiction it is your own content too, if the page is created by a third party and the one who sets the link makes it to his own. [25]

This is the result of the district court Hamburg. There was a link of the defendant to an external page which contents offending remarks on the plaintiff. The court affirmed a failure and damage obligation to pay compensation, althouth the defendant had pointed out on his page that the responsibility for the contents of the respective page lies with the authors.

But the court argued that he didn´t want to dissociate from the design of his link and the purposes pursued with it. The jurisdiction says the the one who spreads foreign contents to offend one person must dissociate from it, sufficiently, to escape liability.[26]

The district court Lübeck argues with liability in a judgement of November 1998. In that case the foreign illegal contents of the third party was offered in the own domain. It was suspected that the two suppliers were identical and that the two pages were not linked. So the foreign contents was not

[24] Vgl. Detlef Kröger, Handbuch zum Internetrecht, S. 170
[25] vgl. Fabian Schuster, Vertragshandbuch Telemedia, S. 931
[26] www.afs-rechtsanwaelte.de/urteile13.htm

foreign at all with the result of a liability according to the general regulations.[27]

3. Links in your own frame

Contents can be represented by framing. The display of the web page is subdivided into several frames which are presented in closed units. These units can be filled with different contents.

By activation of the link, the foreign contens is loaded onto the computer of the user within the framing. The context appears in the context of the first web page and therefore, it isn´t recognizable for the user that it is foreign contents.[28]

In a judgement of April 1998, the district court Düsseldorf thinks that it is not unfair competition if a provider sets a link to a foreign page whose content could be seen in his own frame.

In that case the plaintiff had agreed, particularly, that the defendant put a link to his page. But the advertisement within the frame was disturbing to him. He thought that this hasn´t been covered by the consent. This way, the impression would arise that it is the own work of the defendant. In addition, he might gain an advantage regarding fellow applicants.

At least, the complaint was rejected because it couldn´t be prooved.[29]

4. Deep-links

Another court has another view on unfair competition concerning deep-links. A deep-link is a link backly or below the initial page on a website. It isn´t shown to the user, that he gets the web page of a third party.[30]

[27] www.netlaw.de/urteile/lglue_1.htm
[28] vgl. Bert Eichhorn, Internet-Recht, S. 22
[29] www.flick-sass.de/baumarkt2.html
[30] vgl. Bert Eichhorn, Internet-Recht, S.22

The higher regional court Celle graded it as unfair competition.In the opinion of the court the false impression has arisen that the foreign page is the own content of the defendant. In addition, this is a violation according to § 1 UWG.[31]

5. Illegal aspects

Regarding to criminal matters it is important whether the one who installs a link to illegal contents on his website has to be punished as a culprit or an assistant, merely. There are consequences for the level of punishment. Certainly, culprits are punished more severely.

The one who wants to spread the foreign contents as his own – for example a link to child pornographic contents – is a culprit. He obtains an entrance through his link to a foreign room whose contents he identifies with.

6. Search engine

Another part takes the operator of a search engine. He is not liable for links which violate the brand law. He is only liable when the law violation is obvious for every layman. The operation of a search engine is therefore comparable with the publication of an industry-specific book. The search engine gives information about foreign contents, merely, without utilising them.[32]

The higher regional court Hamburg has to judge a case where the operator of a virtual perfumery had paid consideration to a search engine so that his own advertising was displayed at a petition of brand perfume names.

[31] www.flick-sass.de/links03.html
[32] vgl. Niko Härting, Internetrecht, S. 170

The perfumery was sued to refrain from this advertising and the court noticed that the complaint is well-founded.

The judges saw unfair competition because the defendant intercepts customers who do not want to take up his performances, probably. It is a violation according to § 1 UWG. Hence, the defendant had to remove her advertising on the search engine.[33]

7. Conclusion

The one who wants to set up his own homepage has to know, that by putting links he can be made liable for foreign contents. Before, he should look at the contents of the page he is interlinked with, thoroughly. Indeed, this might be laborious.

Certainly, he can exclude liability at his side. The verdict of the district court Hamburg shows, however, that you can be made liable, anyway. No one should be able to rely on an exclusion on liability.

Regarding criminal matters this fact is very positive because the one who just provides the access to illegal contents is also punished as a perpetrator.

The jurisdiction is in disagreement with respect to internet law which is shown by the courts in Düsseldorf and Celle. On the one hand the use of foreign contents is seen as unfair competition, on the other hand, it is not.

You can assume that it will last for a certain time, till the jurisdiction will have a common agreement.

[33] www.recht-in.de/urteile/Urteil.php?UrteilD=8208

IX. Bibliography

Books

Bleisteiner, Stephan „Rechtliche Verantwortung im Internet“,
Köln, 1999

Eichhorn, Bert „Internet-Recht“, 2.Auflage
Köln, 2001

Härting, Nico „Internetrecht“
Köln, 1999

Köhler, Dr. Marcus/ „Recht des Internet“,
3.Auflage
Arndt, Dr. Hans-Wolfgang Heidelberg, 2001

Kröger, Detlef/ „Handbuch zum Internetrecht“
Gimmy, Marc A. Berlin 2000

Schuster, Fabian „Vertragshandbuch
Telemedia“
München, 2001

Siebert, Ulrich „Verantwortlichkeit im
Internet“
München, 1999

I. Magazines

Hoffmann, Dr. Helmut Zivilrechtliche Haftung im
Internet, in: MMR 5/2002, S. 284-
289

Säcker, Christopher Die Haftung von
Diensteanbietern nach dem
Entwurf des EGG, in MMR 9/2001
S. 2-4

II. Internet

www.afs-rechtsanwaelte.de
www.ecomplex.com

www.flick-sass.de
www.internet4jurists.at
www.jurawelt.com
www.netlaw.de
www.online-recht.de
www.recht-in.de