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GENEVA

## **WORKSHOP ON SERVICE PROVIDER LIABILITY**

**Geneva, December 9 and 10, 1999**

ONLINE SERVICE PROVIDER LIABILITY FOR COPYRIGHT INFRINGEMENT

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## INTRODUCTION

This study is structured as follows. First, a few principles of liability under general tort law will be set out in Section 2. Thereafter, Section 3 will examine the question of online liability with respect to copyright law. Section 4 provides a general introduction to criminal law liability. Subsequently, in Section 5 a number of national laws that specifically deal with online liability, mostly in the context of criminal law, are briefly reviewed. Section 6, the core of this study, compares and analyses the DMCA and the proposed European Directive on Electronic Commerce in depth. Since the law regarding injunctive relief follows different rules to those governing liability for damages, liability to provide for injunctive relief is dealt with separately in Section 7. Finally, a number of conclusions and recommendations will be presented in Section 8.

The liability of online service providers is perhaps the most controversial legal issue to emerge from Cyberspace. Should providers be treated as electronic publishers, and thus made directly liable for all the infringing gigabytes flowing through their servers? Or are they merely the postmen of the Internet, common carriers exempt from all liability? As always in the realm of the law, the answer lies somewhere in the middle.

The problem of online liability has already been the subject of debate, of countless articles in legal journals, of judicial decisions, and even of legislative action in several countries and within the European Union. It may arise in a variety of legal fields, such as trade secret law, misrepresentation, unfair competition law, product liability law, criminal law, defamation law, etc. This study will focus on liability arising from copyright infringement, and therefore touch upon other areas of the law only incidentally.<sup>1</sup> Since copyright infringement may be sanctioned not only under private (civil) law, but also under criminal law, a separate discussion of the principles of criminal liability is included.

The purpose of this study is to provide a comparative analysis of prevailing legislative approaches towards the issue of online liability for copyright infringement. It does not purport to analyse the various rationales, e.g. the freedom of expression and information or the promotion of 'e-commerce', underlying such legislation. Due to the time constraints imposed on the authors, this study can cover only a limited number of jurisdictions. For obvious reasons, its main focus is on the provisions on online liability in the US Digital Millennium Copyright Act (DMCA) and the proposed European Directive on Electronic Commerce.

The study will only deal with 'true' intermediaries, i.e. providers that are instrumental in transmitting or disseminating (potentially copyrighted) third party content, but neither initiates nor takes any part in a decision to disseminate particular material. Currently, various types of intermediaries are involved in delivering content online to end-users. Typically, making a work available over the World Wide Web will involve a chain of intermediate service providers. Having acquired an account with a hosting service provider, an information provider will upload web pages onto his web site which is physically located on the host's 'server' - which is best thought of as a very large hard disk that is directly accessible from the network. Upon storage on the server the uploaded documents become instantly available to

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<sup>1</sup> The study does not contain separate discussion of online liability arising from the infringement of neighbouring ('related') rights. However, due to the similarity in structure and scope between copyrights and neighbouring rights, the analysis and conclusions presented herein apply *mutatis mutandis*.

everyone with a connection to the Internet. Access to the Internet, in turn, is provided by an access provider. On the way from host to access provider to end user the transported documents pass through the infrastructure of a network provider, who, apart from providing the physical facilities to transport a signal, will also transmit and route it to the designated recipient. It is not uncommon that a single (legal) entity provides a complete range of these services. However, since tort law and criminal law deal with liability for one's acts or omissions *in a specific case*, it is important to understand that an intermediary's legal position will depend on the communicative role it plays in a particular situation.

This study is structured as follows. First, a few general principles of tort law and criminal law liability will be set out in Sections 2 and 3 respectively. Thereafter, Section 4 will examine the question of online liability with respect to copyright law in general. Subsequently, in Section 5 a number of national laws that specifically deal with online liability, mostly in the context of criminal law, are briefly reviewed. Section 6, the core of this study, compares and analyses the DMCA and the proposed European Directive on Electronic Commerce in depth. Since the law regarding injunctive relief follows different rules to those governing liability for damages, liability to provide for injunctive relief is dealt with separately in Section 7. Finally, a number of conclusions and recommendations will be presented in Section 8.

This study is based in part on previous research conducted by the Institute for Information Law of the University of Amsterdam (IViR) in the framework of the IMPRIMATUR project.<sup>2</sup> The study was written by Kamiel Koelman, research fellow at IViR, and Bernt Hugenholtz, co-director of IViR and professor of copyright law at the University of Amsterdam, with the assistance of Nanda Ruijters and Sari Galapo.

## 2. TORT

Liability for harm done to (the interests of) others is generally governed by tort law. For a better understanding of the issues at stake, the main principles of tort law are set out below. Unavoidably, in the course of these generalisations, the subtleties of the various national systems will be lost. For the purpose of this study, however, the following summary will suffice.

### *Common and civil tort law*

The approach to tort law differs between civil and common law countries. Most evidently, in civil law countries the national civil codes contain general provisions dealing with tortious liability,<sup>3</sup> whereas such general provisions do not exist in common law jurisdictions. Thus, under civil law all forms of tortious liability are based, in principle, upon the same provisions and therefore follow the same general rules, whereas under common law different types of tort must be distinguished, such as the torts of trespass, conversion, defamation and negligence, subject to their own specific rules. These conceptual differences in approach, however, become less significant since courts in civil law countries have defined specific conditions that must be fulfilled for liability to be found under each form of tort. Perhaps the most accurate way of defining the distinction between the law of torts of the different legal systems is that in common law countries various *torts* exist, whereas in civil law countries various *forms of tort* are recognised. Another difference is that in civil law countries delictual liability is exclusively concerned with the allocation of losses, whereas common law relies on tort liability also for the determination and direct enforcement of rights, and, where it serves the latter purpose, applies a strict liability rule. In civil law countries, in

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<sup>2</sup> See <http://www.imprimatur.net>. The IMPRIMATUR project was funded by the European Commission's *Esprit* program.

<sup>3</sup> See for Germany, Art. 823 of the German Civil Code ('GCC', *Bürgerliches Gesetzbuch*); see for the Netherlands, Art. 6:162 of the Dutch Civil Code ('DCC', *Burgerlijk Wetboek*).

contrast, distinct provisions regarding the rights of a property owner or possessor are often included in the civil codes.<sup>4</sup>

### *Unlawfulness and fault*

Harm inflicted upon another person does not necessarily result in liability for the damages. Often, the elements of fault and/or unlawfulness must be fulfilled. 'Fault' refers to a state of mind or the attitude of the tortfeasor, whereas the notion of 'unlawfulness' is intended to qualify the act or omission of the defendant.<sup>5</sup>

However, these notions are often blurred. Particularly, in the case of a tortious omission, fault and unlawfulness are difficult to distinguish. This is exemplified by the fact that under common law the term negligence refers to a state of mind (a species of fault) as well as to a specific form of tort, i.e. a type of unlawful conduct.<sup>6</sup> Somewhat similarly, in civil law countries a lack of reasonable care may contribute to the unlawfulness of a person's conduct (under German law: *Rechtswidrigkeit*) or be considered in terms of the concept of fault (*Verschulden*).<sup>7</sup>

### *Unlawfulness*

In civil law countries the concept of 'unlawfulness' plays a major role in tort law; it is a separate element which needs to be fulfilled for liability to arise. A violation of a subjective right – such as a copyright – will normally fulfil this requirement *ipso jure*. However, even if a person does not directly infringe a right, his actions may be unlawful on the basis of a breach of a duty of care demanded by society (*Sorgfaltspflicht*). This is somewhat comparable to the tort of negligence in common law countries.<sup>8</sup>

### *Fault*

Basically, two kinds of liability are to be distinguished: with-fault liability and strict (or no-fault) liability. The requirement of fault expresses the ethical maxim that people are morally and psychologically responsible for their actions (or omissions) only when they, having the freedom of will, could and should have avoided the harm. In other words, only if a person is to blame for his actions, should he be held liable.<sup>9</sup> In legal practice, liability based on fault may require various specific mental elements, varying from intention to mere knowledge. Under certain circumstances mere inadvertence or negligence will suffice to find fault on the part of a defendant. Negligence, in turn, may be measured according to an objective criterion: the behaviour of 'the reasonable man', which, according to some, may result in strict liability. Strict liability, on the other hand, may be 'absolute' when no defences whatsoever are available, or it may be mitigated, inter alia, through the requirement of legal cause (see below). Another intermediate form of liability is the with-fault liability with a reversed burden of proof; in principle, fault is required, but because of the reversal of the onus

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<sup>4</sup> England 1992, p. 22; see also Markesinis 1986, p. 19—20; Markesinis 1994, p. 26—27.

Markesinis, 1986, p. 40.

<sup>6</sup> Rogers 1989, p. 45.

<sup>7</sup> Markesinis 1986, p. 42; Van Dunné 1998, p. 39; Koelman 1998, p. 207—208.

<sup>8</sup> See Markesinis 1994, p. 68 ff.; *Onrechtmatige Daad (oud) I* (Jansen), aant. 81.

<sup>9</sup> Fesevur 1998, p. 4; England 1992, p. 9.

of proof this may come very near to a strict liability. In sum, there exist many shades of grey between the extremes of strict and with-fault liability.<sup>10</sup>

### *Duty of care*

As follows from the above, failure to satisfy a ‘duty to take care’ may constitute an unlawful act or a tort in itself, or may play a role in the requirement of fault and therefore result in liability. Either way, similar factors are used by judges in the different jurisdictions to establish whether a duty of care exists, whether it has been violated, and what the consequences of such violation should be. German, British, American and Dutch courts all typically consider such factors as the probability of harm, the costs of avoidance, and the magnitude of the danger if it is realised.<sup>11</sup>

In all jurisdictions examined, the social utility of the activity is taken into account in establishing the scope of a duty of care. Thus, public policy considerations and fundamental rights may play a role in determining the existence and the limits of a duty of care, and consequently, in establishing the scope of liability.<sup>12</sup>

### *Freedom of expression and information*

With respect to ‘informational’ torts, such as defamation, the freedom of expression and information plays an important role in circumscribing an intermediary’s duty of care. In 1990 the German Federal Supreme Court (*Bundesgerichtshof*) held that, because the scope of a publisher’s duty of care is determined by the freedom of expression and information, a publisher may only be said to have acted negligently, if he publishes (defamatory) third party material that is *evidently* unlawful. A more onerous duty would conflict with the constitutionally guaranteed freedom of expression and information, as it would make it impossible for the press to do its socially beneficial work.<sup>13</sup> If, however, a publisher actually knows of the infringing nature of a statement, it cannot be a defence to hold that its unlawful nature was not obvious.<sup>14</sup> Limiting liability to instances where an intermediary acted with fault clearly serves the freedom of expression and information.<sup>15</sup>

U.S. law equally takes into account free speech values. In U.S. 1974 the US Supreme Court held that:<sup>16</sup>

<sup>10</sup> Rogers 1989, p. 30; England 1992, p. 22.

<sup>11</sup> See Markesinis 1986, p. 45; Van Dam 1989, p. 109—130; Hepple & Matthews 1985, p. 216—222.

<sup>12</sup> Markesinis 1986, p. 41; Dias & Markesinis 1984, p. 20—22 and 34—35; Hepple & Matthews 1985, p. 223—224; Van Dam 1989, p. 122.

<sup>13</sup> *Pressehaftung I*, German Supreme Court (*BGH*), 26 April 1990, [1990] *GRUR* 1012; see Pichler 1998, p. 85-86.

<sup>14</sup> *Pressehaftung II*, German Supreme Court (*BHG*), 7 May 1992, [1992] *GRUR* 618.

<sup>15</sup> See Perritt 1992, p. 100.

<sup>16</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). Previously, in *Smith v. California*, the Court found a law holding bookstores strictly liable for the (obscene) contents of the books they sell unconstitutional. Imposing such liability upon vendors would oblige them to read all material they offer for sale in order to avoid liability, and since there are limits to what one can read, fewer books would be available to the public. *Smith v. California*, 361 U.S. 147 (1959).



