

Liability in the Internet and the new German multimedia law regulations

I. Introduction

Liability in the Internet is a subject of growing practical interest. There is a whole string of current and recent cases, where providers have had to and have to face extensive actions for damages. The relevant provisions are spread across different branches of law, ranging from copyright law to the law of unfair competition and finally to the right of personality¹. The crucial question is not the liability of the so-called content provider, i.e. the supplier of On-demand services in the Internet. His responsibility for the correctness and legality of material supplied by him is not under discussion. The situation for the so-called access provider who is only connecting the user to the Internet is similarly clear. He cannot be held responsible for someone else's contents. At most he can be obliged to block the access provided this is possible and reasonable. More difficult however is the legal position of the so-called host- or service provider. He supplies the users with someone else's contents at the users request on his own computers. It is difficult to classify this new constellation within the existing structure of the German provisions regarding liability. Court rulings and doctrine in the past varied regarding the liability of the host provider. As a reaction to this, the German legislator laid down a special rule concerning responsibility in § 5 of the Tele-Services Act (Teledienstgesetz - TDG). The Länder adopted a similar regulation in the practically identical Media-Services State Treaty (Mediendienstestaatsvertrag - MDStV).

Subsequently it will be scrutinized whether the debate over the liability of providers has reached an end after the coming into force of the Tele-Services Act and the Media-Services State Treaty or whether questions still remain at issue².

¹ cp. also the stop notice of the Federal Public Prosecutor from 27. November 1997 - 2 Bjs 104/94, published in MMR 1998, 93 with an annotation by Hoeren

² The liability provisions in the Tele-Services Act might face a „European career“. In spring 1998 the European Commission plans to enact a directive concerning the liability of providers under strong German influence.

II. Relevant provisions regarding liability

There are different constellations in which liability can occur in the field of online activities. Whoever inputs someone else's contents on the Internet is liable for infringement of copyright (§ 97 I Copyright Act - UrhG)³. The use of a domain which is based on protected trademarks or trade names may constitute a violation of trademark law (§§ 14 V; VI; 15 IV; V Trademark Act - MarkenG). Regarding advertising, Internet providers are bound by the requirements of §§ 1, 3 Unfair Competition Act (UWG) and they can be held liable according to § 13 VI Nr. 1 UWG⁴. Finally providers have to be more and more aware of the risk of incurring responsibility according to tort law. In § 823 I German Civil Code (BGB) liability for the violation of absolute legal interests is constituted. More generally, the Product Liability Act (ProdHaftG) establishes a no-fault liability for defective products, which can include responsibility for faulty information⁵. By analogy with §§ 823 I, 1004 BGB, violation of personal privacy is sanctioned⁶. Additionally, reference should be made to the precedents relating to Art. 1 in combination with Art. 2 I of the German Constitution (GG). According to these court rulings the aggrieved party is entitled to claim compensation for immaterial damage in case of serious violation of personal privacy⁷. The liability according to § 823 I BGB can result from violation of the established and exercised business enterprise as well as from the infringement of property (e.g. in case of data loss) or health. The liability for false information is in a certain way exceptional. Particularly, the question arises as to whether liability for faulty information according to § 1 Product Liability Act can be incurred. In an earlier publication, I put forward the opinion that due to the lack of a

³ cp. Lehmann in: Lehmann (Ed.), Internet- und Multimediarecht (Cyberlaw), 1996, p. 25 ff.; Schwarz in: Becker, Rechtsprobleme internationaler Datennetze, 1996, p. 13 ff.; Spindler, ZUM 96, 533, 542 ff.; Waldenberger, ZUM 1997, 176 ff.; Wenning, jur-pc 1995, 3321, 3330.

⁴ Hoeren in: Becker, Rechtsprobleme internationaler Datennetze, 1996, p. 35 ff.; Walzl in: Lehmann (Ed.) Internet- und Multimediarecht (Cyberlaw), p. 185 ff.

⁵ cp. Spindler, ZUM 1996, 533, 544 ff.

⁶ BGHZ 13, 334, 338; 24, 72, 78. Cp. about violation of personal privacy in the Internet in general Flechsig in Becker: echtsprobleme internationaler Datennetze, p. 57, 64; Bachmann in: Lehmann (Ed.), Internet- und Multimediarecht (Cyberlaw), 1996, p. 169, 180; Engel, AfP 1996, 220; Spindler, ZUM 1996, 533, 534; Wenning, jur-pc 1995, 3321, 3328

material object online data transmission may not be considered to constitute a product in the sense of § 2 Product Liability Act. Consequently, the Product Liability Act is not applicable. It seems to me today that this is no longer tenable as it only looks at the issue from one perspective. It rather seems appropriate to distinguish online services in so far as the supply of these services can be regarded as being the functional equivalent to the movement of goods. If software, for example, is supplied on demand via FTP it has to follow the same liability regulations as if the software was sold to the user after being stored on a disc. After all there is no need to distinguish between the traditional sale of goods and their distribution over the Internet when the latter is functionally equivalent to the movement of goods.

