LEGALIZE IT? -OSP AND PEER-TO-PEER NETWORK LIABILITY FOR ONLINE MUSIC COPYRIGHT INFRINGEMENTS IN THE UNITED STATES AND GERMANY

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by

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FORB, Universitaet Bonn, Germany, 2000

A Thesis Submitted to the Graduate Faculty of The University of Georgia in Partial Fulfillment of the Requirements for the Degree

MASTER OF LAWS

ATHENS, GEORGIA

2001
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DEDICATION

This thesis is dedicated to my parents. I am more than grateful for your never-ending love and support through the past 27 years. Vielen Dank fuer Eure Liebe, Unterstuetzung und Euren guten Rat, ohne Euch waere dies alles nicht moglich gewesen.
ACKNOWLEDGEMENTS

I would like to especially thank my grandparents for their love and support. Ich danke Euch fuer Eure Liebe und Unterstuetzung liebe Grosseltern.

Sherry, thank you for your love and support, thank you for everything. I love you.

Thanks also to Paul Heald, L.Ray Patterson and the other Law School Faculty for their support and wisdom.
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INTRODUCTION

Copyright law worldwide is facing a new challenge – the Internet. Although new technologies have often caused reason for concern in the field before, rarely since the invention of the printing press by Gutenberg in 1440 has the challenge been this great. The strength of the Internet, the ability to distribute information worldwide with unprecedented speed and ease, is the cause for a multitude of legal problems especially in the field of copyright. Facilitated distribution of information means facilitated copyright infringement as well. Lately, the attention has been drawn to music and sound recording copyrights in particular, due to the highly publicized cases involving MP3.com and Napster, Inc. The problems addressed in those cases and in this thesis arose after a German scientist at the Fraunhofer Institute invented a new digital audio file format: MP3. It filters sounds not perceptible to the human ear, thereby dramatically decreasing file size. While a 5 minute song would have taken up 50 MB of memory before the

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1 See generally, Timothy L. Skelton, Internet Copyright Infringement and Service Providers: The Case for a Negotiated Rulemaking Alternative, 35 San Diego L. Rev. 219 (1998) (describing the Internet and its function); see also Michael Neuber, Urheberrecht im Internet, (2000) (describing the spread of the Internet in Germany)

2 New technologies have had an impact on copyright law whenever invented. One may think not only of the printing press but also of phonorecords, CDs and computer programs for example. See generally Robert P. Merges, Peter S Menell, Mark A. Lemley, Intellectual Property in the New Technological Age, 347 (2000), citing Paul Goldstein, Copyright’s Highway (1995) and Jessica Litman, Copyright Legislation and Technological Change, 68 Or. L.Rev. 265 (1989)

3 See generally Timothy L. Skelton, Internet Copyright Infringement and Service Providers: The Case for a Negotiated Rulemaking Alternative, 35 San Diego L. Rev. 219 (1998)


5 MP3 stands for Motion Picture Experts Group 1 Layer 3

6 MP3 reduces the original sound data by a factor of twelve. See Timothy L. Skelton, Internet Copyright Infringement and Service Providers: The Case for a Negotiated Rulemaking Alternative, 35 San Diego L. Rev. 219, 220-242 (1998)
advent of MP3, the same song can now be stored using only 5 MB. It is obvious that this
tremendous decrease in file-size makes the transfer of such files over the Internet much
closer; especially in conjunction with faster connections via DSL, cable modem or other
broadband technologies and ever increasing memory and RAM size of home PCs. Moreover, the sound quality of MP3 is better than that of older formats; it produces near-
perfect digital copies. Peer-to-peer (P2P) file-sharing networks like Napster, or Gnutella
have further facilitated the transfer of audio files: They are based on free software (and in
the case of Napster a catalogue and search engine service), which enables Internet users
to browse the services’ other users’ hard-drives and ultimately lets them copy files
directly from that location. Internet access providers (IAPs), Internet service providers
(ISPs) and Online service providers (OSPs) enable the individual user to access the
Internet and thereby are a prerequisite to any activity of the users that could constitute infringement. Whether they can be held liable for online infringements is an important
question in the context because the result has tremendous implications for the further
growth and structure of the Internet and modern communications technology in general.