“so long as [the States] do not impose liability without fault, [they] may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. This approach provides a more equitable boundary between the competing concerns involved here. It recognises the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation. [...]. Here we are attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment.”

The Supreme Court’s reasoning is clearly reflected in *Cubby v. Compuserve*, one of the first cases dealing with online liability. Here, the US District Court stated:<sup>17</sup>

“Given the First Amendment considerations, the appropriate standard of liability to be applied [to a BBS operator] is whether it knew or had reason to know of the allegedly defamatory statements.”

### *Causal connection*

Even where fault is not a requirement, usually a causal connection must be established for liability to be found. Generally, the criterion is whether the act or omission was a *conditio sine qua non* for the damage to occur. In common law this is known as the ‘but-for’ test: would the plaintiff’s harm not have occurred ‘but for’ the defendant’s conduct? If it would not, the conduct concerned is the cause of the harm, and the defendant will be held liable. This is sometimes called ‘factual causation’ or ‘cause in fact’, and is said to be based upon the physical sequence of events.<sup>18</sup>

### *Legal cause*

If an act is found to be the factual cause of the harm, a defendant may nevertheless escape liability if his conduct is not regarded as the ‘legal cause’ of the harm. In common law, under the tort of negligence, the predominant test is that of ‘foreseeability’ or ‘remoteness of the damages’, i.e. a person is only liable for those consequences of his deeds that were reasonably foreseeable at the time that he acted.<sup>19</sup> In German civil law the theory of ‘adequate causation’ (*adäquater Kausalsammenhang*) prevails. Adequate causation is found if an act or omission has, in a general and appreciable way, enhanced the objective possibility of a consequence of the kind that is the subject of the case. In deciding this, account is taken of all the circumstances recognisable at the time the event occurred.<sup>20</sup> Evidently, the civil and common law criteria can very well be compared. The main purpose of the tests is to put a limit to the extent of liability for wrongful acts. Commentators underscore that the determination of legal causation often reflects policy considerations.<sup>21</sup>

<sup>17</sup> *Cubby v. Compuserve*, 776 F. Supp. 135 (S.D.N.Y. 1991).

<sup>18</sup> Markesinis 1986, p. 64; Hepple & Matthews 1985, p. 245; Jansen 1996, p. 39.

<sup>19</sup> Dias & Markesinis 1984, p. 79; Rogers 1989, p. 131 ff; Emanuel 1991, p. 106—113.

<sup>20</sup> Markesinis 1986, p. 67—71. For a discussion of adequate causation in relation to contributory copyright infringement under German law, see Vinck, Nordemann & Hertin 1994, p. 567—568.

<sup>21</sup> See Dias & Markesinis 1984, p. 36 and 79; see also England 1993, p. 181.

### 3. COPYRIGHT

The dissemination of copyrighted works online potentially implicates both the right of communication to the public and the right of reproduction. Hosting service providers are instrumental in ‘making available’ to the public web pages stored on their servers. Moreover, the reproduction right may come into play in various ways. The transmission of a work over the Internet will normally result in several acts of reproduction. First, the work is copied onto the server of the hosting service provider. Then, it will be temporarily reproduced, in whole or in part, during transmission – during transmission digitised packets are repeatedly ‘stored and forwarded’. Often, the access provider’s facilities will play a part in that process. Furthermore, an access provider may choose to ‘cache’ content retrieved from the World Wide Web on his own installations, in order to speed up further retrieval by his customers.

Can an intermediary be held directly or indirectly liable for (his contribution to) copyright infringement, and if so, under what circumstances? As will be shown below, the answer to this question depends upon whether the defendant has performed a restricted act for the purpose of copyright law. Before examining this question, the rules governing liability for direct and indirect infringement will be discussed.

#### 3.1 Direct infringement

Under the general provisions on tort in civil law countries, a *direct* infringement of copyright, i.e. the unauthorised performance of a restricted act, is considered an interference with a person’s subjective right, and therefore constitutes an unlawful act in itself.<sup>22</sup> The general rules on liability, however, require that some form of fault be shown for liability to arise.<sup>23</sup> For this purpose, courts generally find that direct copyright infringers are subject to a rather stringent duty of care, even to such an extent that they are almost strictly liable. In Germany, for instance, a printer cannot escape liability by relying on statements of his clients, but must investigate for himself whether the printing of a certain publication constitutes a copyright infringement.<sup>24</sup> Similarly, in the Netherlands a publisher has a duty to investigate whether the publication of material supplied by a third party infringes copyrights. A retailer, on the other hand, cannot be expected to be on guard, or to control whether each item he deals in violates a copyright, unless he has a reason to suspect that the particular item infringes a copyright.<sup>25</sup>

In the US, copyright infringement constitutes a specific tort following its own statutory rules. Under the US Copyright Act a direct infringer is strictly liable.<sup>26</sup> However, even though lack of fault cannot exonerate a direct infringer, if he is successful in proving that he was not aware, nor had a reason to believe, that his acts constituted infringement, a court may mitigate

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<sup>22</sup> Markesinis 1986, p. 33—34; *Onrechtmatige Daad (oud) I* (Jansen), aant. 81.

<sup>23</sup> The German Copyright Act contains a number of specific provisions on copyright liability (Arts. 97 ff.). These, however, merely repeat the general requirements of the German Civil Code. See Institute for Information Law 1997, p. 15.

<sup>24</sup> Vinck, Nordemann & Hertin 1994, p. 574.

<sup>25</sup> Quaadvlieg 1998, p. 159—160.

<sup>26</sup> Section 501 of the US Copyright Act. The US Copyright Act’s strict liability rule probably derives from the notion of copyright as a property right. Under other proprietary torts, such as trespass and conversion, the defendant is similarly strictly liable, i.e. it is sufficient that he intended to commit an act that has the effect of interfering with another person’s property. Intention to cause harm is not required. See Englund 1992, p. 49; Emanuel 1991, p. 30.

the statutory (or punitive) damages. But even then, the defendant will be fully liable for the actual damages.<sup>27</sup>

Interestingly, the UK Copyright Act distinguishes between so-called primary and secondary infringers. With regard to primary infringers, a with-fault liability with a reversal of the burden of proof exists. In principle, primary infringers are strictly liable, but they may escape liability if it is shown that at the time of the infringement they did not know, nor had reason to believe that copyright subsisted in the item.<sup>28</sup> Secondary infringers, such as mere distributors and organisers of performances, are considered copyright infringers only if they knew or had reason to believe that they contributed to an infringement. Thus, some form of fault appears to be included in the notion of (secondary) infringement.<sup>29</sup> Despite the conceptual difference in approach between the civil law jurisdictions and the UK, it appears that the outcome of a dispute will not differ substantially. Under civil law a distributor may be considered an 'infringer' for the purpose of copyright law (i.e. violate a copyright), but may at the same time avoid liability through the *separate* requirement of fault, whereas in the UK a distributor who does not (have a reason to) know that he contributed to the distribution of an infringing article is not an 'infringer' in the first place, and therefore not directly liable. Moreover, due to the extensive duty of care imposed on printers and publishers under Dutch and German law, the publisher's and printer's positions are very much the same as they are in the UK.

### 3.2 Indirect infringement

Under the general doctrine of tort in the Netherlands and Germany, the distinction between direct and indirect infringement of rights is generally accepted. Indirect infringers are persons who do not themselves violate a right, but whose actions or omissions contribute to such a violation. They may have acted unlawfully because of a breach of a duty of care. Thus, whereas with regard to direct infringers the duty may be relevant in establishing *fault*, with regard to indirect infringers negligence may result in the act or omission becoming *unlawful*.<sup>30</sup>

According to the German Supreme Court, anyone whose deeds are related to a copyright infringement in a way that fulfils the criterion of 'adequate causation', may be liable as a concurrent tortfeasor. Consequently, copy shop owners and providers of recording equipment may, in principle, be held accountable for copyright infringements taking place on the machines they provide, even if they do not themselves perform a restricted act. However, since the further one is removed from the actual acts of infringement, the narrower the scope of the duty of care becomes, ultimately, these actors were in fact not found to have acted unlawfully. An organiser of a performance, on the other hand, may act negligently if the performing artists that he hires violate copyrights. Factors determining the extent of the duty of care are, *inter alia*, the actual control one can exercise over the acts of infringement and the indirect infringer's financial interest in those acts.<sup>31</sup> Dutch copyright law is somewhat similar.

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<sup>27</sup> Section 504 of the US Copyright Act.

<sup>28</sup> Arts. 16–21 of the CDPA deal with primary infringements and Arts. 22–26 deal with secondary infringements. Arts. 96 and 97 of the CDPA are on liability in general.

<sup>29</sup> Institute for Information Law 1997.

<sup>30</sup> See for Germany Markesinis 1994, p. 74–75; see for the Netherlands *Onrechtmatige Daad (oud) I* (Jansen), aant. 81.

<sup>31</sup> See Decker 1998, p. 10; Vinck, Nordemann & Hertin 1994, p. 567–568.

Commentators state that the further a person is removed from the actual infringing activity, the less likely it is that breach of a duty of care or fault will be found.<sup>32</sup>

The indirect infringer's position is not expressly regulated in the US Copyright Act. In 1984, however, in its *Betamax* decision the US Supreme Court affirmed that the concept of contributory liability, which was developed in other areas of the law, applies under copyright law.<sup>33</sup> Contributory liability consists of personal conduct that forms part of, or furthers, the infringement, or of the contribution of machinery or goods that provide the means to infringe. To establish contributory liability, proof of fault, i.e. actual knowledge or a reason to know of the infringing nature of the activity of the primary actor, is required. Thus, whereas a direct infringer is held strictly liable, the liability rules are less stringent with regard to the indirect infringer.<sup>34</sup>

### 3.3 Restricted acts

The position of the defendant differs depending on whether he is considered an indirect or a direct infringer, or in other words, whether he did or did not perform a restricted act under copyright law. Is an online intermediary a direct infringer? Much ink has been spilled over this controversial issue.<sup>35</sup> In the following we will briefly examine how courts and legislatures have dealt with this question, and to what extent it has been settled by international regulations.

#### *Case law*

Pursuant to Article 111(a)(3) of the US Copyright Act, which was drafted in order to deal with cable retransmission, any 'passive carrier' who has no direct or indirect control over the content or selection of the primary transmission, and whose activities with respect to secondary transmission consist solely of providing wires, cables, or other communication channels, is exempted from liability, but only with respect to the restricted acts of performing and publicly displaying a work.<sup>36</sup> Under UK law, a person transmitting a television program will only be considered as performing the primary infringing act of 'broadcasting' (Article 20 CDPA), 'if he has responsibility to any extent for its contents' (Article 6(3)(a) CDPA).<sup>37</sup> Thus, under both regimes a 'retransmitter' that has no control over the contents cannot be held liable for direct copyright infringement. However, even though Internet intermediaries may

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<sup>32</sup> See Spoor & Verkade 1993, p. 341—343; Koelman 1998, p. 206 Gerbrandy 1989, p. 317; Hugenholtz 1998, p. 226-227; Brinkhof, Dupont, Grosheide et al. 1998, p. 212 ff.

<sup>33</sup> *Sony Corp. v. Universal Studios, Inc.*, 464 US 417, 435 (1984). The Court stated that the "absence of such express language in the copyright statute does not preclude the imposition of liability for copyright infringement on certain parties who have not themselves engaged in the infringing activity. For [...] the concept of contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another."

<sup>34</sup> Nimmer on Copyright, § 12.04 [A][2][b].

<sup>35</sup> See e.g., Zscherpe 1998, p. 404—411; Aplin 1998; Elkin-Koren 1995, p. 352-362; Decker 1998, p. 11; Panethiere 1997.

<sup>36</sup> See Panethiere 1997, p. 20.