The general principles of liability apply above all to the producer of contents offered on demand, who is not necessarily identical with the content provider according to § 5 I TDG. The producer in this sense is the person who puts together the contents for an electronic call and then makes it available to the public via a host provider. This situation is not covered by the TDG. It can be assumed that the general liability provisions are applicable to this extent. For the content provider, § 5 I TDG refers explicitly to the general liability provisions. So whoever offers his own contents on his own computers on demand is liable under copyright, trademark or unfair competition law according to § 5 I TDG. The classification of providers proves more difficult if they only provide links to other homepages. Some writers are of the opinion that these should be considered as host providers. Others are of the opinion that in these cases the rule for access providers is applicable. The only sensible distinction is the one to be found in the judgement of the Amtsgericht (County Court) Berlin-Tiergarten. There the court takes into account the context of the respective link. If a link is nothing more than a mere reference to someone else's contents, the provider is either an access provider or at least he should be judged as if he were⁸. The situation is different, when the provider adopts someone else's statements in setting a link⁹. He has then to be treated like a content provider for the context of his link shows that he identifies himself with someone else's statements.

⁷ BGH NJW 1995, 861, 864=GRUR 1995, 224, 228 „Erfundenes Exklusiv-Interview“; NJW 1996, 984, 985 „Caroline von Monaco“; Müller, AfP 1997, 499, 502.

⁸ Engel-Flehsig, ZUM 1997, 231, 236; Koch, CR 1997, 193, 199.

⁹ Declined by Koch, CR 1997, 193, 202.

III. Liability of access providers

Before the Tele-Services Act (TDG) entered into force, a general liability for the access provider has already been rejected. To provide access can without a doubt constitute conduct giving rise to liability. The question is, however, whether the access provider can be held responsible. In so far as negligence cases are concerned, this is not possible. To give rise to a charge of negligence, a lack of care is required. However, the supervision of all contents in the Internet cannot be reasonably expected of an access provider¹⁰. Quite similar to a telecommunication organization connecting a phone call¹¹, the access provider's role is only to transmit. Taking notice or even monitoring the contents are not part of his duty. The TDG is based on the same views. In § 5 I 1 TDG, the access provider is exempted of any responsibility. According to § 5 III 2 TDG, even an automatic and short-term suspension of contents because of a user query can not create any responsibility. The provider is now discharged even from intentional liability which goes beyond the previous legal situation, This extension is not justified in my opinion.

In addition to the risk of liability the access provider is under a legal blocking obligation. According to § 5 I TDG every provider is obliged to block illegal contents, whenever - while respecting the secrecy of telecommunications according to § 85 Telecommunications Act (TKG) - he obtains knowledge of these contents and blocking is technically possible and reasonable. Thus according to the general law illegal contents are also to be blocked by the access provider if this is possible and reasonable for him. Blocking contents is reasonable even if the illegal content is to be found on many different servers and, in case of blocking, stays available on these other computers. However, it remains doubtful if the provider's reliance on the impossibility of blocking due the fact that it would totally paralyze access to other servers is valid. A general liability of the access provider can not be established on the basis of § 5 IV TDG contrary to the wording of § 5 III TDG. Doctrine has made quite valid objections against the according stop notice of the Federal Public Prosecutor.

¹⁰ Engel-Flehsig, ZUM 1997, 231, 236; Koch, CR 1997, 193, 199.

¹¹ Cp. in general to liability of net carriers Marly, jur-pc 1992, 1442, 1443; Rütter, jur-pc 1992, 1812 ff.; Sieber, JZ 1996, 429, 438.

Furthermore, the difference between the blocking obligation in the TDG and in the Länder's Media-Services State Treaty (MDSStV) is astonishing. § 5 III 2 MDSStV refers to § 18 III in the treaty. This provision lays down a blocking obligation for access providers in case the youth authorities direct such a blocking. The different phrasings show that Federal and Länder legislators have not achieved the same regulations, despite their stated intention. Consequently, there exist different approaches with regard to the blocking obligation in the sensitive area of provider's liability.

IV. Liability of host providers

The most difficult questions concern the liability of host providers. First of all, liability, e.g. product liability and personal rights liability is of relevance¹². In this context, the first problem is to determine the liability creating practice. Focussing on prevention is one conceivable approach in such a way that the host provider is liable for failing to control the hosted contents and/or illegally failing to block hosted contents¹³. This opinion fails to see that the dissemination itself can be an action leading to liability. The act of making someone else's contents available can already create the statutory definition of tort liability. If tort liability can thus be created by action and not forbearance¹⁴, the next question is whether the provider is to blame for his behaviour. In principle the provider's liability is for wilful or negligent wrongdoing. These general results are however modified by the Tele-Services Act or the Media-Service State Treaty. § 5 II of both these regulations state that liability can only be based on intent. Though the provision is obviously based on a criminal law concept, that only takes into account the knowledge of contents and does not consider the issue of knowledge of unlawfulness¹⁵. Civil law has another concept of intent. It covers both, the knowledge of contents as well as the awareness of unlawfulness¹⁶. So how can § 5 II be understood in a civil law context? In my opinion it must be assumed that in both acts the legislators left the question of knowledge of unlawfulness open and

¹² Cp. Pichler, MMR 1998, 79 ff.