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7 Using .wav., .aif, .wmf., .pcm or aiff file formats. See Praveen S. Thampi, MP3 Digital Format: Funk and
Blues, Computers Today, 86, Jan.31, 1999
8 RAM stands for Random Access Memory, see http://www.webopedia.com
9 See generally <http://Internet.bestbuy.com; http://Internet.fastaccess.com/consumer/blsc_howfast.jsp>
(last visited 6/1/2001); With a regular 56K modem the transfer of a five minute song would still take up to
thirty minutes.
10 See generally A&M Records, Inc. v. Napster, Inc., 114 F.Supp.2d 896 (N.D. Cal. 2000), aff’d in part,
rev’d in part, and rem’d, 239 F.3d 1004 (9th Cir. 2001)
11 For a detailed description of P2P technology and Napster Inc.’s service in particular, see A&M Records,
Inc. v. Napster, Inc., 114 F.Supp.2d 896 (N.D. Cal. 2000), aff’d in part, rev’d in part, and rem’d, 239 F.3d
1004 (9th Cir. 2001); see generally Timothy L. Skelton, Internet Copyright Infringement and Service
Providers: The Case for a Negotiated Rulemaking Alternative, 35 San Diego L. Rev. 219, 224-241 (1998);
for a description of decentralized P2P systems like Gnutella, see generally Frederike Hänel, Napster und
Gnutella - Probleme bei der Übertragung von MP3-Dateien nach deutschem Urheberrecht, JurPC Web-
12 These types of services differ in that they offer different levels of service to their subscribers. In this
thesis they will however all be referred to as OSPs.
13 See Alfred C. Yen, Internet Service Provider Liability For Subscriber Copyright Infringement,
The reasons for writing about liability for copyright infringement with special regard to music on the Internet are fairly obvious in light of these recent and ongoing litigations and the introduction of legislation addressing the problems of liability for online infringements like the Digital Millenium Copyright Act (hereinafter: DMCA) or European Directive 2000/31/EC.14

It may be useful to explain why a comparative approach was chosen. It is easy and comfortable to get caught up in one's own legal system and not look abroad. It is often difficult enough to understand and apply one's own laws accurately and the study of a foreign legal system may seem an effort too great. Yet, this reluctance to look beyond the familiar is fatal to legal development and improvement since entirely new ideas are rare in the field of law and the main source of change and new approaches is borrowing from another legal system.15 If one does not stray beyond the boundaries of the familiar, progress is inhibited just as learning would be without a steady flow of accessible information. This may be illustrated by examples as old as the reception of Roman law in Europe.16 Therefore, it is important to conduct this study comparatively, especially because the problems concerning the topic, like the Internet, are global and may pose much of the same difficulties for many legal systems.

As to the structure of this thesis, a few remarks may be useful. In order to keep the work organized and systematic, the relevant law and its application to the issue will be presented and discussed separately for the legal systems of Germany and the United States. Furthermore the historical and philosophical background of copyright law in the

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14 *Infra*, p. 80 et. seq.
16 See generally, Allan Watson: *Roman Law and Comparative Law* (1991) (giving an overview of the impact of Roman law)
respective legal systems is included but kept as short as possible, so as to address the real issue in appropriate length. It is however, necessary to elaborate on historical and philosophical topics to some extent, since both are vital to the understanding of copyright law, the problems arising in conjunction with the Internet and even more so to an insightful comparison of the laws discussed.

The final part of this thesis, after presentation, analysis and comparison of the laws and the respective problems and solutions to the problems concerning the Internet, will be a conclusion including the author’s opinions and suggestions.
CHAPTER I: COPYRIGHT LAW IN GERMANY

A. Copyright protection in Germany – General Overview

In Germany, like in the United States, there is only indirect mention of copyright in the constitution.\(^\text{17}\) Article 14 Grundgesetz (GG)\(^\text{18}\) guarantees the right to property, and since copyright is considered property, this article protects at least the economic rights of the copyright holder. Article 73 Nr. 9 Grundgesetz (GG)\(^\text{19}\) assigns the legislative power concerning copyright to the federal legislative bodies. The legislative used this power in 1965 to reform copyright law, formerly regulated by the LUG (concerning literature and music) of 1901\(^\text{20}\) and the KUG (concerning art and photography) of 1907\(^\text{21}\). Copyright in Germany is almost exclusively regulated by the Copyright Statute enacted on 9/9 1965, the Urheberrechtsgesetz (hereinafter UrhG).\(^\text{22}\) Its express purpose is the protection of the

\(^{17}\) Haimo Schack, Urheber- und Urhebervertragsrecht, 37 (1997); For the U.S. “copyright and patent clause”, U.S. Const. art. 1 § 8, cl. 8., see infra, p. 88 (quoting from § 8, cl. 8)

\(^{18}\) Article 14 Grundgesetz [GG] [Constitution]: “(1) Das Eigentum und das Erbrecht werden gewaehrleistet. Inhalt und Schranken des Eigentums werden durch die Gesetze bestimmt.”