<sup>37</sup> See Dworkin & Taylor 1989, p. 196.

have an equally passive role, a US district court has ruled that online access providers cannot invoke the ‘passive carrier’ exemption.<sup>38</sup>

Does this mean that online intermediaries should be regarded as direct infringers? Particularly in the US, this question has been addressed in several decisions. At first, the courts approached the issue in a rather rigid fashion. In 1993, in *Playboy Enterprises v. Frena* a district court found a Bulletin Board Service (BBS) operator to be liable, even though the operator had not uploaded the work and was unaware of the infringement taking place. The Court found that the operator had *directly* infringed copyrights and simply stated that ‘intent or knowledge is not an element of [direct copyright] infringement’.<sup>39</sup> Other district courts have followed a similar approach.<sup>40</sup>

In the landmark *Netcom* decision of 1995, a US district court for the first time mitigated the strictness of the liability of online intermediaries.<sup>41</sup> The Court found that temporary copies made while transmitting a work over the Internet constitute reproductions for the purpose of copyright law and acknowledged that fault is not required under the US Copyright Act. However, mainly on grounds of public policy and sheer reasonableness<sup>42</sup>, the Court required an additional element of ‘volition or causation’ to hold the provider liable for direct infringement. The reasoning in the *Netcom* case was followed in several other decisions where it was found that a BBS operator cannot be a direct infringer if he does not ‘directly cause’ the infringement.<sup>43</sup> According to these decisions, if an intermediary does not initiate the infringement nor create or control the content of its service, he cannot be considered to have *caused* the infringement and therefore is not a direct infringer. Apparently, the notion of foreseeability, that plays a role in establishing legal cause, is introduced as an element of direct infringement to limit the US Copyright Act’s strict liability rule. The courts in these decisions added that an intermediary may still be held indirectly liable under the doctrine of contributory infringement, in which case fault on the part of the provider must be proven (i.e. the plaintiff must show that the provider knew or should have known of the direct infringer’s conduct). Other post-*Netcom* courts, however, have held online intermediaries directly liable, even when the defendant acted as passively as *Netcom*.<sup>44</sup>

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<sup>38</sup> *Religious Technology Center v. Netcom Online Communication Services*, 907 F. Supp. 1361 (N.D. Cal. 1995), note 12.

<sup>39</sup> 893 F. Supp. 1552 (M.D. Fla. 1993).

<sup>40</sup> See e.g. *Sega Entertainmant, Ltd. v. Mapphia*, 875 F. Supp. 679 (N.D. Cal. 1994). See for a critical analysis of these decisions Elkin-Koren 1995, p. 350—375.

<sup>41</sup> *Religious Technology Center v. Netcom Online Communication Services*, 907 F. Supp. 1361 (N.D. Cal. 1995).

<sup>42</sup> The *Netcom* Court stated, inter alia, that the “plaintiffs’ theory would create many separate acts of infringement and, carried to its natural extreme, would lead to unreasonable liability. [...] Where the infringing subscriber is clearly directly liable for the same act, it does not make sense to adopt a rule that could lead to the liability of countless parties whose role in the infringement is nothing more than setting up and operating a system that is necessary for the functioning of the Internet. Such a result is unnecessary as there is already a party directly liable for causing the [infringement].”

<sup>43</sup> *Sega Enterprises v. Sabella*, LEXIS 20470 (N.D.Cal. 1996); *Sega Enterprises v. Maphia*, 948 F. Supp. 923 (N.D.Cal. 1996).

<sup>44</sup> *Playboy Enterprises, Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503 (N.D. Ohio 1997); *Central Point Software, Inc. v. Nugent*, 903 F. Supp. 1057 (E.D.Tex.1996).

In Europe, a considerably smaller body of case law exists. A Dutch lower court came to a similar result as did the Court in the *Netcom* decision. In the Dutch *Scientology* case, the Court found that a hosting service provider does not directly infringe copyrights and may only be held liable if he knows or has a reason to know of the actual wrongful act taking place over its installations.<sup>45</sup>

### *WIPO Treaties*

On the international level, several attempts have been made to deal with the issue. An ‘Agreed Statement’ accompanying the WIPO Copyright Treaty of 1996, which provides for a broad right of communicating a work to the public that is specifically designed to cover online dissemination, clarifies that:<sup>46</sup>

“It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention [...]”

Literally taken, the statement deals only with the provision of facilities - not with the provision of transmission services. Even so, the Agreed Statement clearly signals that an intermediary cannot be held liable for *direct* infringement, insofar as the ‘right of communication to the public’ is concerned.<sup>47</sup> However, the Statement does not rule out liability for indirect infringement.

Perhaps because the WIPO Treaty does not contain a provision on the right of reproduction, there is no similar statement regarding “the mere provision of physical facilities for enabling or making” a reproduction. Particularly controversial is the status of temporary copies which are made during the ‘store and forward’ process in the course of transmitting material over the Internet. This issue was discussed at length at the WIPO Conference in 1996, but because the Contracting Parties could not agree, no provision was included in the Treaty.<sup>48</sup> The only language on the reproduction right is another Agreed Statement that

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<sup>45</sup> *Scientology*, President of District Court of the Hague, 12 March 1996, [1996] *Mediaforum* B 59, available in English in: M. Dellebeke (ed.), *Copyright in Cyberspace, ALAI Study Days Amsterdam, 4–8 June 1996*, Amsterdam, Cramwinckel 1997, p. 139. See Dommering 1998a; Hugenholtz 1998, p. 228. See also *Scientology*, Court of the Hague, 9 June 1999, [1999] *Informatierecht/AMI* 110, available in English at <http://www.xs4all.nl/~kspaink/cos/verd2eng.html> (service provider not directly liable for copyright infringement, but general duty of care may result in indirect liability if provider fails to intervene upon notification of infringement).

<sup>46</sup> Agreed Statement with Art. 8 of the WIPO Copyright Treaty, WIPO document CRNR/DC/96 (23 December 1996), Agreed Statements Concerning the WIPO Copyright Treaty, adopted by the Diplomatic Conference on December 20, 1996. Remarkably, no such statement accompanies the WIPO Performances and Phonograms Treaty, even though Art. 14 of that Treaty contains a similarly broadly defined performers’ right of communication to the public. WIPO Document CRNR/DC/97, 23 December 1996, adopted by the Diplomatic Conference on 20 December 1996.

<sup>47</sup> See *WIPO National Seminar on Digital Technology and the New WIPO Treaties*, 22 August 1997, WIPO/CNR/SEL/97/1, p. 7.

<sup>48</sup> See Foster 1997. Art. 7(1) of the Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to Be Considered by the Diplomatic Conference (WIPO document CRNR/DC/4, 30 August 1996) would have introduced into the Treaty the following provision: “The exclusive right accorded to authors of literary and artistic works in Article 9(1) of the Berne Convention of authorising the reproduction

[Footnote continued on next page]

declares that digital copies are considered reproductions for the purpose of (international) copyright law.<sup>49</sup> This does not, however, clarify the status of the ‘transmission copy’. Notably, both in Europe and the US, the temporary storage of computer programs, as a particular class of works, is expressly considered a reproduction under copyright law as is the temporary storage of databases in Europe. In the US, transient reproductions of other classes of works probably qualify as reproductions as well.<sup>50</sup>

### *European Copyright Directive*

The European Commission has seen fit to address the issue of temporary copying in the proposed Copyright Directive. Article 2 of the proposal states:<sup>51</sup>

“Member States shall provide for the exclusive right to authorize or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part.”

The provision is drafted broadly enough to cover the transient copying that occurs while transmitting a work over a network. To exclude, inter alia, such reproductions from the scope of copyright law, Article 5(1) of the proposed Directive provides:

“Temporary acts of reproduction referred to in Article 2, such as transient and incidental acts of reproduction which are an integral and essential part of a technological process, including those which facilitate effective functioning of transmission systems, whose sole purpose is to enable use to be made of a work or other subject matter, and which have no independent economic significance, shall be exempted [...]”

In many cases, access providers ‘proxy cache’ copies of web pages recently retrieved by their subscribers. Although the wording of Article 5(1) is somewhat ambiguous, Recital 23 with the (amended) proposal suggests that under normal circumstances proxy caching will be exempted from the reproduction right. This conclusion is supported by a statement in the Explanatory Memorandum with the proposed E-Commerce Directive, where the Commission

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[Footnote continued from previous page]

of their works shall include direct and indirect reproduction of their works, whether permanent or temporary, in any manner or form.”

<sup>49</sup> Agreed Statement with Art. 1(4) of the WIPO Copyright Treaty states that “[t]he reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.” See also Agreed Statement with Articles 7, 11 and 16 of the WIPO Performances and Phonograms Treaty, which contains a similar statement regarding performers’ rights.

<sup>50</sup> The *Netcom* Court (*supra* note 41), for example, found that under transient transmission-copies are relevant under copyright law.

<sup>51</sup> Amended proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, Brussels, 21 May 1999, COM (1999) 250 final.

states that a proxy cache copy “does not as such constitute a separate exploitation of the information transmitted”.<sup>52</sup>

Undoubtedly, transient copies that are by-products of the ‘store and forward’ transmission will fall under the proposed exemption. Thus, operators that provide transmission services over the Internet will not be considered direct infringers of the right of reproduction. On the other hand, intermediaries that store copyrighted works more or less permanently on their servers, such as hosting service providers or BBS operators, still risk incurring direct liability for copyright infringement. Pursuant to the Agreed Statement with Article 8 of the WIPO Treaty, which is repeated almost verbatim in Article 3(4) of the proposed Copyright Directive, these providers will probably not be regarded as direct infringers of the right of communication to the public. Neither the Statement nor the proposed Directive, however, rule out direct liability for infringement of the right of reproduction.

### *Australian Copyright Bill*

In Australia changes have been proposed to the Copyright Act 1968 which would clarify the intermediary’s position under copyright law. The Copyright Amendment (‘Digital Agenda’) Bill 1999 limits when Internet service providers directly infringe a copyright and when they may be held liable for ‘authorising’ an infringement.<sup>53</sup> Under Australian copyright law, a person ‘authorising’ an infringement may be directly liable as an ‘infringer’, even if he did not himself perform a restricted act.<sup>54</sup> Under US and continental European copyright law, such actors would normally be regarded as indirect or contributory infringers. In the past, a university has been held to infringe copyrights by ‘authorising’ the making of infringing copies by providing copying machines and retaining control over the machines and the books which were copied.<sup>55</sup>

Pursuant to the WIPO Copyright Treaty, the Australian Bill introduces a new right of communication to the public (Section 31(1)(a)(iv)). Proposed Section 22(6) allocates liability for direct infringement of the communication right ‘upstream’ by providing:

“For the purposes of this Act, a communication other than a broadcast is taken to have been made by the person responsible for determining the content of the communication.”

According to the Explanatory Memorandum<sup>56</sup> “[t]his would mean that carriers and carriage service providers (including ISPs) who are not responsible for determining the

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<sup>52</sup> Explanatory Memorandum with the E-Commerce Directive (*infra* note 92), Commentary on Individual Articles, Chapter 1, Section 4, Article 13.

<sup>53</sup> Copyright Amendment (‘Digital Agenda’) Bill 1999, available at: [http://www.copyright.com.au/digital\\_agenda\\_bill.htm](http://www.copyright.com.au/digital_agenda_bill.htm).

<sup>54</sup> Sections 13 and 36(1) of the Australian Copyright Act. Article 16(2) of the British CDPA contains a similar provision.

<sup>55</sup> *University of NSW v Moorhouse* (1975) 133 CLR 1. See E.P. Skone James (ed.), *Copinger and Skone James on Copyright*, 1991, p. 221.

<sup>56</sup> Explanatory Memorandum with Copyright Amendment (‘Digital Agenda’) Bill 1999, available at: [http://www.copyright.com.au/digital\\_agenda\\_bill.htm](http://www.copyright.com.au/digital_agenda_bill.htm).



content of the transmission would not be directly liable for those transmissions.”<sup>57</sup>  
Complementing this provision, proposed Section 39B limits the liability of a ‘carrier or carriage service provider’, a term that presumably includes Internet service providers, for acts of ‘authorising’ infringement:

“A carrier or carriage service provider is not taken to have authorised any infringement of copyright in a work merely because the carrier or carriage service provider provides facilities used by a person to do something the right to do which is included in the copyright.”<sup>58</sup>

In addition, Section 43A creates an exemption for transmission copies, which, according to the Explanatory Memorandum, also applies to “certain caching”:

“(1) The copyright in a work, or an adaptation of a work, is not infringed by making a temporary reproduction of the work or adaptation as part of the technical process of making or receiving a communication.”