¹³ Sieber, JZ 1996, 494, 499

¹⁴ E.g. Altenhain, CR 1997, 485, 487 ff.; Pichler, MMR 1998, 79, 82

¹⁵ Spindler, NJW 1997, 3193, 3196

¹⁶ Cp. BGHZ 69, 128, 142; 118, 201, 208; cp. Baumann, AcP 150 (1950) 495 ff.; Mayer-Maly, AcP 170 (1970), 133, 153 ff.

that this element of intent must be further examined¹⁷. Thus the provider according to § 5 II is not required to examine all the contents but only the content of which he is aware. Though it is my conviction that the examination can be limited to more serious infringements of the law. Court rulings relating to the press sector should be taken into consideration in this respect. An obligation to examine all advertisements has been regarded as too extensive by the courts and a threat to the freedom of press (Art. 5 I 2 GG). They thus limited liability to cases involving obvious or visible infringements of the law. Irrespective of whether Internet providing is more similar to broadcasting or to the press and as which it should be classified, the position of the host provider can be regarded as similar to the position of a newspaper publisher as far as liability is concerned. In both cases it is hard to examine the large amount of hosted material and information for unlawfulness. To protect the new mass medium WWW the limitation of liability to serious infringements seems inevitable.

There remain further difficulties of interpretation. One, for example, is whether in a group of companies knowledge can be attributed, i.e. if for example the knowledge of a staff member in a branch office can be attributed to the provider's head office. Lately the Federal Supreme Court (BGH) has confirmed in a prominent judgement the principle of attribution of knowledge in groups¹⁸. This can be applied on the WWW to the same extent. Any knowledge inside a company is thus sufficient to bring the matter within the scope of § 5 II TDG.

Another problem concerns the application of this concept of knowledge for the company structure. A provider would have to reduce as far as possible the number of his staff members, who could possibly obtain knowledge. The representative for the protection of minors, mentioned in another provision in the Act and the Treaty could be regarded as a dangerous person in context. The company that can dispense with staff members in the hosting area would perform best. Though the knowledge criterion can not be interpreted that extensively. I would suggest also considering court rulings concerning organizational fault. Besides, a company has the tortious duty of care toward third parties that includes the duty to employ staff members as a

¹⁷In this sense cp. Pichler, MMR 1998, 79, 87 f.; Spindler, NJW 1997, 3193, 3196.

¹⁸BGHZ 131, 30=NJW 1996, 1339=JZ 1996, 731 (with an annotation by Taupitz). Cp. further Drexler, ZHR 161 (1997) 491 ff.

contact for advice about unlawful contents. To this extent a kind of passive product monitoring duty exists granting the setting up of internal registration departments for these advises.

Distinguishing between Media Services and Tele Services is another difficult problem. To date this distinction has not played a major role as the provisions in the Media-Services State Treaty and the Tele-Services Act correspond to greater or lesser extent. This is also true for § 5 II TDG, it should thus be taken into consideration, that the provisions concerning liability have to be regarded as horizontal standards of fault not dependent on single rules. They cover areas like copyright law, trademark law, the law of unfair competition and general civil law as laid down in the German Civil Code (BGB). The Länder have no legislative competence in the field of industrial property and copyright according to Art. 73 Nr. 9 GG. As a consequence, the Media-Services State Treaty can not apply to liability in trademark law for example. The situation is comparable in general civil law where the allocation of competences between Federation and Länder is in favour of the Federation according to Art. 74 I Nr 1, 11 GG which provides for concurrent legislative powers. Since the Federation has used its jurisdiction and regulated liability in tort comprehensively in the BGB long before the new provisions entered into force and since there are no signs that the Federation will renounce its competence, the liability provisions laid down in the Media-Services State Treaty do not apply in the area of of general tortous liability. Consequently, § 5 Media-Services State Treaty applies substantively only to the violation of provisions in the Media-Services State Treaty itself and to the violation of regulatory rules. An application by analogy with § 5 Tele-Services Act to media services is impossible, as § 2 IV Nr. 3 TDG expressly prohibits such an analogy. For media services that would mean the logically consistent validity of the extensive conception of fault in the area of civil law responsibility. In this case, host providers have to face liability for negligence within the scope of application of the Media-Services State Treaty. Nevertheless, according to the prevailing view, the possibility of an infringement of the duty of care is inconceivable since it is unreasonable to expect the host provider to know all of the contents. In my opinion this argument can be put the other way round in the sense, that it is just the opening of such a controllable forum that creates a violation of the duty of care. So concerning the knowledge of contents, the obligation to take notice is to be understood in an extensive way. The limit of unreasonability is not yet exceeded thereby.

V. Contractual liability

Apart from § 5 TDG and the Media-Services State Treaty, a provider can be liable in contract for the unlawfulness or incorrectness of the information provided. Usually however there are no contractual relations between content providers and users. The user contacts a website without entering into a contract. Thus in most of the cases an exclusion of liability is not valid. Even if a provider himself states that he does not give a warranty as to the correctness of the information, this clause has no binding effect because of the lack of contractual relations with the user. It is only within the scope of § 254 I BGB that such a clause may indicate that the user can not trust blindly the information given and a possible compensation claim may be reduced or rejected because of contributory negligence.