\(^{19}\) (2) Eigentum verpflichtet. Sein Gebrauch soll zugleich dem Wohle der Allgemeinheit dienen.


\(^{21}\) Translation provided by author: “(1) Property and succession are guaranteed. The laws define content and limitations of property.

\(^{22}\) (2) Property is an obligation. Its use serve the public good at the same time.

\(^{23}\) (3) Expropriation is only permissible for the public good. It may only take place by law or under a law that contains the manner and scope of compensation. Compensation is to be defined by justly weighing the interests of the public and the interests of the parties involved. Concerning the amount of compensation recourse to the courts is guaranteed.”

\(^{24}\) Article 73 GG: “Die Gesetzgebung des Bundes hat die ausschliessliche Gesetzgebung uber: ...9. den gewerblichen Rechtsschutz, das Urheberrecht und das Verlagsrecht...”

\(^{25}\) Translation provided by author: “The federal legislative has the exclusive legislation regarding: ...9. trade regulations, copyright and publishing law...”

\(^{26}\) See Haimo Schack, Urheber- und Urhebervertragsrecht, 53 (1997)

\(^{27}\) See id., 53-54

\(^{28}\) Schoenfelder, Deutsche Gesetze, Stand Juni 2001 Nr. 65, full text also available at <http://www.netlaw.de/gesetz/urhg.htm> (last visited 6/5/2001)
author's economical and moral interests in her work, it regulates the relation between the author and his successors and the work.\textsuperscript{23}

Other laws relevant for copyright protection in Germany are to be found in international treaties\textsuperscript{24}, European law\textsuperscript{25}, the Informations- und Telekommunikations-dienstegesetz (IuKDG),\textsuperscript{26} and the Buergerliches Gesetzbuch (BGB), the civil code of Germany\textsuperscript{27}.

1. The philosophical and historical background – “Natural law theory”

The earliest signs of concern regarding authors and their rights arose when Eike von Repgow published his Sachsenspiegel, a book of laws for Saxony, in 1230. He expressed worries that others might copy his work and alter the contents, which would then be attributed to him.\textsuperscript{28} At this time no copyright law existed in Germany and the only “remedy” known to authors was to curse those who copied or altered their work unauthorized in the foreword to their works.\textsuperscript{29}

With the invention of the printing press, copyright began to evolve. First, privileges, closer to a modern day patent than to a copyright, were granted to printers. In the 16\textsuperscript{th} century the first author's privilege was granted, affording the rights to certain

\begin{footnotesize}
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\item\textsuperscript{23} Haimo Schack, Urheber- und Urhebervertragsrecht (1997)
\item\textsuperscript{25} Especially Council Directive 2000/31/EC which will be addressed in detail later; see infra, p. 78-79
\item\textsuperscript{26} Also available at <http://www.netlaw.de/gesetz/IuKDG.htm> (last visited 6/5/2001)
\item\textsuperscript{27} Provisions on intent/negligence (§ 276) are found in the Buergerliches Gesetzbuch [BGB] [Civil Code]
\item\textsuperscript{28} Haimo Schack, Urheber- und Urhebervertragsrecht, 45 (1997); see also Georg Mueller: Eike von Repgow als Urheber, Archiv fuer Urheberrecht 1937, 383-422, 417
\item\textsuperscript{29} Haimo Schack, Urheber- und Urhebervertragsrecht, 45 (1997)
\end{enumerate}
\end{footnotesize}
works to their creator rather than to the publisher.\textsuperscript{30} These \textit{privileges} prohibited the preparation of copies of the work and were limited to a term of three to ten years. While the \textit{author's privileges} have little in common with today's copyright, they are an early expression of the author's moral rights.\textsuperscript{31}