However, the exemption cannot be invoked by the person making the initial communication, if the communication is not authorised by the right holder:

‘(2) Subsection (1) does not apply in relation to the making of a temporary reproduction of a work, or an adaptation of a work, as part of the technical process of making a communication if the making of the communication is an infringement of copyright.’

In sum, it appears that under the Australian Bill online intermediaries are exempted from liability for infringing, either directly or indirectly, both the (new) right of communication to the public and the right of reproduction.

#### 4. CRIMINAL LAW

In most jurisdictions copyright law provides for criminal sanctions. Although remedies under private law prevail in practice, prosecution under criminal law will occur in cases of piracy or other forms blatant copyright infringement. To our knowledge, until today no online service provider has been convicted for criminal acts of copyright infringement or related conduct.<sup>59</sup>

However, to present a complete picture it appears useful to set out a few general principles of criminal liability.

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<sup>57</sup> The amendment seems to have been largely inspired by the High Court’s ruling in the *Telstra* case. *Telstra Corporation Ltd. v. APRA* (1997) 38 IPR 294 (telephone operator held liable for playing music ‘on hold’).

<sup>58</sup> A corresponding section in relation to subject-matter other than works is provided in Section 112<sup>E</sup>.

<sup>59</sup> In 1996, a German lower court held a BBS operator criminally liable for direct copyright infringement for failure to ensure that third parties could not download pirated software from the bulletin board. Amtsgericht Nagold, 31 October 1995, [1996] *Computer und Recht* 240.

Criminal law can be chiefly distinguished from private law in terms of the objective pursued. Private law focuses primarily on damages or the restoration of the lawful situation. Criminal law, in contrast, primarily aims at punishing the offender; it is a system not of remedies, but of sanctions. There are various reasons for imposing punishment, such as reprisal, general and special prevention (deterrence), the enforcement of standards, safety and satisfaction for the victim. The thrust, however, appears to lie in reprisal: the infliction of pain on the offender. Because of its far-reaching sanctions, criminal law will only be applied if is no viable alternative is available; criminal law is *ultimum remedium*.

Criminal law does not easily lend itself to universal application. To a greater degree than in private law, standards in criminal law mirror political, cultural, moral and religious beliefs and thus vary significantly from country to country. This diversity of standards may lead to problems, particularly for cross-border disputes, given that the jurisdiction of many countries practically always extends over the national boundaries. This is, of course, particularly relevant with respect to online intermediaries, given that the Internet is an outstanding example of a medium that leaves its traces world-wide. However, in the context of this study, this problem is not explored any further, because the standards in copyright law are much less culture-dependent and thus lend themselves better to universal application. Moreover, due to the Berne Convention and subsequent international and regional treaties, many national differences in copyright law have gradually disappeared.

In the jurisdictions of the European continent, criminal liability will be incurred less easily than liability on the grounds of civil law. This is because to establish criminal liability, it is always necessary to prove a certain level of culpability. Strict liability is considered to contradict the presumption of innocence in these countries. In Anglo-Saxon law systems, on the other hand, in exceptional cases a rule of strict liability is applied.

Both Anglo-Saxon and Continental law recognise a number of basic principles in criminal law, which apply to all offences.

#### *Principle of Legality*

On account of the possible drastic effect of the sanctions to be imposed, it is a general principle of criminal law, and much more so than in civil law, to establish with utmost clarity and certainty what is and what is not considered to be an offence. It must be predictable and known to the subjects of the law what constitutes a punishable act. This *nulla poena sine lege* principle<sup>60</sup> further ensures that reasoning by analogy and extensive interpretation are severely limited in the pursuit of criminal justice.

#### *Conditions constituting a criminal offence*

Criminal law in civil law countries usually requires that three conditions be met for a criminal offence to arise: unlawfulness (*Rechtswidrigkeit*), culpability (*Schuld*) and, of course, a (criminal) act (*Tatbestand*). In the common law systems, *mens rea* (culpability) and *actus reus* (act) are frequently included as separate elements in the description of an offence.

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<sup>60</sup> This principle has been codified, e.g., in Article 1(9)(3) of the U.S. Constitution.

### *Culpability*

The level of culpability required mostly follows from the description of the offence. American penal law distinguishes four different ‘types’ of culpability that may result in liability: purpose, knowledge, recklessness and negligence.<sup>61</sup> In civil law countries a distinction is made between culpable and intentional criminal acts. For a culpable offence negligence suffices, whereas for an intentional offence it is necessary that intent is proven.<sup>62</sup>

In many legal systems, an omission can also result in a criminal offence, provided there is an obligation to act that has been breached.<sup>63</sup> This is, of course, particularly relevant to online intermediaries, because of the passive character of an intermediary’s conduct – he is neither the producer of the content, nor the initiator of the dissemination.

### *Participation*

Even if an intermediary’s conduct does not qualify as an offence under a specific provision of the law, he still may be liable as a participant. All the countries dealt with in this survey have implemented rules which expand the circle of actors that can be held liable – and thus also criminal liability. In the common law a distinction was traditionally made between (1) the offender (principal in the first degree), (2) the person who encourages the act or offers help in its commission or omission while physically being present at the scene of the crime (principal in the second degree), (3) the person who does the same thing, but is not physically present at the scene (accessory before the fact), and (4) the person who promotes the offence (accessory after the fact). However, not all countries with a common law background have maintained this distinction.

Even though in most countries there is no distinction in the maximum punishment for the different types of participants and the perpetrator<sup>64</sup> (the Netherlands is an exception), the penalty imposed on a participant will usually be less severe than the punishment to the primary offender.<sup>65</sup> Consequently, an intermediary would risk a less severe sanction if it is regarded as a participant rather than a principal offender.

In some continental countries like Denmark, Sweden, Italy and Austria, which have adopted the *Einheitstätersystem*, the law does not distinguish between participants and primary offenders.

The *Einheitstätersystem* focuses on the individual acts or omissions of each person involved in an offence. The fact that each and every person involved is a culprit, means that each and every one of them is subject to the same maximum punishment.<sup>66</sup>

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<sup>61</sup> Lensing 1996, p. 111

<sup>62</sup> For Germany see Günther Jakobs 1993, p. 258-261.

<sup>63</sup> France is an exception. Omission is not an offence, except in case of real omission offences. Sieber, ‘Die Verantwortlichkeit von Internet-Providern im Rechtsvergleich’, [1999] ZUM 199.

<sup>64</sup> Smith & Hogan 1996, p. 130.

<sup>65</sup> The U.S. Sentencing Guidelines, for instance, determine that consideration should be given to each person’s share in the offence in establishing the severity of the punishment. U.S. Sentencing Guidelines Manual, §§ 3B1.1 and 3B1.2.

<sup>66</sup> Van Toorenburg, 1998, p.251-283

Most online intermediaries will be legal entities. A legal entity, just as a natural person, can be either perpetrator or participant. In addition to the legal entity in question, the actual leaders or managers of the entity may also be prosecuted.<sup>67</sup> Thus, a public prosecutor can institute its action against a variety of actors.

### *Exemptions from criminal liability*

The fact that an act answers to the description of an offence does not necessarily result in the suspect being liable to punishment. Grounds for exemption from criminal liability exist in all legal systems. In German and Dutch law, a distinction is made between grounds for excuse and grounds for justification. The latter are grounds which ‘cure’ the unlawfulness of the offence. The former concern *mens rea*; even though all requirements of a provision are fulfilled, the suspect will escape liability because fault is lacking. In the common law systems, no such clear distinction is made. In all countries of study more or less the same grounds for exemption from liability appear: self-defence, *force majeure*, duress, necessity, public order and insanity. It remains to be seen whether these general grounds will benefit an online intermediary in a given situation.

## 5. SPECIFIC LEGISLATION ON INTERMEDIARY LIABILITY

The special position of intermediaries, whether online or ‘offline’, in disseminating third party content has been recognised in many national laws, many of which relate to criminal law and do not (directly) deal with copyright. Even so, some of these laws have inspired national and international legislators in dealing with the issue of online liability for copyright infringement. In the following section a small selection of online liability laws will be briefly reviewed.

### *United States*

The Communications Decency Act of 1996 (CDA)<sup>68</sup> introduced a number of rules that chiefly deal with criminal liability of online providers. Section 223(e) of title 47 of the USC determines that an access provider is not responsible for “obscene, lewd, lascivious, filthy or indecent material” if it solely provided access to a public computer network. This exemption does not, however, apply unconditionally, as Section 223(e)(2) determines that the exclusion of liability does not apply to a party which is “a conspirator with an entity actively involved in the creation or knowing distribution of communications that violate this section, or who knowingly advertises the availability of such communications”. Section 223(e)(3) adds that this rule does not apply to a party who “provides access or connection to a facility, system or network engaged in the violation of this section that is owned or controlled by such a person”. Section 231, drawn up as part of the Child Online Protection Act<sup>69</sup>, excludes network

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<sup>67</sup> Cf. *CompuServe*, Amtsgericht München, May 28, 1998, [1998] *Multimedia und Recht* 429-448 (director of German branch of OSP sentenced for being accessory to circulation of pornographic material).

<sup>68</sup> Communications Decency Act of 1996, in Telecommunications Act of 1996, § 230, 501-61, Pub. L. No. 104-104, 110 Stat. 56, 133-43 (1996).

<sup>69</sup> Child Online Protection Act, available at <http://www.techlawjournal.com/internet/81022omn.htm>. The provision has been declared unconstitutional by a U.S. District Court: *ACLU v. Reno* (E.D. Penn. 1999), available at <http://zeus.bna.com/e-law/cases/aclureno99.html>.

providers and access providers from liability for deliberately providing “dangerous material” to minors, as part of conducting professional activities, on condition that they have subjected access by minors to those sites to measures intended to check and prevent such access.

The CDA also provides for a ‘good Samaritan defence’ to protect bona fide service providers against liability arising from (state) defamation law, as a result of bona fide monitoring.<sup>70</sup>

### *United Kingdom*

The United Kingdom was the first European country to deal specifically with online intermediary liability by statute. In the UK Defamation Act of 1996<sup>71</sup>, which codified the ‘innocent dissemination’ defence for distributors of hard copies, service and access providers are also specifically mentioned. Like any ‘ordinary’ distributor, an online intermediary may escape liability for third party material, if he sustains the burden of proving that he took reasonable care in relation to the publication and did not know, nor had a reason to believe that he contributed to the publication of a defamatory statement. In determining what would constitute reasonable care or whether an intermediary should have known of his contribution, courts must expressly take into account the extent of editorial control and the nature and circumstances of the publication and the prior conduct of the author. In the *Demon* case, the Court found that a hosting service provider can not invoke the liability limitation of the Defamation Act after receiving notification of the existence of defamatory messages on his server.<sup>72</sup>

The Criminal Justice and Public Order Act of 1994 widened the definitions applied in the Protection of Children Act of 1978 and the Criminal Justice Act of 1988 of “publication” to include computer transmissions. Section 1 (4) (b) of the Protection of Children Act 1978, and Section 160 (2)(b) of the Criminal Justice Act 1988, offer special defences to providers accused of disseminating child pornography.

### *Germany*

Germany has enacted legislation that specifically deals with online intermediary liability in its Multimedia Act of 1997 (*Informations- und Kommunikationsdienste-Gesetz*).<sup>73</sup> The Act intends to regulate liability ‘horizontally’ - its rules apply to the full range of liabilities resulting both from civil and criminal law. Three types of ‘service providers’ are distinguished: information providers, hosting service providers and access providers. Not surprisingly, providers of the first category are fully responsible for the content they disseminate; here the general laws apply in full.

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<sup>70</sup> See *infra* text accompanying note 120.