There is thus a difference if the user and provider have entered into contractual relations. This is either the case, if the user claims damages or applies for an injunction against his access provider. Secondly, several homepages provide for the possibility to order via electronic mail, so that contractual relations are created between user and content provider within the scope of this order. In both cases there are contractual liability claims in addition to liability of tort as shown above¹⁹.

1. Access provider - user

First of all the legal classification of the contracts between access providers and users will be discussed. How these contracts can be categorized in the scope of traditional types of contracts is not yet settled²⁰. The discussion is mainly about using, access and disposal of the provider's net

¹⁹ The constellation in which the user retrieves information from a data base for remuneration (e.g. Juris) is not subject of this essay. Though it has dominated the debate about the legal nature of online contracts, it is of minor relevance for the Internet; cp. more detailed Mehrings, *Der Rechtsschutz computergestützter Fachinformationen*, Baden-Baden 1990, 237 ff.

²⁰ cp. more detailed Schneider, *Handbuch des EDV-Rechts*, Köln 2. Ed. 1997 n. O 125 ff.; Briner, *Die Rechtsstellung des Access Providers*, in: Reto Hilty (Ed.), *Information Highway. Beiträge zu rechtlichen und tatsächlichen Fragen*, Bern/München 1996, 489, 496 ff.; Sieber, *CR* 1992, 518 ff.; Herget/Reimer, *DStR* 1996, 1288 ff.; each with further information.

infrastructure. This service is partly classified as belonging to landlord and tenant law²¹. Others consider it as a part of agency business for remuneration according to § 675 BGB²². Both statements must be rejected as the obligation owed by the provider consists not in the supply of the single information but in the access and the arrangement of these informations²³. So in most cases the online contracts in question have to be classified as services in the scope of service contracts.

For service contracts, however, there are no express warranty provisions in the BGB. Instead, in consulting the legal institute of positive violation of contractual duty in cases of non-performance or defective performance, the user's claim for compensation can be established. The question remains, what exactly can be regarded as non-performance or defective performance of online contracts. Some say an interrupted or interfered access must always constitute non-performance or defective performance with the effect that the access provider is liable, given the existence of fault and damage²⁴. Furthermore some authors are rather critical towards providers. So Briner²⁵ for example (on the basis of Swiss law) is of the opinion that providers must put an adequate number of exchange lines and a hotline in case of technical troubles at the users disposal. In his opinion, the access provider is obliged to inform his customers about possible operational breakdowns in time. As far as emailing is concerned, he should be considered under an obligation to install a mail box sufficient for about 10 emails for private clients. For business users and company mail boxes the size will differ depending on the individual circumstances. In my opinion these considerations are exaggerated. It is not possible to determine the obligations of an access provider objectively as there is no criteria for determining what is normal. This depends to a high degree on the contractual arrangements. In contracts the access possibilities are normally graded and operational breakdowns are usually quantified particularly in peak periods. Additionally, the modalities of possible hotline services are settled in the contract. So the agreements between the contracting parties are the decisive factor for determining the

²¹ Schneider, loco citato n. O 134

²² Müller-Hengstenberg, NJW 1996, 1777, 1780.

²³ Cp. quite right expressly Schneider, loco citato, n. O 142.

²⁴ Briner, in: Hilty (Ed.), Information Highway, loco citato, 489, 506.

²⁵ Briner, in: Hilty (Ed.), Information Highway, loco citato, 489, 502 ff.

obligations. In the same extent, a terms control according to § 9 Standard Contracts Act (AGBG) can not be carried through.

2. Content provider - user

The legal situation concerning contracts between content providers and users is different. The electronic commerce with goods is arranged in the form of sales contracts in most cases. This is true even when the products (e.g. a computer program) are delivered by permitting downloading directly from the web. If the contract involves services, it is either a service or agency contract. To this extent it is possible to consult the general principles of civil law. That means that apart from warranty for material defects according to §§ 434, 440, 463, 480 II BGB the principles of positive violation of contractual duty and of culpa in contrahendo can be applied to contractual liability.

Apart from general liability, the Federal Supreme Court has recognized a special liability for information services. In the judgement „Börsendienst“²⁶, the court held that an advertising mail of a supplier of stock market news according to printed form includes the offer for the conclusion of a separate consultancy agreement, if the supplier emphasizes the reliability and the correctness of the information. The BGH has extended this practice in the following years. According to this, no more special agreement or written contract is necessary for a consultancy contract. In the opinion of the Federal Supreme Court²⁷, such an information agreement is implied in fact, if the information concerned was discernibly of considerable importance and if it was basic to important decisions for the user. In such a case the user can claim for full compensation for positive violation of contractual duties. In general a thirty-year limitation period is applied to such claims.

These cases concerned already existing contractual obligations. In the case of the supplier of stock market news, for example, a continuing obligation between editor and customers similar to

²⁶ BGH, NJW 1978, 997

²⁷ BGH, NJW 1989, 1029; NJW 1986, 181.

a subscription existed, which was inter alia characterized by elements of consultancy²⁸. As a consequence, the Supreme Court's decisions concerning consultancy contracts can only be applied to relationships between a user and an online information service for remuneration.