The change in paradigm from privilege to intellectual property came about in the 18\textsuperscript{th} century. Johann Stephan Puetter (1725-1807), intrigued by John Locke's (1632-1704) idea that the justification for private property was to be found in labor\textsuperscript{32}, wrote that creative works are "\textit{unstreitig ein wahres Eigentum ihres Verfassers, so wie jeder das, was seiner Geschicklichkeit und seinem Fleiss sein Dasein zu danken hat, als sein Eigentum ansehen kann.}"\textsuperscript{33} This approach was refined by the distinction between the property in the work and property in the expressed ideas of the author; the former being considered no different from any other property right in tangibles, the latter being defined as an inalienable natural right.\textsuperscript{34} Long before the codification of copyright in the UrhG, the author's personality-related rights in the work were recognized in Germany.\textsuperscript{35} The first fairly modern codification of copyright in the parts of Europe that would eventually become Germany was the Prussian copyright statute of 1837, followed by a statute for

\textsuperscript{30} \textit{Id.}, 46
\textsuperscript{31} \textit{Id.}, 47-48; a privilege system is often regarded as primitive because it does not recognize authors' natural rights in their creations, see Bundesgerichtshof in Zivilsachen [BGHZ] [Supreme Court] 17, 266, 270-277
\textsuperscript{32} See Haimo Schack, Urheber- und Urhebervertragsrecht, 49 (1997); This approach is common in continental Europe. See Stephen Breyer, \textit{The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs}, 84 Harv.L.Rev. 281, 284 (1970), quoting Marion: "...as the heavens and earth belong to god, because they are the works of his word... so the author of a book is its complete master, and as such can dispose of it as he chooses."
\textsuperscript{33} Translation provided by author: "Intellectual works are indisputably property, just as anyone may claim as his property that which owes its existence to his skillfulness and labor." Johann Stephan Puetter, Der Buechermarkt nach aechten Grundsaetzen des Rechts gepueft (1774, republished 1981)
\textsuperscript{34} Haimo Schack, Urheber- und Urhebervertragsrecht, 49 (1997), quoting Immanuel Kant, Von der Unrechtmaessigkeit des Buechernachdrucks (1785) or Immanuel Kant, Of the Injustice of Counterfeiting Books, 1 Essays and Treatises on Moral, Political and Various Philosophical Subjects 225, 229-230 (Richardson Ed. 1798)
northern Germany, which was kept as the copyright law for the Reich of 1871 and amended in 1876. A revision of copyright in 1901 resulted in the LUG, a new copyright statute, which finally led to the present copyright statute.\textsuperscript{36} Interestingly, during the Nazis' reign of terror, copyright was declared to be a fiduciary right of the author, while the work and ideas were labeled as "common good of the people". This remains the only period when copyright was not perceived as a proprietary right in Germany.\textsuperscript{37}

Copyright in Germany today is again (or more accurately: still) based on the perception that the author has a natural right to his creation.\textsuperscript{38} Internationally it has been recognized in Art. 6bis Berne Convention.

2. The Urheberrechtsgesetz (Copyright Statute)

The UrhG consists of five parts. The first part concerns the nature and existence of copyright, while the second deals with similar or related rights. The third part contains special provisions for moving pictures; the fourth contains provisions applied to both copyright and related rights, such as infringement actions and procedural rules. Finally, the fifth part regulates the scope of the statute and contains rules of temporal conflicts.\textsuperscript{39}

\textsuperscript{35} Haimo Schack, Urheber- und Urhebervertragsrecht, 145 (1997), quoting Reichsgericht in Zivilsachen [RGZ] [Supreme Court before 1949] 79, 397.
\textsuperscript{36} See Haimo Schack, Urheber- und Urhebervertragsrecht, 52-55 (1997)
\textsuperscript{37} See id., 54
\textsuperscript{38} Id., 49; see also BGHZ 17, 266, Heading and at 278: "Die Herrschaft des Urhebers ueber sein Werk, auf die sich sein Anspruch auf gerechten Lohn fuer eine Verwertung seiner Leistung durch Dritte gruendet, wird hiernach nicht erst durch den Gesetzgeber verliehen, sondern folgt aus der Natur der Sache, naemlich aus seinem geistigen Eigentum, das durch die positive Gesetzgebung nur seine Anerkennung und Ausgestaltung findet."
Translation provided by author: "The author’s power over his work, on which his claim for just compensation for the use of his work is founded, is not created by the legislature but exists naturally, because of the author’s intellectual property, which is merely recognized and put into legal form by the law."
\textsuperscript{39} See Haimo Schack, Urheber- und Urhebervertragsrecht, 55 (1997)
The first and fourth parts are to be examined closely in this thesis. In the following, the requirements and scope of protection will be presented in general and with regard to musical works and sound recordings in particular. “Musical works” are understood as “a succession of sounds intended to create an acoustic experience for the listener”. This definition serves to draw the line between composed musical works and common or random sounds. It does not matter how the sounds are created as long as they are created as the result of some human act of creation, which controls the compositional process. “Sound Recordings” are manufactured fixations of musical works in media that allow the playback of the musical work with the aid of a playback device such as a CD player or a tape deck.