<sup>71</sup> U.K. Defamation Act of 1996, available at <<http://www.hms.o.gov.uk/acts/acts1996/96031--a.htm>>.

<sup>72</sup> *Godfrey v. Demon*, High Court of Justice Queens Bench Division, 26 March 1999, available at: <http://www.courtservice.gov.uk/godfrey2.htm>.

<sup>73</sup> Art. 1 of the German Multimedia Act contains the Teleservices Act (*Teledienstegesetz*) of which Art. 5 addresses intermediary liability. The Multimedia Act is available in German and English at <http://www.iid.de/iukdg/>.

Providers of the second category, who ‘offer for use’ third party content<sup>74</sup>, are only liable if they have actual knowledge of the content, and if preventing further dissemination is technically possible and can be reasonably expected. Thus, under the Multimedia Act a duty to monitor or investigate can not be imposed on service providers. Moreover, the Act requires a high level of fault (actual knowledge<sup>75</sup>), and specifically takes into account the costs of avoidance of the harm in establishing the duty of care under general tort law. According to the explanatory memorandum, it would be impossible for the provider to have knowledge of all the content disseminated and examine its lawfulness.<sup>76</sup> Access providers are totally excluded from liability, either resulting from the ‘mere provision of access for use’ of third party content, or from the act of temporarily copying in the course of the provision of access.

The Multimedia Act is said to act as a filter, in particular where the hosting service provider is concerned (an access provider will never pass the ‘filter’). Only if the requirements of the Act are met, may a court consider whether the service provider is liable under general civil or criminal law.<sup>77</sup>

The Act was applied by the court that decided the infamous *Compuserve* case in 1998.<sup>78</sup> The Court ruled that Compuserve Germany, a full subsidiary of Compuserve US, which routed traffic to the latter’s servers, could not apply for the limitation in the Act open to access providers, because access to the Internet was, strictly speaking, provided by the parent company, and not by Compuserve Germany. Apparently, according to the Court, the provision does not apply to mere network providers. The Court decided that the German company should be regarded as a hosting service provider, because the actions of Compuserve US, which operated the servers, were to be attributed to its subsidiary. Sufficient knowledge was found on the basis that a provider who hosts news groups with names as ‘alt.sex’ and ‘alt.erotica’ can be presumed to know of the fact that pornographic material is available on its servers. Thus, according to the Court, knowledge of an actual message, or of particular material, is not required; it is enough if a provider generally knows illegal content is stored on its servers.<sup>79</sup> The Court found that it would be technically feasible to block access, because Compuserve US could simply have discarded all news groups concerned. Finally, blocking could reasonably be expected, because the interests of Compuserve to make money by providing intermediary services are outweighed by the interests of society to be protected against pornographic material, and the Multimedia Act should not lead to the existence of a lawless pirate zone. Consequently, the Act did not prevent Compuserve Germany, or rather its

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<sup>74</sup> The German law distinguishes between “eigene und fremde Inhalte”. However, these terms are not always clear. The literature, for example, endlessly asks the question of whether hyperlinks should be considered as “eigene” or as “fremde Inhalte”. See Stefan Ernst, ‘Zivil- und strafrechtliche Verantwortlichkeit für Hyperlinks auf fremde Inhalte’, available at <http://www.uni-freiburg.de/rz/rzschriften/anrufarchiv/m9901/CuR9901.html>

<sup>75</sup> Commentators argue that the knowledge requirement under the German Multimedia Act applies only to the knowledge of the existence of the contents, and not to knowledge of their unlawful nature. If this view is correct, and the proposed E-Commerce Directive were adopted in its current form, the German Act may need to be redrafted to comply with it; the proposed Directive undoubtedly refers to the second level of knowledge. See Pichler 1998, p. 87—88; Bulst 1997, p. 34—35.

<sup>76</sup> Deutscher Bundestag- 13. Wahlperiode, Drucksache 13/7385, p. 20.

<sup>77</sup> Engel-Flehsig, Maennel & Tettenborn 1997; Pichler 1998, p. 86-88; Engel-Flehsig 1999, p. 46; Bulst 1997.

<sup>78</sup> Amtsgericht München, May 28, 1998, [1998] MultiMedia und Recht 429-448

<sup>79</sup> As to the knowledge required under the Multimedia Act, see *supra* note 75.

CEO, from being held liable under the pornography provision of the German Penal Code. The *Compuserve* decision has been met with severe criticism, both in legal journals and the general press, and even by German officials.<sup>80</sup>

### France

Under Articles 42 ff. of the Act on the Regulation of the Press of 1881 (*Loi sur la réglementation de la presse*), liability for crimes committed by the press is organised in a cascading system.<sup>81</sup> In principle, publishers or editors of printed matter are liable, while the author can be held liable as an accomplice. In the absence of a known publisher, the author will be held solely liable. Only if none of the above actors is available for prosecution, the vendor and distributor can be held accountable. With the Act on Audiovisual Communications of 1982 (*Loi sur la communication audiovisuelle*) this system of ‘cascade liability’ was extended to apply to audio-visual communications.<sup>82</sup> In a civil case concerning privacy infringement, the Paris Court of Appeals applied these rules by way of analogy to a hosting service provider. If a provider allows customers to post material anonymously on his server, he willingly takes the risk of being the sole actor accountable, and must therefore bear the consequences of unlawful material being disseminated over his installations.<sup>83</sup> In a later decision a lower court held that a hosting service provider was not liable under the 1982 Act, because he did not control the contents of the (defamatory) information prior to its dissemination; in this case the author of the defamatory statement was known.<sup>84</sup>

Currently, draft legislation amending the Freedom of Communications Act of 1986 (*loi du 30 septembre 1986 relative à la liberté de communication*) is being debated, which would limit the liability of online intermediaries in a general way.<sup>85</sup> Proposed Article 43-2 would exempt Internet providers<sup>86</sup> from liability for the infringement of rights of third parties, unless they themselves have contributed to the creation or production of the contents, or, if requested by the proper authorities, they fail to immediately prevent access to the prohibited content. Article 43-3 determines that providers, if requested by the authorities in question and conditional upon their storing the information, have to identify the perpetrator and inform the authorities about the source of the material in question. Additionally, Article 43-1 of the proposal would impose on providers an obligation to place filters to prevent access to certain services. Another version of Article 43-2 currently under discussion would limit provider liability to cases where the provider has knowingly committed the illegal act, or failed to undertake the requisite steps to stop it.<sup>87</sup>

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<sup>80</sup> See Spindler, NJW 1997, 3193, 3196, Koch, CR 1997, 193, 199 and Sieber MMR 2/1999

<sup>81</sup> The Act’s rules on liability are regularly applied in defamation cases decided under civil law.

<sup>82</sup> See Institute for Information Law 1997 (S. Dusollier), p. 35.

<sup>83</sup> *Estelle Hallyday v. Valentin Lacambre*, Court of Appeal Paris, 10 February 1999, available at <[http://www.legalis.net/legalnet/judiciaire/decisions/ca\\_100299.htm](http://www.legalis.net/legalnet/judiciaire/decisions/ca_100299.htm)>.

<sup>84</sup> Tribunal d’instance de Puteaux, 28 September 1999, available at <http://www.afa-france.com/html/action/jugement.htm>.

<sup>85</sup> See <http://www.assemblee-nationale.fr/2/dossiers/communic/ta0325.htm>. The amendment was inspired by a report published by the Council of State. Conseil d’Etat, *Internet et les réseaux numériques, Etude adoptée par l’Assemblée générale du Conseil d’Etat*, Paris, 2 July 1998.

<sup>86</sup> The French text speaks of “les personnes physiques ou morales qui assurent, directement ou indirectement, à titre gratuit ou onéreux, l’accès à des services en ligne autres que de correspondance privée ou le stockage pour mise à disposition du public de signaux, d’écrits, d’images, de sons ou de messages de toute nature accessibles par ces services”.

<sup>87</sup> See <http://www.assemblee-nationale.fr/2/propositions/pion1710.htm>

### *The Netherlands*

Articles 53 and 54 of the Dutch Penal Code (*Wetboek van Strafrecht*) provide for a different system of ‘cascade liability’ for a publisher or printer ‘as such’ – i.e. an actor who neither produced the statement, nor was involved in the decision to publish it but who merely invests in publishing or printing. The printer or publisher can escape prosecution if several conditions are met. First, he must identify by name and address the actual author of the statement. Second, the author must be available for prosecution, and may not reside outside the Netherlands. If these conditions are met, the printer or publisher may not be prosecuted even if they were aware of the fact that the contents of the material constituted a criminal offence, and hence they would have been criminally liable under general principles of criminal law.

The rationale for introducing this system was to avoid a situation whereby publishers would act as censors. Thus the system serves the freedom of expression and information.<sup>88</sup> Note that the Dutch and French cascading systems differ, in that in the Netherlands a publisher may pass on liability to the originator of the material, while in France a mere distributor may divert liability to the publisher or author by identifying them, but a publisher will always be liable even in the event that the actual author is available for prosecution.

The Dutch government now intends to rewrite the provisions on the ‘cascade’ system in the Penal Code to ensure that they apply to all ‘intermediaries’ (*tussenpersonen*), including online intermediaries.<sup>89</sup> The proposal does not distinguish between analogue or digital, service or access providers. Under the proposal, in order to escape prosecution an intermediary must identify itself, reveal the identity of the perpetrator or, if requested to do so, provide all relevant information to find the perpetrator. Moreover, the intermediary must take all steps that may be reasonably required to prevent any further dissemination of the material constituting the offence. The proposed rules no longer require that the perpetrator be located within the Netherlands. The proposed regime thus takes into account that the Internet is a global medium, and that perpetrators may be found anywhere in the world.

### *Sweden*

In May 1998, the Swedish Parliament passed the Act on Responsibility for Electronic Bulletin Boards (*Lag (1998:112) om ansvar för elektroniska anslagstavlor*). The Act obliges service providers to remove obviously illegal or copyright infringing material from their servers. In order to fulfil this obligation the provider must supervise the activities of his subscribers in so far as can reasonably be expected in view of the size and the purpose of the service.<sup>90</sup> The Swedish act is unique in that it imposes upon the intermediaries a duty to

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<sup>88</sup> Schuijt 1987, p. 163—167.

<sup>89</sup> Proposal *Wet Computercriminaliteit II* of January 1998, Tweede Kamer, 1998-1999, 26671, nos. 1-2.

<sup>90</sup> In the Explanatory Memorandum the Swedish Government explains: “The provider must regularly go through the content of the electronic bulletin board. How often this is done varies from case to case depending on the content of the service. Commercial services must check more regularly than private services. It is not intended that the activity of the supplier be seriously hampered by the act. If the number of messages is so large, that it is too cumbersome to check them all, it can be

[Footnote continued on next page]



monitor. In fact, the Act appears not to limit the scope of intermediary liability, but to broaden it instead; it will only apply if the provider is not liable under the general provisions of the Penal Code or the Copyright Act. Network providers are expressly excluded from the scope of the Act. Presumably, access providers are excluded as well.<sup>91</sup>

## 6. THE DMCA AND THE E-COMMERCE DIRECTIVE

As we have seen, the statutory rules on online liability differ substantially from one European country to another. It was these differences, among other things, that brought the European Commission to draft a directive on e-commerce regulating, *inter alia*, online intermediary liability.<sup>92</sup> The proposed E-Commerce Directive, published in November 1998, applies to so-called 'information society services', which are services 'normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services'.<sup>93</sup> The liability rules are modelled upon the German Multimedia Act in that they deal with liability in a horizontal manner and serve as a filter; only if a provider fails to qualify for the limitations on liability, may he be held liable on the basis of the general law.<sup>94</sup>

In October 1998, the US Online Copyright Infringement Liability Limitation Act was enacted as part of the Digital Millennium Copyright Act (DMCA).<sup>95</sup> The Act adds a new Section 512 to Chapter 5 of the US Copyright Act, which deals with the enforcement of copyrights. Because the European proposal is heavily influenced by the DMCA, they will be analysed together and compared below.