With regard to contractual liability, a limitation of liability e.g. in general terms and conditions is more or less out of the question. The Standard Contracts Act (AGBG) and the BGB prohibit any exemption from liability as well as any restriction on liability for fraudulent intent (§ 476 BGB), the lack of warranted characteristics (§ 11 Nr. 11 AGBG) and intentional or negligent conduct in the scope of a culpa in contrahendo or positive violation of contractual duties (§ 11 Nr. 7 AGBG). Additionally, according to court rulings concerning § 9 II Nr. 2 AGBG, liability can not be excluded on the part of the supplier, even for slight and medium degrees of negligence, when the violation of essential primary contractual duties is in question²⁹. Thus the following provisions in a contract must be regarded as invalid³⁰:

- „Any liability for defects is excluded.”
- „The seller is not liable for negligence.”³¹
- „We are not liable for consequential harm caused by a defect, data loss and lost profit.”³²
- „We are liable for damages (...) up to a maximum of (...) DM.”³³
- „We exclude any liability as far as permitted by law.”³⁴
- „We exclude the liability for slight negligence.”³⁵

Only a clause such as the following are permissible:

²⁸ Cp. Hopt, publication in honour of Fischer, 1979, 237; Köndgen, JZ 1978, 389.

²⁹ Cp. BGH, DB 1996, 1276.

³⁰ Cp. also Schneider, loco citato n. O 167, who rightly makes the point that „the providers' liability clauses are more a developing country than these of software sellers”.

³¹ OLG Köln, DAR 1982, 403.

³² LG Bayreuth, DB 1982, 1400; Erman/Hefermehl, § 11 n. 6

³³ According to § 11 Nr. 11 this clause is totally invalid for warranted characteristics. It is valid for claims under positive violation of contractual duties and culpa in contrahendo, if all typical and predictable damages are covered (BGH, ZIP 1984, 971; BGH, BB 1980, 1011; BGH, NJW 1993, 335; Erman/Hefermehl, § 11 Nr. 7 AGBG, n. 15). When exactly this is the case can hardly be told. Thus the clause is too dangerous in any case.

³⁴ Such a „sheet anchor” is not permitted. It is considered as an inadmissible salvatoric clause. Cp. BGH, NJW 1987, 1815; NJW 1985, 623, 627; OLG Stuttgart, NJW 1981, 1105.

³⁵ BGHZ, 49, 363.

„We exclude the liability for slight negligence, if the breach of duty concerns no essential primary contractual duties or warranted characteristics or if claims according to the Product Liability Act are in question. The same applies for breach of duties by persons employed by us in the performance of our obligation.”

Questionable is though whether it still makes sense and whether it is compatible with the requirement of transparency as laid down in the Standard Contracts Act to embody such a term in an agreement. After all, the provider is liable for all important breaches of duty and default of performance, a liability which he can not exclude.

3. Insurability of damages

The liability risk, which I hope has become clear in this essay, leads inevitably to the question to what extent this risk is insurable. There is no information about if and to what extent single insurance companies are issuing insurance policies. What is well-known is that Gerling, R+V and Chubb are preparing first proposals for the insurance of those risks³⁶. For this reason only the General Policy Conditions (AHB)³⁷ can be taken into consideration at this stage when examining whether the general employer's liability insurance insures against such an event³⁸. In principle, liability insurance covers claims in torts, e.g. according to § 823 I BGB. Contractual claims for damages are covered as well with an exception for performance of contracts (§ 4 I Nr. 6 III AHB). Thus the content provider takes the risk that he obtained the information which he offers on demand for remuneration in a correct and lawful way. Furthermore, claims based on third party liability are excluded from the insurance, if they go beyond the scope of statutory provisions due to an agreement or a special promise (e.g. in warranted characteristics or in the case of an additional consultancy contract as mentioned above). For the Internet in the first place the exemption from liability for damages occurring abroad (§ 4 I Nr. 3 AHB) is of relevance. Insurance for the infringement of copyright or personal privacy law with a foreign element can

³⁶ A detailed representation of the existing insurance products will be published soon in Hoeren/Sieber (Ed.), Handbuch Multimediarecht, München 1998.

³⁷ Text in Dörner (Ed.), Allgemeine Versicherungsbedingungen, 2. Ed. München 1996, in Nr. 11.

not be achieved via the general employer's liability insurance. Finally damages other than those arising from personal injury and damage to property are not covered by the insurance (§ 1 III AHB), e.g. data loss or breakdown of an undertaking. Though it is these pecuniary losses that occur most typically in the online area. But the incorrectness of an information rarely leads directly to personal injury and damage to property. Due to this the provider's insurance coverage has to be extended³⁹. This extension should, similar to software liability insurance, cover the liability for special promises, non-performance, foreign elements and pecuniary losses.

VI. View to Private International Law

An essay about civil law liability in the Internet would remain incomplete without at least a short consideration of the conflict of laws. So in the following let me make a few remarks about this aspect⁴⁰.

1. Fundamental reflections

In principle a liability claim is enforceable according to the *lex loci delicti commissi*⁴¹. Apart from general tortious liability this is true for the right to forbearance⁴², as well as for claims under the law of unfair competition⁴³, copyright law⁴⁴, and trademark law⁴⁵. Tortious acts in the

³⁸ Cp. in general Schmidt-Salzer/Otto, *Versicherungsrecht*, in: Kilian/Heusen (Ed.), *Computerrechtshandbuch*, München as at 1997, Chapt. 112; Schulze Schwienhorst, CR 1995, 193 ff.

