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Provider's Liability: For Insults Online

Service providers play a key role in daily internet life. Without them, publishing contents on the WWW would not be possible. Practically seen, they are the gateway to the Internet and often are in the crosshairs whenever rights are infringed by others. This article will discuss to what degree Internet providers can be held liable for legal infringements of third parties.

When persons infringe rights on the Internet, it is often done anonymously. Authors purposely publish infringing contents with a pseudonym, so that the concerned cannot directly address his rights of defense to the violator. Further, German data protection veils the identity of the infringer. In many cases, the concerned person will not be able to protect her rights.

I. Term „Internet Provider“

Internet-Providers are the intermediaries between the individual users and providers in the Internet. There are Internet Service Providers (ISP) and Internet Presence Providers (IPP). An Internet Service Provider primarily offers the possibility to dial into the Internet (like Alice, Vodafone, an Internet Presence Provider (like Strato, 1&1) GET OTHER PRESENCE PROVIDERS AND LINK AFFILIATE! however offers storage space and server functions for the Net. Since they make a web publication possible, they generally can be held liable (and so doubling liability).

II. Liability of Providers

1. Overview

Until a few years ago, providers' liability for illegal contents on Internet pages was legally controversial, when the providers physically held the sites or rendered technical services. The Remote Media Act (Telemediengesetz) of 2007 has clarified this question of liability. §§7 - 10 TMG states the statutory framework for provider's liability. These rules are also valid for civil, penal, and administrative law.

The TMG is directed towards the service supplier (provider). This can be any and all physical and juristic persons, who hold ready their own or customer's remote media or give access to its use (§2 no 1 TMG). The rules in TMG intend a scaled scope of liability relating to the different degrees on infringement. The scope of liability will depend on how much the company is involved: Does it only provide content, hosting abilities, access or just links?

In general, one must admit, that the provider has, when dealing with content posted to the net by others, no responsibility to either monitor all or search for such content. Furthermore, as a rule, they can avoid all responsibility for the injury the content creates, if they do everything within reason to remove the content.

Note, however, that the regulations in TMG give no grounds for claims of liability against the providers

involved. The remedies come much more from the general rules of copyright, civil or criminal law. The TMG solely determines under what conditions the liability of providers under the general rules and regulations are. When the rules of the TMG apply, the liability of providers under the relevant provisions of the copyright, civil or criminal law is eliminated (so-called “filtering function”).

2. Liability of Content Providers

Content Provider is whoever provides their own content on a website. Pursuant to §7 I TMG providers are always responsible for their own posted information according to the general laws. A content provider always takes the full responsibility according to general rules, if the website violates rights of other persons. Thus, there are no differences between this and off-line publications.

3. Liability of the Host Provider

Host provider is whoever puts information and content of other persons on his or her own webserver. Crucial is that, following a general impression, it is not likely considered to be the provider’s own contents. §10 TMG determines that a host provider is principally not responsible for third-party content. The provider, however, is then liable when he has positive knowledge, i.e. when it can be proven, that he is aware of the illegality of the published content. Even if it can be shown that the host provider harbored strong suspicions, but has not undertaken efforts for clarification, he can be held liable. So, when there is a suspicion that hosted content is illegal, they must either immediately block access to the site or the information must be promptly removed.

Although the host provider having knowledge of illegal content on his server is obliged to block or delete these contents under §7 II TMG, he is not obliged to monitor the presentation. The obligation for removal and blocking starts from when the provider becomes aware of the content is illegal. How this knowledge is gained, whether through a notice, a warning or "surfing" is irrelevant.

4. Liability of Access Providers

Access Provider is whoever conveys third-party information on the Internet or other networks or simply gives access to the Internet. This mediation of the Internet is a purely technical nature. Access providers are liable pursuant to §8 TMG. They will principally not be held liable for forwarding other person’s information, unless they initiated, changed or choose the information to be transmitted to the addressees. Consequently, the provider takes no responsibility for illegal content of her customers when they use her servers for transmission or retrieval from her or other company’s servers. In as far the access providers has knowledge of illegal content, this is – in contrast to the host provider – irrelevant. They also have no duty to search for and monitor any transmitted information which is exclusively exempted in §7 II TMG.

5. Special Case: Liability of so-called Usenet Providers

a) Background

A Usenet provider is considered as the operator of a network of discussion forums on the Internet. Such forums are enjoying growing popularity, and as a result the publication is seen by large parts of the population. Correspondingly high also is the potential misuse of Usenet. Often, the discussion forums are used to compromise opponents in front of a large readership or ridicule products or suppliers of goods. Because those affected often can not or only with great difficulty are able to reach the authors of such contributions, in this context, the question of the responsibility of the operator forums also arises.

b) Case Law of OLG Düsseldorf

OLG Düsseldorf (re I-20 U 95/07) decided on January 15, 2008 that the operator of a network of discussion forums is legally to be classified as the cache provider within the meaning of §9 TMG. They are not liable for third party infringements via a liability as a perpetrator because such would establish an unreasonable general obligation to general surveillance.

In accordance with the precedent Federal Court of Justice in its ruling "Internet auction I", the court rejected a liability for the alleged right of forbearance following TMG and based the grounds for the evaluation of a possible perpetrator liability on §§823, 1004 BGB all other things being equal mutatis mutandis. As the extent of requiring monitoring should not get out of hand, monitoring has to be possible and reasonable for the provider. Also actual and technical possibilities are to be taken into consideration.

According to the OLG Düsseldorf, Usenet providers can hardly delete infringing content from the Usenet. Reasoning of the Higher Regional Court in Düsseldorf: "Unlike Internet forums, the operator of a news server, which mirrors the data of the Usenet cannot permanently remove them from the Usenet. They can only delete such data, which on their own server. When a new user calls the data again, it will reappear. This is possible as long as the message still is available on the Usenet. That is precisely why Usenet providers have much smaller opportunities, to stop a disturbance than a host provider.

III. Conclusion

The content and scope of the provider liability according to the statutory scheme in §§7 et.seq. TMG have now clearer contours than previously. Nevertheless, in practice, especially in regard to the question of who actually qualifies as a provider within the meaning of §§7 et.seq. TMG, is often still problematic. In the future, this issue will often only be clarified by the courts. Generally, however, it can be summed up that providers basically have no monitoring and research duties related to third party's contents, and they can escape liability for infringing other person's right if when becoming aware of a legal infringement the provider does everything possible and reasonable to eliminate the infringement.

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