However, whatever the similarities between these regulations, it is important to keep in mind that the proposed E-Commerce Directive deals with online intermediary liability 'horizontally', whereas the DMCA only governs liability under copyright law. Perhaps, a non-horizontal approach is only natural for a system of law that, unlike civil law, specifically recognises different torts. Contrary to the DMCA, the proposed Directive applies both to civil and criminal liability for copyright infringement.

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[Footnote continued from previous page]

acceptable to provide an abuse board, to which users can complain of the existence of illegal messages." Translation by J. Palme.

<sup>91</sup> An English translation with a commentary by J. Palme is available at <http://www.dsv.su.se/~jpalme/society/swedish-bbs-act.html>. See also Julià-Barceló 1998, p. 457.

<sup>92</sup> Proposal for a European Parliament and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Market, Brussels, COM (1998) 586 final; Amended proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the Internal Market, Brussels, COM(1999) 427 final. References in this study are to the Amended proposal.

<sup>93</sup> See Explanatory Memorandum with the E-Commerce Directive, Commentary on Individual Articles, Chapter 1, Art. 2.

<sup>94</sup> See Explanatory Memorandum with the E-Commerce Directive, Commentary on Individual Articles, Chapter 1, Section 4.

<sup>95</sup> Public Law 105-308-OCT. 28, 1998.

### *Mere conduits*

Both under the proposed Directive and the DMCA, a provider acting as ‘mere conduit’ cannot be held liable to provide for monetary relief.<sup>96</sup> The exemption applies to providers who merely transmit third party content or provide access to communications networks. Clearly, this not only concerns the provision of the infrastructure (as it may be under Section 111 of the US Copyright Act or the Agreed Statement with the WIPO Copyright Treaty), but also the activity of providing transmission services. To qualify for the exemption, providers may neither initiate the transmission, select the receiver nor have any editorial control by selecting or modifying the material. In terms of general tort law, one could say that fault on the part of the ‘mere conduit’ is completely excluded, and that a duty to block access will never arise.

Presumably for the purpose of clarifying the intermediary’s position under copyright law, it is stipulated that acts of transient storage, which take place for the sole purpose of carrying out a transmission and do not last longer than is necessary for that transmission, are considered as part of the provision of access or transmission services. Thus, a mere conduit can not be held liable for infringing the reproduction right, even if the transient copy would constitute a copyright infringement. Consequently, rather than determining whether a ‘transmission-copy’ is a reproduction for the purpose of copyright law, the legislature has chosen to simply rule out liability for transient copying during transmission.<sup>97</sup> The US legislature could have perhaps followed the ‘passive carrier’ precedent of Section 111 of the US Copyright Act (i.e. provide that the intermediary does not directly infringe a copyright<sup>98</sup>), but instead has elected to address the liability issue ‘head-on’. A similar approach is followed with regard to storage of third party material by a hosting service provider and proxy-caching by an access provider.

### *Proxy caching*

A copy in a proxy cache is comparable to a transmission-copy in that it is intermediate and temporary. To be considered a transmission copy for the purpose of the DMCA and the proposed Directive, however, a copy may not be accessible to any person other than the anticipated recipient, and may not be maintained for a period longer than is reasonably necessary for the transmission. However, a copy in a proxy cache will usually be retained for

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<sup>96</sup> Art. 12 of the proposed E-Commerce Directive and Section 512(a) of the US Copyright Act.

<sup>97</sup> See Explanatory Memorandum with the E-Commerce Directive, Commentary on Individual Articles, Chapter 1, Section 4: (“It should be clear, however, that the provisions of this section do not affect the underlying material law governing the different infringements that may be concerned.”). See also US Senate, *The Digital Millenium Copyright Act of 1998, Report together with Additional Views to Accompany S. 2037*, submitted by Senator Hatch, from the Committee on the Judiciary (Report 105-190, 11 May 1998), p. 19 and 55 (“Section 512 is not intended to imply that a service provider is or is not liable as an infringer either for conduct that qualifies for a limitation of liability or for conduct that fails to so qualify. Rather, the limitations of liability apply if the provider is found to be liable under existing principles of [copyright] law. [...] New section 512 does not define what is actionable copyright infringement in the online environment, and does not create any new exceptions to the exclusive rights under copyright law. The rest of the Copyright Act sets those rules. [...] New section 512 simply defines the circumstances under which a service provider, as defined in this Section, may enjoy a limitation on liability for copyright infringement.”).

<sup>98</sup> See *supra* text accompanying note 36.

some time and be accessible to more than just one specific recipient.<sup>99</sup> To escape liability for maintaining cache-copies, an intermediary must abide by more stringent rules.<sup>100</sup> Aside from requirements implying that he be unaware of the contents of a copy, because there was no editorial control, under the DMCA an intermediary must expeditiously block access to the information if he receives a notification of infringement, but only if the material has previously been removed from the originating site. Thus, unlike a provider who functions as a mere conduit, an intermediary who has made a cache-copy may become liable if he has actual knowledge of the potentially infringing character of the material and does nothing to prevent its further distribution. However, only if he obtains this knowledge in a specific way, namely by receiving a notification that meets certain statutory requirements (see below), will he incur liability. If a provider obtains knowledge in any other way, he will still escape liability. The EU proposal does not contain any specific notice and take down procedures. However, under the proposal too, it is not the knowledge of the unlawful character of the cached material as such, but knowledge of removal at the initial source or of the fact that a competent authority has ordered such removal that may prompt an intermediary to block access to the cached copy.

Additionally, both regimes include requirements that appear to be intended merely to protect the originator of the material, such as the operator of the cached web site, who is not necessarily the person who will incur harm from the dissemination of unlawful material, e.g. where defamatory material is disseminated, or in cases where the operator of the site is the copyright infringer. First, both the US Act and the proposed directive provide that the material may not be modified. Note that this requirement has a double function; it both indicates that the intermediary did not have editorial control, and thus implies that there is no fault on his part, and it ensures that the interests of the originator are served. Second, the intermediary must comply with generally accepted standards regarding the updating and refreshing of cache-copies.<sup>101</sup> Third, he may not interfere with technology associated with the material which sends back data to the originator (e.g. the number of 'hits'), in so far as such can reasonably be expected. And finally, if, at the original location conditions are set upon access to the material (e.g. the insertion of a password), the intermediary may only permit access to the cache-copy if these conditions are met.

#### *Hosting service provider*

The threshold level of fault required for holding a hosting service provider liable is somewhat lower.<sup>102</sup> A service provider may be held liable for storing third party content, if he does not 'expeditiously' block access to the material upon obtaining knowledge of its unlawful character, or is aware of facts or circumstances of which that character is apparent. The EU proposal does not provide any guidance on the exact meaning of the latter criterion, but, as it is probably derived from the US Act, it presumably refers to the same thing. The US legislature explains that the 'awareness criterion' intends to express that an intermediary has

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<sup>99</sup> The Act and the proposed Directive subtly distinguish 'transient storage' (with respect to transmission services) from 'temporary storage' (with respect to caching).

<sup>100</sup> Art. 13 of the proposed E-Commerce Directive and Section 512(b) of the US Copyright Act.

<sup>101</sup> There is no indication that, by inclusion of the latter two requirements, the legislature intended to protect the originator's moral rights under copyright law. However, one might argue that they protect comparable interests. On the other hand, the originating web site owner will often not be the 'author' for the purpose of copyright law.

<sup>102</sup> Art. 14 of the proposed E-Commerce Directive and Section 512(c) of the US Copyright Act.

an obligation to investigate and block access if he has a special reason to suspect that infringing activities are taking place.<sup>103</sup>

To qualify for the exemption in the DMCA, the intermediary may not receive financial benefit directly attributable to the infringement and must remove the material upon reception of a notification of claimed infringement. Consequently, the threshold level of certainty by the intermediary regarding the infringing character of the material appears to be somewhat higher if no notification is received; a service provider must remove material that is *claimed* to be infringing upon notification, whereas content of which he becomes aware in any other way needs only be removed if it actually *is* infringing. Perhaps, the difference is justified by the statutory ‘notice and take down’ procedures that are set out below. In requiring actual knowledge, the intention of the US legislature is to take the criterion that was applied in the *Netcom* decision one step further. The level of fault required is somewhat higher than it is under the doctrine of contributory infringement, where an indirect infringer may also be held liable if he has a ‘reason to know’ of the direct infringer’s conduct.<sup>104</sup> However, by inclusion of the ‘awareness criterion’ and the obligation to act upon notification, the ‘reason to know’ standard seems to be reintroduced. Furthermore, due to the reversal of the onus of proof (see below), it would seem that a service provider is more likely to be found liable under the DMCA than under the doctrine of contributory liability.

As mentioned before, the Directive intends to set limits upon civil as well as criminal liability in a ‘horizontal’ fashion. However, with respect to hosting service providers the liability exemption is not entirely uniform. In fact, Article 14(1)(a) sets a double standard: the absence of ‘actual knowledge’ and ‘awareness’. The latter (lower) threshold applies only “as regards claims for damages”. In other words, a hosting service provider will incur *criminal* liability under this subsection only if he has actual knowledge that the activity is illegal.

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<sup>103</sup> See Senate Report (*supra* note 97), p.44: “[This] can best be described as a ‘red flag’ test. [A] service provider need not monitor its service or affirmatively seek facts indicating infringing activity (except to the extent consistent with a standard technical measure [...]), in order to claim this limitation on liability (or, indeed any other limitation provided by the legislation). However, if the service provider becomes aware of a ‘red flag’ from which infringing activity is apparent, it will lose the limitation of liability if it takes no action. The ‘red flag’ test has both a subjective and an objective element. In determining whether the service provider was aware of a ‘red flag,’ the subjective awareness of the service provider of the facts or circumstances in question must be determined. However, in deciding whether those facts or circumstances constitute a ‘red flag’—in other words, whether infringing activity would have been apparent to a reasonable person operating under the same or similar circumstances—an objective standard should be used.” The House Committee on the Judiciary adds that “[these] circumstances include the absence of customary indicia of ownership or authorization, such as a standard and accepted digital watermark or other copyright management information”. US House of Representatives, *WIPO Copyright Treaties Implementation and On-line Copyright Infringement Liability Limitation, Report To Accompany H.R. 2281*, submitted by Mr. Coble, from the Committee on the Judiciary (Report 105-551 Part 1, 22 May 1998), p. 25.

<sup>104</sup> See House Report, *ibid.* (“This standard differs from existing law, under which a defendant may be liable for contributory infringement if it knows *or should have known* that the material was infringing”).

*Notice and take down*

From Recital 16 of the EU proposal it can be concluded that the European Commission expects ‘notice and take down’ procedures to evolve in the form of self-regulation.<sup>105</sup> The US legislature, on the other hand, has felt that it was necessary to regulate such procedures by way of statute to ensure that access is not blocked without proper justification.<sup>106</sup> The Act specifies certain formal requirements for a notification that must be fulfilled for it to impose a duty to block access on an intermediary.<sup>107</sup>

Of course, if a service provider were to take down material that turns out to be non-infringing, the web site owner may have grounds to hold him liable for the damages suffered as a result of the removal of the material. To deal with this problem, the DMCA provides that an intermediary cannot be held liable if he blocks access in good faith reliance upon a notification or believing that the material is infringing, regardless of whether the material is ultimately determined to be infringing.<sup>108</sup> In addition, the DMCA states that, to remain immune for all claims, a hosting service provider who removes material upon notification must promptly notify the subscriber that access to his web page has been disabled, and put the content back on the server, upon receipt of a ‘counter notification’ from the web site owner

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<sup>105</sup> See also Explanatory Memorandum with the proposed E-Commerce Directive, Commentary on Individual Articles, Article 14 (“Service providers will not lose the exemption from liability if after obtaining actual knowledge or becoming aware of facts and circumstances indicating illegal activity, they act expeditiously to remove or to disable access to the information. This principle [...] provides a basis on which different interested parties may lay down procedures for notifying the service provider about information that is the subject of illegal activity and for obtaining the removal or disablement of such information (sometimes referred to as ‘notice and take down procedures’). It should nevertheless be stressed that these procedures do not and cannot replace existing judicial remedies. The Commission is actively encouraging industry self-regulatory systems, including the establishment of codes of conduct and hot line mechanisms.”). For an alternative procedure which may foster the freedom of expression and information to a greater extent, see Julià-Barceló 1998, p. 461—462 (advocating the establishment of a ‘special body’ that would judge whether a claim of infringement should lead to an obligation to block access). Hugenholtz argues that, if a web site operator objects and the material is not obviously unlawful, the content should be taken down only *after* a judicial decision, not *pending* one, as is the case under the DMCA. Hugenholtz 1998, p. 230—231. De Roos has similar objections against the proposed update of the Dutch ‘cascade’ system. Even though an examining magistrate is involved when a preliminary inquiry is commenced, it would be unjust to oblige an intermediary to take down content at that stage pending a judicial decision. See De Roos 1998, p. 56; see also Schuijt 1998, p. 72.