³⁹ In this context I refer to the common coinsurance for the violation of the Federal Data Protection Act (BDSG); cp. Schmidt-Salzer/Otto (footnote 39), Chapt. 112 n.37 f.

⁴⁰ More detailed Hoeren/Pichler, in: Loewenheim/Koch (Ed.), *Praxis des Online-Rechts*; Spindler, ZUM 1996, 533, 555 ff.

⁴¹ BGH, NJW 1996, 1128; NJW 1992, 3091; NJW-RR 1990, 604, 605; NJW 1981, 1606; Firsching/v. Hoffmann, IPR, 4. ed. 1995, § 11 n. 20; Kegel, IPR, 7. ed. 1995, § 18 IV, p. 533; v.Bar, IPR vol. 2 1991, n. 654.

⁴² BGH, NJW 1996, 1128.

⁴³ BGH GRUR 1962, 243, 245=BGHZ 35, 329 „Kindersaugflaschen“; v.Bar, IPR vol. 2 1991, n. 695; Firsching/v.Hoffmann, IPR, 4. ed. 1995, § 11 n. 45; Kropholler, IPR, 2. ed. 1994, § 53 IV, p. 458.

⁴⁴ BGH, NJW 1994, 2888, 2889; v.Bar, IPR vol. 2 1991, n. 702; Kropholler, IPR, 2. ed. 1994, § 53 IV, p. 459.

⁴⁵ Kropholler, IPR, 2. ed. 1994, § 53 IV, p. 460.

Internet are in most cases torts of distance and dispersion⁴⁶ with a gap between the place of tortious action and the place where the tortious success occurs. The server is installed abroad (place of tortious action), the tortious success (retrieval of the homepage) occurs at many different places worldwide. In this constellation, both locations can be considered as connecting factors for the determination of the place of tortious commission⁴⁷. As a consequence, the relevant tort law can either be the *lex loci actus* or the law of the place where the tortious success occurs⁴⁸. This so-called ubiquity principle⁴⁹ thus leads to the alternative applicability of a wide range of national legal systems. It is said that in these cases the law which should be applied is that which most favours the injured party⁵⁰. This leads in most cases to the application of German law of tort, since the consideration of foreign law is unnecessary, when the asserted claim is already reasonable according to German law⁵¹. Nevertheless the injured party could in view of the possibility of retrieving homepages worldwide chose the most favourable law in an extreme case⁵² whereas the provider would have to adjust his conduct to the strictest law worldwide⁵³.

2. Further differentiations

It is thus necessary to determine whether a global application of the ubiquity principle has to be differentiated more⁵⁴.

a) Residence of damaging and injured party

⁴⁶ v.Bar, IPR vol. 2 1991, n. 659.

⁴⁷ Kegel, IPR, 7. ed. 1995, § 18 IV, p. 535.

⁴⁸ BGH, NJW 1981, 1606 „Benomyl“; NJW 1964, 2012

⁴⁹ Firsching/v.Hoffmann, IPR, 4. ed. 1995, § 11 n. 22; Kegel, IPR, 7. ed. 1995, § 18 IV, p. 536; Kropholler, IPR, 2. ed. 1994, § 53 IV, p. 443.

⁵⁰ BGH, NJW 1981, 1606 „Benomyl“; NJW 1964, 2012. Partly in doctrine a clear determination of the tortious place without any right to chose is favoured; cp. for example Kropholler, IPR, 2. ed. 1994, § 53 IV, p. 444; v.Bar, IPR vol. 2 1991, n. 668.

⁵¹ BGH, NJW 1964, 2012; Kropholler, IPR, 2. ed. 1994, § 53 IV, p. 444; v.Bar, IPR vol. 2 1991, n. 669; Firsching/v.Hoffmann, IPR, 4. ed. 1995, § 11 n. 24.

⁵² Bachmann in: Lehmann (Ed.), *Internet- und Multimediarecht (Cyberlaw)*, p. 169, 181.

⁵³ Schack, UFITA 108, 51, 63, 66.

⁵⁴ Cp. in general v.Bar, IPR vol. 2 1991, n. 652.

In accordance with the court rulings concerning traffic accidents⁵⁵, it is conceivable to take a different point of view towards the *lex loci delicti commissi*, if the contact to the place of tortious commission seems to be accidental, forced or inadequate and the application of another legal system seems adequate due to unusual circumstances⁵⁶. Applied to the online area, this consideration leads to the exclusive application of German law at least if the damaging and injured party both have their habitual residence in Germany, even if the tortious success occurred in the USA and American tort law would be more advantageous.

b) Violation of personal privacy

With regard to the characteristics of the respective claims in tort, further differentiations in the scope of private international law are necessary. In connection with the traditional mass media a restriction for distribution as intended⁵⁷ or as regular⁵⁸ has been introduced for violations of personal privacy. As a consequence, places where the copies of a magazine are distributed only by chance are excluded. As soon as the distribution to a certain place is wanted or obvious, it has to be regarded as intended⁵⁹.

