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**STUDY ON THE LIABILITY OF
INTERNET INTERMEDIARIES**

COUNTRY REPORT – Germany

Executive summary

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Part 1: Legislation

The E-Commerce Directive (ECD) was incorporated into German law at federal level by the Electronic Commerce Act (EGG – Elektronischer Geschäftsverkehrsgesetz), which in turn modified the Teleservices Act (Teledienstegesetz – TDG), at the level of the German Federal States (Bundesländer) by the Interstate Agreement on Media Services (Mediendienstestaatsvertrag – MDStV). The two laws have now been put together into the Telemedia Act (Telemediengesetz – TMG), which does not however effect any changes on questions of liability.

Part 2: National Case Law

According to German courts, knowledge in terms of § 10 TMG is actual, positive human knowledge, but not negligent ignorance or contingent intent (*dolus eventualis*). Only in very extreme cases may “knowledge” be interpreted as “turning a blind eye to the illegal action or information”. The courts have so far rejected any such wider interpretation. Furthermore § 10 TMG provides for the liability of host providers to pay damages in cases of deliberate and gross negligence, which can be assumed only in cases of “obvious” illegality.

Cases of injunctions against intermediaries mainly refer to auction platforms and discussion fora. In the landmark decision “Internetversteigerung I” the German Federal Court of Justice ruled that the liability exemptions contained in the TDG and MDStV are not applicable to claims for termination of or refraining from infringements. This jurisdiction was recently affirmed under the new TMG by the Federal Court of Justice in a decision concerning an injunction against eBay (“Internetversteigerung II”).

Neither the former TDG and MDStV, nor TMG provide for special claims for termination of or refraining from infringements. However the courts apply the doctrine of “accessory liability” (“Störerhaftung”) to all types of intermediaries. According to this doctrine, it is not only the wrongdoer himself and participants that can be subject to a claim for termination of and refraining from infringements, but also mere accessories who knowingly and causally contribute to the infringement of a third party’s right. However, because accessory liability must not be extended unreasonably to third parties who did not commit the infringement themselves, they may only be held liable if there was a *violation of an obligation to examine*. According to the Federal Court of Justice, once an intermediary obtains knowledge of a clear infringement the intermediary is obliged to remove the unlawful content and to take all technically feasible and reasonable precautions to prevent future infringements. In other words, subject to the

requirements of *reasonableness* an examination obligation is initially *activated* as soon as the provider obtains notice of unlawful third party content.

Culpable breach of an injunction constitutes contempt of court and punished by a disciplinary fine. For intermediaries the effort to avoid the imposition of a fine effectively results in a limited obligation to examine for illicit third party content. As a consequence of so-called “Core Theory” this examination is not restricted to the initial unlawful offer or information posted by a specific user or recipient, but is extended to all similar infringements.

The Regional Administration of Düsseldorf issued orders against certain access-providers in order to block access to websites located overseas which contained Nazi propaganda. The Higher Administrative Court of Münster upheld these orders as a suitable means to guarantee the non-proliferation of Nazi propaganda in Germany. An administrative order must be proportionate, which in particular means that the measures taken have to be technically feasible. Regarding access providers, the blocking of IP addresses, the modification of domain-name servers and use of proxy servers have been accepted by German administrative courts and contemplated by German administrative authorities as a suitable means.

Decisions related to requests for information by public authorities predominantly refer to the identification holders of dynamic IP-addresses in cases of copyright infringements via filesharing, fraud on auction platforms, e-mails containing insulting content or defamatory statements in chat or discussion forums. The majority of courts applied § 113 TKG – thus denying the need for judicial authorisation as stipulated in §§ 100g, 100h StPO – on the grounds that the requests for information of the type listed above have only referred to customer data. Decisions regarding court orders against access providers have predominantly dealt with claims for information about the identity and IP address of users who were alleged to have committed copyright infringements. Under the law currently in force, claims for information against access providers have predominantly been disallowed by courts: for various reasons it has not proved possible so far to bring the access and host within the scope of the relevant regulations. In the course of the implementation of the Enforcement Directive the provisions mentioned above will be revised to allow claims for information to be brought against intermediaries.

According to the German Federal Court of Justice (“Schöner Wetten”) the liability exemptions of the TMG are not applicable to hyperlinks. Following this decision lower courts have held that the liability exemptions equally do not apply to search engine operators. As regards the extent of the obligations to examine that rest on a person who places or perpetuates a hyperlink, the Federal Court of Justice in “Schöner Wetten” held that such obligations were subject to various factors like the knowledge of the person

setting up the hyperlink, the circumstances indicating that the website serves unlawful purposes and the opportunities available to the person who sets up a hyperlink to reasonably notice the illegality of this activity. Where a hyperlink only facilitates access to generally accessible sources, the principles of constitutional freedom of speech and freedom of the press require the court to limit the obligations to examine. In another case a Higher Regional Court found that the hyperlink in question (at least) facilitated location of a website where a software producer had advertised software designed to crack copy protection. By setting up a hyperlink the defendant had knowingly and causally contributed to copyright infringements committed by the software producer.

Injunctions against search engine operators concerning responsibility for unlawful search results have not yet been the subject of judgements by the Federal Court of Justice. Decisions of lower courts dealing with the problem refer to the doctrine of accessory liability and apply its principles to cases involving search engines. The law in respect to the extent of obligations to examine is still developing and is not consistent. In a number of decisions German courts have had to deal with “adwords” or “sponsored links”. Holders of trademarks took legal action against search engine provider with a view, to generally prohibit the use of their trademarks as adwords. The courts have predominantly held that prior to obtaining knowledge, search engine operators could not be held liable as accessories for trademark infringements committed by their clients. As regards sponsored links to foreign online gambling websites, the courts have affirmed accessory liability of search engine operators.

In a number of cases the “administrative contact” (admin-c) was held to be liable according to the principles of accessory liability for infringements caused by content on a foreign website connected to the domain administered by the admin-c.

Part 3: Notice and Take Down Procedures

Current German law does not provide for a notice and take-down procedure. It was not expressly discussed during the first revision of the German TDG. A kind of co-regulation standard exists for the protection of minors against illicit content. Internet providers participate in the Voluntary Self-Control Multimedia Services, whose members have subjected themselves to a code of conduct.