<sup>106</sup> See Senate Report (*supra* note 97), p. 21 (“The Committee was acutely concerned that it provide all end-users—whether contracting with private or public sector online service providers—with appropriate procedural protections to ensure that material is not disabled without proper justification. The provisions in the bill balance the need for rapid response to potential infringement with the end-users legitimate interests in not having material removed without recourse.”).

<sup>107</sup> The notification must be in writing, signed, sufficiently identify the allegedly infringing material, contain the address of the complaining party and a statement that that party has a good faith belief that the use of the material is not authorised by either the rights holder or the law, and, under the penalty of perjury, include a statement that the complaining party is authorised to act on behalf of the copyright holder. Section 512(c)(3) of the US Copyright Act.

<sup>108</sup> Section 512(g)(1) and (4) of the US Copyright Act.

claiming that the removal was unjustified.<sup>109</sup> Furthermore, the provider may not enable access upon counter notification, if the first claimant, upon being informed of the counter notification, has filed an action seeking a court order to restrain the alleged infringer from engaging in the infringing activity. Finally, perhaps to serve as a disincentive for issuing an unjust (counter) notification, it is determined that any person who knowingly misrepresents that material is infringing or mistakenly removed is liable for the damages incurred as a result of a provider acting upon such misrepresentation.<sup>110</sup>

### *Information location tools*

Contrary to the EU proposal, the US Act deals with two other kinds of intermediaries as well: universities and intermediaries who refer users to infringing content, whether by directly providing a hyperlink or through a search engine. The latter, providers of so-called 'information location tools' (search engines), are basically treated as hosting service providers.<sup>111</sup> The E-Commerce Directive does not directly address the position of providers of search engines.<sup>112</sup>

### *Universities providing online services*

The second category of providers whose position is specifically regulated by the DMCA and not under the EU proposal is that of non-profit institutions of higher education who act as online intermediaries.<sup>113</sup> These are not accountable for the infringing activities of their staff, so long as these activities are not related to the employees' teaching or research functions and where the institution has no reason to suspect that the employee is an infringer by repeatedly receiving notifications of claimed infringement. The provision is included because it was acknowledged that, due to academic freedom, the relationship between a university and its faculty members differs from an 'ordinary' employer-employee relationship. To prevent a university from being held liable for the actions of its employees under the principle of *respondeat superior*, the wrongful act of a faculty member will not be considered an act of the educational institution and the knowledge or awareness of an employee will not be attributed to the university.<sup>114</sup>

### *Duty to monitor and technology*

From the above, it can be concluded that, only if an intermediary encounters particularly suspicious circumstances, he may be subject to a duty of care to investigate further whether material he hosts or refers to is unlawful and, where found to be so, to block access.

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<sup>109</sup> Section 512(g)(2) of the US Copyright Act. This counter notification must comply with similar formal requirements as are applicable to the notification of claimed infringement, but also must contain some sort of choice of forum provision. Section 512(g)(3) of the US Copyright Act.

<sup>110</sup> Section 512(f) of the US Copyright Act.

<sup>111</sup> Section 512(d) of the US Copyright Act.

<sup>112</sup> The principles laid down in the E-Commerce Directive may, however, influence decisions concerning references to unlawful third party content. See also Waldenberger 1998, p. 74 (arguing that the German Multimedia Act could, and probably will, be applied to a provider of a hyperlink by way of analogy).

<sup>113</sup> Section 512(e) of the US Copyright Act.

<sup>114</sup> US House of Representatives, *Digital Millennium Copyright Act*, submitted by Mr. Coble from the Committee of Conference (Report 105-796, 8 October 1998), p. 74.

Additionally, both the EU proposal and the US Act explicitly stipulate that a duty of care to the extent that a provider must actively search for unlawful activities may not be imposed.<sup>115</sup>

However, in the US, the exclusion of a duty to monitor is not as absolute as it appears to be in the E-Commerce Directive. To qualify for the liability limitations of the DMCA, a provider must accommodate and not interfere with (future) standard technical measures that are used by copyright holders to identify or protect copyrighted works, to the extent that the implementation of such technologies imposes neither substantial costs on the provider nor substantial burdens on his systems.<sup>116</sup> Apparently, the availability of such technical measures may result in a duty to monitor the contents of transmitted, cached or hosted material or content to which one provides a hyperlink.<sup>117</sup> Moreover, according to the US legislature, awareness on the part of the provider, for the purpose of the Act, may follow from the absence of technological tags that normally indicate ownership or authorisation.<sup>118</sup> Consequently, the availability of technologies that facilitate monitoring may widen the scope of an intermediary's duty of care, which, in turn, is limited by the burden that the inclusion of such technology may impose upon (the systems of) the intermediary. A similar result could have been reached by applying the principles of general tort law, where, in establishing the scope of a duty of care, the likelihood and magnitude of harm to the plaintiff are balanced against the cost of avoidance to the defendant and the public interest served by his activities.

It seems that the availability of technology that facilitates monitoring will not affect the scope of a duty to monitor under the EU proposal. The provision that forbids Member States from imposing a general duty to monitor includes no reservations with regard to the future existence of technologies that would facilitate monitoring, as does the US Act. Moreover, even though Recital 16 of the proposed Directive states that the provisions of the proposal "should not preclude the development and effective operation [...] of technical systems of protection and identification and of technical surveillance instruments made possible by digital technology [...]", it is hard to see why intermediaries would co-operate with the implementation of such technologies; mere conduits and proxy-caching intermediaries would have nothing to gain, and the legal position of hosting service providers would be undermined. The application of monitoring techniques would result in these intermediaries being more likely to be held to have sufficient knowledge or awareness, and thus would extend their liability.<sup>119</sup>

It was precisely this dilemma that brought the US legislature to enact special legislation on liability for third party defamatory contents. In the *Prodigy* case, a US lower court held that a BBS operator who exercises editorial control, inter alia, through the use of automatic software screening programs, must be regarded as a 'primary publisher' and therefore can be presumed to have knowledge of a defamatory third party statement.<sup>120</sup> Consequently, the application of monitoring technologies may lead to greater liability, and intermediaries who

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<sup>115</sup> Art. 15 of the proposed E-Commerce Directive and Section 512(m) of the US Copyright Act.

<sup>116</sup> Art 512(i) of the US Copyright Act.

<sup>117</sup> See Section 512(m)(1) of the US Copyright Act. See Senate Report (*supra* note 97), p. 44.

<sup>118</sup> House Report (*supra* note 114), p. 25.

<sup>119</sup> See Decker 1999, p. 13; Pichler 1998, p. 87. Both authors note that the German Multimedia Act suffers from a similar problem.

<sup>120</sup> *Stratton Oakmont, Inc., v. Prodigy Services Co.* No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. 1995).

do take care to avoid unlawful statements being disseminated over their installations are more likely to be held liable than those who do not. Due to concern within the US Congress that the decision might therefore serve as a disincentive for online service providers to apply such technologies or to restrict access to unlawful contents, a so-called ‘good Samaritan defence’ was included in the Communications Decency Act of 1996.<sup>121</sup> The provision forbids the States (defamation being a State cause of action) from treating a provider ‘of an interactive computer service’ as a ‘publisher’ of third party content.<sup>122</sup> Several courts have deduced from this provision that under no circumstances may an online intermediary be held liable for defamatory third party content, even if he actually knows or is notified of the presence of the material on his systems.<sup>123</sup>

### *Identity of the alleged infringer*

Clearly, one of the main justifications for limiting intermediary liability may be found in the fact that it is another actor (the information provider) who initiates the unlawful act and is primarily liable. As there is always a person to hold accountable, the Internet need not become a lawless ‘pirate-zone’ if intermediaries are exempted. To facilitate holding the actual infringer accountable, the DMCA has introduced an obligation upon the intermediary to reveal his identity upon receipt of a subpoena. However, this obligation apparently exists only if the identity is actually known to the provider.<sup>124</sup> Consequently, providing the identity of the original infringer is not a condition for escaping liability, as it is in the proposed revision of the ‘cascade’ system in the Netherlands.

Thus, both under the DMCA and the proposed Directive, the situation may arise that no liability at all can be imposed for an infringing act. The intermediary may escape liability because the requirements of the liability limitations are fulfilled, whereas the actual infringer cannot be held accountable simply because his identity is unknown.

### *Burden of proof*

The proposed E-Commerce Directive does not give any guidance on who bears the onus of proof. Must the intermediary show that he did not know of (the unlawful nature of) a subscriber’s activities, or did not have any editorial control, to qualify for the liability limitations, as is the case under the UK Defamation Act of 1996, or must the plaintiff instead prove fault on the part of the intermediary? Needless to say, the answer to this question will substantially affect the practical implications of the liability regulations. The US legislature, while likening the DMCA’s liability limitations to the copyright exemptions (e.g. fair use), expressly states that the limitations in the DMCA are affirmative defences, and that the defendant therefore bears the burden of establishing his entitlement to the relevant limitation

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<sup>121</sup> See Guenther 1998, p. 82—88.

<sup>122</sup> Section 230(c)(1) of Title 47 of the United States Code.

<sup>123</sup> See *Zeran v. America On Line Inc.*, 985 F. Supp. 1124 (E.D. Va. 1997), aff’d 129 F.3d 327 (4th Cir. 1997), review denied 22 June 1998, U.S., No. 97-1488; see also *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C.1998).

Section 512(h) of the US Copyright Act. Pursuant to Section 512(h)(3) the subpoena shall order the provider to disclose to the copyright owner “information sufficient to identify the alleged infringer [...] to the extent such information is available to the service provider”.



of liability.<sup>125</sup> However, whereas a defendant must show that he *did* use a work ‘fairly’ to apply for the fair use exemption, a service provider has the burden of proving that he *did not* know of the primary infringer’s conduct, and an access provider that he *did not* have any editorial control. Keeping in mind that it is, to say the least, not particularly easy to prove that something did not happen or exist, it remains to be seen to what extent intermediary liability will, in practice, be limited by the Act.

## 7. INJUNCTIONS

The liability exemptions of the DMCA and the proposed E-Commerce Directive do not apply with respect to the imposition of injunctions. This is not surprising, since under general tort law, too, different requirements must be fulfilled for an injunction to be granted. It is in accordance with general tort law that the statutory threshold levels of fault do not apply to the granting of injunctions.<sup>126</sup> Thus, the effect of the liability exemptions on copyright practice is rather limited - especially in continental Europe, where monetary damages are rarely substantial and the focus of most cases of copyright infringement is on obtaining an injunction, rather than monetary relief.