Furthermore, some argue that a clear choice of the connecting factor has to take the place of the application of the legal principle according to which the most favourable connecting factor is relevant⁶⁰. According to this opinion, either the place of the main tortious success or the residence of the injured party must be chosen besides the residence of the damaging party in order to avoid an arbitrary preferential treatment of the injured party⁶¹. The idea of only taking into account the place of tortious commission with which the injured party is most closely connected due to its habitual residence or similar reasons in the case of more than one place of

⁵⁵ Cp. BGH NJW 1992, 3091 ff.

⁵⁶ BGH, NJW 1992, 3091; NJW 1993, 1007, 1008; cp. further v.Bar, IPR vol. 2 1991, n. 672; Firsching/v.Hoffmann, IPR, 4. ed. 1995, § 11 n. 34; Kegel, IPR, 7. ed. 1995, § 18 IV, p. 546; Kropholler, IPR, 2. ed. 1994, § 53 IV, p. 448 f.

⁵⁷ Ehmann/Thorn, AfP 1996, 20, 22.

⁵⁸ v.BAR; IPR vol. 2 1991, n. 662.

⁵⁹ Schack, UFITA 108, 51, 65 f.

⁶⁰ v. Bar, IPR vol. 2 1991, n. 668.

⁶¹ Firsching/v.Hoffmann, IPR, 4. ed. 1995, § 11 n. 26, 30.

tortious commission goes into the same direction⁶². Others object that the place where the damage occurs is thus chosen as the relevant connecting factor. However, this place can not be taken into consideration to determine the relevant regime of tort according to the prevailing opinion⁶³. It is also said, that moreover it is not possible to determine a main focus of violation in the scope of non-locatable infringement of personal privacy⁶⁴, especially for persons who are well-known all around the world⁶⁵.

Practice, however, prefers the so-called material mosaic solution. According to this, in cases of a multitude of possible tortious places the respective *lex loci delicti commissi* is applied only for the actual damage that occurred right there. The whole claim consists of a mosaic-like bundle of several single claims which are to be established according to different legal systems⁶⁶. However, this solution is not practicable at all. The partial damage occurred in one country as the result of a violation of personal privacy can hardly be put in concrete terms. Especially in the Internet these territorial connections prove to be not very helpful. As a consequence, the injured party would be forced to put in the claim in the place where the provider is established for there and only there it is allowed to assert its claim for damages to full amount.

In my opinion other points have to be considered within the discussion. It is quite possible, for example, to leave far away places of tortious commission out of consideration when determining the statute of tort. Certain court rulings concerning magazines can be applied, stating that a delivery of single copies by chance into a country is not enough to meet the criterion for the applicability of that country's law⁶⁷. It is conceivable to apply these judgements on the Internet and leave out of consideration all the places where the retrieval of the affected site seems to be rather accidental. In so far I propose to take into account the objective, content and context of the affected site. It has to be asked for example whether the homepage is noticed in many countries

⁶² Kropholler, IPR, 2. ed. 1994, § 53 IV, p. 457; Ehmann/Thorn, AfP 1996, 20, 23; Hohloch, ZUM 1986, 165, 178 ff.

⁶³ Schack, UFITA 108, 51, 64.

⁶⁴ Schack, UFITA 108, 51, 64.

⁶⁵ Spindler, ZUM 1996, 533, 558.

⁶⁶ OLG Hamburg, NJW-RR 1995, 790; similar Kegel, IPR, 7. ed. 1995, § 18 IV, p. 541; Spindler, ZUM 1996, 533, 559; differing in the results Ehmann/Thorn, AfP 1996, 20, 22.

⁶⁷ Cp. Schack, UFITA 108, 51, 65.

rather accidentally because of its language (e.g. a website in Lützelian language)⁶⁸. It can also happen that the person affected by the infringement of personal privacy is not known at all in certain countries. To speak of a relevant place of tortious commission in those and similar cases seems to be rather unreasonable.

To defuse the issue, two additional points may be helpful. If claims are filed against a German, no tortious claims based on foreign law can be entered against him if they are more extensive than claims based on German law would be (Art. 38 Introductory Law of the Civil Code - EGBGB). As a result of this *privilegium germanicum*, the courts apply only German tort law for the moment. If a court rejects a claim according to German law, it will not deal with another *lex loci delicti commissi*, even if this should be more favourable⁶⁹. Vice versa, the court will not apply any foreign law, if a claim enforced by legal action proves to be justified to its full extent, no matter if the claim is filed against a German or a foreigner⁷⁰.

c) Violations of the law of unfair competition

In view of their cross-border effect the question as to the applicable law also arises in the field of advertising law. Insofar the general principles as expounded above can undoubtedly be applied. Any infringement of the law of unfair competition constitutes an infringement of the law of torts⁷¹ to which in principle the *lex loci delicti commissi* is applicable, i.e. the *lex loci actus* and the law of the place where the tortious success occurs⁷². However the law of unfair competition has a special position in the scope of tort law for it also protects the interests of third parties and of fair competition as an institution⁷³. Due to these peculiarities a competition-specific

⁶⁸ A similar approach has v.Bar, IPR vol. 2 1991, n. 662.

⁶⁹ v.Bar, IPR vol. 2 1991, n. 680.