Injunctions come in various forms. The two main types are prohibitory and mandatory injunctions. A prohibitory injunction orders the defendant to desist from certain wrongful conduct. A mandatory injunction orders the defendant to take positive action to rectify the consequences of what has already occurred. In common law countries, more stringent criteria must be fulfilled for a mandatory injunction to be ordered. Another distinction is made between permanent and interlocutory or preliminary injunctions. The latter may be issued pending the settlement of either the legal or factual basis of the plaintiff’s claim. These injunctions may be prohibitory or mandatory. Generally, an interlocutory injunction will only be granted if the plaintiff shows a good arguable case on the merits.<sup>127</sup>

*In civil law jurisdictions there is no requirement that fault be established for an injunction to be imposed. In these countries, however, the ‘unlawfulness’ of the defendant’s*

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<sup>125</sup> House Report (*supra* note 114), p. 26 (“The exemption and limitations provided in this subsection are affirmative defenses, like the exceptions and limitations established elsewhere in title 17. While the burden of proving the elements of direct or contributory infringement, or vicarious liability, rests with the copyright owner in a suit brought for copyright infringement, a defendant asserting this exemption or limitation as an affirmative defense in such a suit bears the burden of establishing its entitlement.”)

<sup>126</sup> See for Germany Markesinis 1994, p. 413—414. The GCC does not specifically provide for injunctive relief in tort cases, but it has long been available on the analogy of Art. 1004 GCC, which does not require fault. The German Copyright Act expressly provides that an injunction may be granted in the absence of fault. See Art. 97 of the German Copyright Act; see for the Netherlands Asser-Hartkamp 4-III 1998, p. 115; Van Nispen 1978, p. 131. Commentators on common law are less outspoken in this respect; nevertheless, Art. 97 of the UK CDPA states that the defendant may escape liability for damages if he proves no fault on his part, but adds that other remedies (such as injunctions) are not affected by such proof. See Dias 1989, p. 1569. Not surprisingly, in the US, where strict liability exists even with regard to compensation for damages, the Copyright Act provides that the same applies in respect of injunctions. Section 502 of the US Copyright Act. See Nimmer on Copyright, § 14:06[B].

<sup>127</sup> Rogers 1989, p. 636—640; Dias & Markesinis 1984, p. 429—431; Nordemann, Vinck & Hertin 1994, p. 569—574; Dias 1989, p. 325-338; Van Nispen 1978.

*activity must nevertheless be established. This is where it may matter whether an intermediary does or does not directly infringe a copyright. If he has performed a restricted act under copyright law, the requirement of unlawfulness is fulfilled eo ipso. If, however, he is considered an indirect infringer, a court must determine whether he acted negligently and will consider several factors when deciding whether an intermediary violated a duty of care and therefore acted unlawfully. Consequently, in the latter case an injunction is less likely to be imposed. Similarly, in the US an injunction can only be granted if the defendant's acts (would) result in liability under copyright law.<sup>128</sup> Thus, as liability is less likely to be found if an intermediary is seen as a contributory infringer, there too the qualification of an intermediary's conduct under copyright law may affect the possibility of imposing an injunction.*

An injunction will normally be refused if compliance would involve an illegal act.<sup>129</sup> It cannot, for instance, be ordered that a subscriber's activities be monitored if this would violate the secrecy of communications. Also, the practical and economical feasibility of compliance is often taken into account.<sup>130</sup> Finally, the public interest in the continuation of the defendant's activities may be of relevance.<sup>131</sup> In conclusion, it can be said that roughly the same factors that are considered in determining whether a duty of care has been violated are of importance where (the scope of) an injunction is concerned.

Both the EU and the US legislature have taken these factors into account in determining the scope of injunctions that may be imposed on online intermediaries. The proposed E-Commerce Directive repeatedly applies the formula: "Member States shall provide in their legislation that the provider shall not be liable, otherwise than under a prohibitory injunction [...]". Interestingly, earlier drafts used the broader notion of 'injunctive relief' instead of 'prohibitory injunction'. In conjunction with the prohibition against imposing a general obligation to monitor third party activities, from the current wording one might conclude that the proposal intends to limit the forms of injunctive relief that may be granted: a provider may be ordered to block access to identified unlawful content, but a court may never demand that affirmative steps be taken to avoid future unlawful third party activities, because this would necessarily involve some kind of monitoring and may be considered to amount to a mandatory injunction.

The DMCA is somewhat more explicit as regards (the scope of) injunctions that may be imposed.<sup>132</sup> Pursuant to the Act, a provider acting as a 'mere conduit' may be ordered to terminate the account of a subscriber to its own services or to take reasonable steps to block access to a specified, identified, online 'location' outside the US. Apparently, it may be ordered that access be blocked to an entire server if the specific infringing content or web site falls outside the reach of US copyright law. The fact that *hosting* service providers may only be ordered to block access to a 'site', rather than to a 'location' (the latter appears to be a broader notion) supports this assumption. However, factor (C), cited below, probably rules out an order to block access to an entire server, since such an injunction would probably "[...] interfere with access to non-infringing material at other online locations."

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<sup>128</sup> Nimmer on Copyright, § 14:06[B].

<sup>129</sup> Dias 1989, p. 375.

<sup>130</sup> Dias & Markesinis 1984, p. 430.

<sup>131</sup> Rogers 1989, p. 637.

<sup>132</sup> Section 512(j) of the US Copyright Act.

Hosting service providers can be ordered to block access to infringing material on a particular ‘site’, or to terminate the account of an infringing subscriber. Note that the DMCA does not provide for an injunction in the form of a duty to monitor. However, courts may order any relief they consider necessary, but, at the same time, must select, of equally effective measures, the injunction that is least burdensome on the intermediary. As a guidance to the courts, the DMCA lists four factors that must be considered while contemplating the granting and the scope of injunctive relief:

- “(a) whether such an injunction, either alone or in combination with other such injunctions issued against the same service provider [...], would significantly burden either the provider or the operation of the provider’s system or network;
- (b) the magnitude of the harm likely to be suffered by the copyright owner in the digital network environment if steps are not taken to prevent or restrain the infringement;
- (c) whether implementation of such an injunction would be technically feasible and effective, and would not interfere with access to non-infringing material at other online locations; and
- (d) whether other less burdensome and comparably effective means of preventing or restraining access to the infringing material are available.”

Again, this is reminiscent of the factors that are to be considered in the determination of breach of duty of care. Interestingly, factor (C) appears to be included to protect freedom of speech, as it implies that an access provider may not (readily) be obliged to block access to infringing content, if such blocking would affect the availability of non-infringing material.<sup>133</sup>

## 8. CONCLUSIONS

As this study has amply demonstrated, courts and legislatures world-wide have dealt with the problems of online liability in different ways. Even so, courts in the United States and Europe have produced case law that is sometimes remarkably similar, based on general principles of common or civil tort law. This similarity is particularly surprising considering that the workings of tort liability under both legal systems are very different. The consensus emerging from the courts is confirmed by specific legislation that is either in the making (such as the European E-Commerce Directive) or already adopted (the DMCA). Whether judged under tort law or under the new legislation, the basic rules are roughly the same:

- access providers (‘mere conduits’) are exempt from liability;
- absent knowledge or ‘awareness’, hosting service providers are not liable for monetary relief;

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<sup>133</sup> Cf. Sieber 1997a, p. 586 (“Bei der Beurteilung von Kontrollmaßnahmen ist daher nicht nur - wie dies in den bisherigen strafrechtlichen Ermittlungsmaßnahmen erfolgte - zu berücksichtigen, inwieweit sie zu wirtschaftlichen Aufwendungen der Provider führen. Entscheidend ist vor allem auch, inwieweit sie (z.B. bei der Sperrung von Servern) den Datenverkehr unbeteiligter Dritter beeinträchtigen.”).

- upon acquiring knowledge or ‘awareness’, hosting service providers are not liable for monetary relief, if they immediately disable access to the infringing content; and
- online intermediaries are not immune to injunctions.

As summarised above, the rules on liability for copyright infringement are fairly consistent with the general provisions on liability contained in the enforcement chapter of the TRIPs Agreement.<sup>134</sup> Article 45(1) of TRIPs requires that “the judicial authorities shall have the authority to order the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of an infringement of that person’s intellectual property right by an infringer who *knowingly, or with reasonable grounds to know*, engaged in infringing activity” [italics added].<sup>135</sup> Moreover, Article 44(1) of TRIPs prescribes that the judicial authorities have the authority to issue injunctions.

Even though the general thrust of the legal solutions described in this study is the same, there remain certain, largely technical differences. Interestingly, the Australian legislature intends to deal with online liability *directly* by expressly stating, as a matter of substantive copyright law, that passively acting providers do not perform restricted acts, not even by ‘authorising infringement’.

A fundamental difference between the European approach (as inspired by the German legislature) and the US solution is in the scope of application. Whereas the European legislature has opted for an all-encompassing ‘horizontal’ approach, the US have dealt with copyright liability within the framework of the copyright law. The horizontal approach has the obvious advantage of providing a measure of legal security to intermediaries and injured parties across the board. The drawback is that different kinds of liability are subsumed under a single common denominator. This may be problematic in areas of the law, such as defamation law or criminal law, where because of fundamental rights or the legality principle, liabilities tend to be allocated ‘upstream’ (i.e. with the author of the unlawful statement).

Indeed, the system of ‘cascade’ liability found in French and Dutch (criminal) defamation law is difficult to reconcile with a system, such as proposed in the E-Commerce Directive, that allows for concurrent liabilities, and focuses on the level of fault on the part of the provider. Already, the European Commission has indicated that the proposed revision of the Dutch Penal Code that would extend the existing (print-oriented) system of cascade liability to cover intermediaries in all media, is at odds with the proposed directive.

The main difference between the US and EU models lies in the DMCA’s elaborate ‘notice and take down’ procedures, which are not included in the proposed Directive, but, as the European Commission optimistically predicts, will evolve from self-regulation. The central role of the notification system in the US law is exemplified by the requirement that to

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<sup>134</sup> Gervais 1998, p. 206-207; Panethiere 1997, p. 16; see also Decker 1999, p. 8 (finding that the German Multimedia Act’s limitation of hosting service provider liability is in accordance with TRIPs).

<sup>135</sup> Arguably, the US and European rules that exempt providers from liability for acts of transmission and proxy caching, even in (theoretical) cases of actual knowledge, do not fully comply with Art. 45(1) TRIPs. This problem might be solved by dealing with the liability problem directly, as the Australian legislature proposes, by determining as a matter of substantive law that access providers do not infringe a copyright.

escape liability a hosting service provider must disable access immediately “upon notification of claimed infringement”. The European proposal does not contain such a formal requirement; here the provider must act upon obtaining knowledge or ‘awareness’ that the activity is illegal. Even so, notifications undoubtedly will have a role to play in Europe; in all likelihood national courts will find that actual knowledge or sufficient awareness for the purpose of the Directive is established when a proper notification is received.<sup>136</sup>

The European approach has the advantage that it leaves providers a certain latitude in dealing with (possibly frivolous) notifications. In this respect the Directive appears to have heeded to the important freedom of expression and information concerns that underlie the issue of online liability. Indeed, the Explanatory Memorandum with the proposed E-Commerce Directive asserts that Article 10 of the European Convention on Human Rights was duly taken into account when drafting the proposal.<sup>137</sup> On the other hand, as most providers will probably elect to disable access in case of doubt, the US ‘replacement’ rule, which is part of the ‘notice and take down’ procedure, also clearly serves the freedom of speech. Even so, the US notification scheme raises difficult questions of civil procedure and due process.<sup>138</sup>

Another difference concerns monitoring. Whereas the European proposal contains an absolute prohibition on imposing a duty to monitor, the DMCA does not entirely rule out such a duty. If future technology would make monitoring a realistic possibility, a duty to monitor may arise. Other, less important differences are the US Act’s intricate rules regarding providers of ‘information location tools’, and universities acting as providers, rules that the proposed Directive does not offer.

Clearly, from a copyright perspective the differences between the US and European legislative solutions are far from spectacular. If an international initiative were to be contemplated, the US/European consensus would appear to be the obvious point of departure.

[Annex follows]

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<sup>136</sup> See Bulst 1997, p. 34-35; and Decker 1999, p. 9 (finding that a notification will be enough to trigger liability under the German Multimedia Act).

<sup>137</sup> See Explanatory Memorandum with the E-Commerce Directive (*supra* note 92), under IV, 5, p. 16.

<sup>138</sup> According to the US Senate Committee on the Judiciary, these procedures “provide all the process that is due”. Senate Report (*supra* note 97), p. 21.

ANNEX

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