⁷⁰ BGH, NJW 1964, 2012; v.Bar, IPR vol. 2 1991 n. 680.

⁷¹ BGH, GRUR 1964, 316, 318 „Stahlexport“; GRUR 1962, 243, 245 „Kindersaugflaschen“; v.Bar, IPR vol. 2 1991, n. 695.

⁷² BGH, GRUR 1964, 316, 318 „Stahlexport“; Kropholler, IPR, 2. ed. 1994, § 53 IV, p. 458.

⁷³ v.Bar, IPR vol. 2 1991, n. 695; Firsching/v.Hoffmann, IPR, 4. ed. 1995, § 11 n. 45.

determination of the place of tortious commission is carried out⁷⁴. As a result, unfair competition can only take place where the interests of the co-competitors collide⁷⁵.

The place of the collision of competition interests⁷⁶ is the place where the relevant market is situated, where the competitors seek to attract the consumers to increase their sales⁷⁷. According to this, foreign law of unfair competition is in principle applicable to domestic companies which advertise on foreign markets - insofar the company's residence does not matter⁷⁸. Thus a place of commission for advertising in print media can only be established at circulation places where advertising is able to influence competition and the consumers' choice⁷⁹. If advertising affects more than one market, the law of the respective market place is applicable⁸⁰. There is no reason to diverge from this principle for the Internet, only because of the claimed predictable world-wide effect of advertising and of virtual markets, where no primary sale or advertising market can be located⁸¹. So in the online area, the unfair competition law of that country is applicable, in which an email can be received in accordance with the intended use or from where a WWW homepage can be retrieved for the intended use. Due to the required final character of the effect, Internet services which are only intended for the American market, for example, can not be subject to an examination according to German unfair competition law.

However, the question remains how the „intention“ of a homepage can be determined. The decisive factor can not be seen in the online provider's subjective-final perspective. Otherwise he could exclude the applicability of German law in applying a warning sign to his website („This homepage is not intended for the German market“) When in doubt, the principle of „*protestatio facto contraria*“ and an objective receiver's perspective have to be applied. So the criteria to

⁷⁴ Firsching/v.Hoffmann, IPR, 4. ed. 1995, § 11 n. 45.

⁷⁵ BGH, GRUR 1964, 316, 318 „Stahlexport“; GRUR 1962, 243, 245 „Kindersaugflaschen“; v.Bar, IPR vol. 2 1991, n. 695; Firsching/v.Hoffmann, IPR, 4. ed. 1995, § 11 n. 45; Kegel, IPR, 7. ed. 1995, § 18 IV, p. 538; Kropholler, IPR, 2. ed. 1994, § 53 IV, p. 458.

⁷⁶ v.Bar, IPR vol. 2 1991, n. 695.

⁷⁷ Firsching/v.Hoffmann, IPR, 4. ed. 1995, § 11 n. 45; Kropholler, IPR, 2. ed. 1994, § 53 IV, p. 458.

⁷⁸ BGH, GRUR 1964, 316, 318 „Stahlexport“; GRUR 1962, 243, 245 „Kindersaugflaschen“.

⁷⁹ v.Bar, IPR vol. 2 1991, n. 697.

⁸⁰ v. Bar, IPR vol. 2 1991, n. 696.

⁸¹ Spindler, ZUM 1996, 533, 561.

determine the circle of receivers an Internet advertising campaign aims at have to be built up in an objective way. However it seems to be quite difficult to develop such criteria. In any case the chosen language of a website is of great significance for it often corresponds with a national market⁸². I have to admit that this point of view is a specific German one since if a website uses English or French, it seems that a single national market can not be spotted because of the worldwide importance of these languages. Besides the language a currency mentioned in the homepage may prove helpful. If payments are only admissible in DM or if the handling of payments is only possible via accounts of German banks for example, this can be a hint for a limitation to the German market. Nevertheless it is difficult to rely on this aspect too. For in the Internet payments by credit cards, card money (Mondex) or net money (Digicash) are common⁸³. Those three terms of payment are internationally spread which makes it impossible to draw any conclusions that online marketing is intended to reach only consumers of a certain nationality. Anyway, the customers' opportunities to buy the promoted products are of importance. When a certain product is not being sold in a country so that there exists no market, there is no place of commission and this country's law is not applicable⁸⁴. On the other hand references to limitations concerning sales and delivery („The offered products can not be ordered from Austria or Switzerland") can only be regarded as an indication of a limitation to the German market. Insofar, the online provider's real conduct and if he de facto accepts orders from the surrounding countries is decisive. Therefore a number of homepages without fixable market orientation exists. The providers of these sites will have to take into account, that they have to cope with several national legal orders as far as unfair competition is concerned. German providers for example will additionally have to consider Swiss and Austrian unfair competition law which partly differ a lot. As a result, the limitation of the potential number of applicable laws of unfair competition is more easy to handle in my opinion because of the specific determination of the place of commission, even when a certain fuzziness remains.

⁸² Cp. Ueber, WRP 1997, 497, 503 (for international jurisdiction)

⁸³ Cp. Escher, WM 1997, 1173 ff.

⁸⁴ Similar Spindler, ZUM 1996, 533, 561; Ueber, WRP 1997, 497, 503.