a. Requirements for protection:

Today, the requirements for copyright protection in Germany are contained in the UrhG. Typical protectible subject matter are works of literature including speech, music, fine arts, computer programs, pantomimic and choreographic works, industrial design, architecture, photographies and moving pictures. In the context of this thesis,

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40 Id. at 91
41 Id. at 91; Accordingly, “music” created by “random” are not protectible; neither would John Cage’s “4.33” be protectible in which a pianist sits at a piano quietly for four minutes and thirty three seconds as a musical work. There is no compositional creativity involved. It may or may not be protected as a performance or other work of art.
42 See Haimo Schack, Urheber- und Urhebervertragsrecht, 87-88 (1997) (stating that while a single word is rarely protectible, the length of the work is unimportant and that the scope of protection and whether protection should be granted for certain works in this category such as telephone book design is subject to heated discussion and courts have decided in many different ways)
43 These are now expressly mentioned. Before, computer programs were commonly considered works of literature. See, Haimo Schack, Urheber- und Urhebervertragsrecht, 88-89 (1997), BGHZ 94, 276, 282
44 See, Haimo Schack, Urheber- und Urhebervertragsrecht, 87-102 (1997) (giving an overview of the various kinds of works and definition thereof
the focus will be on musical works and the related sound recordings.\(^{45}\) Therefore the problems and difficulties arising with regard to some of the other kinds of works will not be elaborated upon.

§ 1 UrhG\(^{46}\) clarifies that the law protects authors of “works of literature, science and art”. The central element is the work itself. Defining the term “work” causes considerable problems. It is often claimed that the term defies definition altogether.\(^{47}\) Especially since the forms of protectible works mentioned in the law are merely examples, not a “list of protected works”.\(^{48}\) Since some form of definition is necessary, however, § 2 UrhG\(^{49}\) describes a “work” as a “personal intellectual creation” of the

\(^{45}\) Although many of the problems and solutions discussed here will equally apply to other protected subject matter.

\(^{46}\) § 1 Urheberrechtsgesetz [UrhG] [Copyright Statute]: “Die Urheber von Werken der Literatur, Wissenschaft und Kunst geniessen fuer ihre Werke Schutz nach Massgabe dieses Gesetzes.”

Translation provided by author: “Authors of works of literature, science and art enjoy protection of their works according to the measures set out in this law.”

\(^{47}\) See, Haimo Schack, Urheber- und Urhebervertragsrecht, 78 (1997)

\(^{48}\) See, id. at 78 and compare § 2 (1) UrhG

\(^{49}\) § 2 UrhG:

“(1) Zu den geschuetzten Werken der Literatur, Wissenschaft und Kunst gehoeren insbesondere:
1. Sprachwerke, wie Schriftwerke, Reden, und Computerprogramme;
2. Werke der Musik;
3. pantomimische Werke einschliesslich Werke der Tanzkunst;
4. Werke der bildenden Kuenste einschliesslich der Werke der Baukunst und der angewandten Kunst und Entwuerfe solcher Werke;
5. Lichtbildwerke einschliesslich der Werke, die ahnlich wie Lichtbildwerke geschaffen werden;
6. Filmwerke einschliesslich der Werke, die ahnlich wie Filmwerke geschaffen werden;
7. Darstellungen wissenschaftlicher oder technischer Art, wie Zeichnungen, Plaene, Karten, Skizzen, Tabellen und plastische Darstellungen.
(2) Werke im Sinne dieses Gesetzes sind nur personliche geistige Schoepfungen.”

Translation provided by author:

“(1) Protected works especially include works of literature, science and art of the following kind:
1. works of speech like writings, speeches and computer programs;
2. musical works;
3. pantomimic works including works of choreography;
4. works of art including architectural works, functional art and drafts of such works;
5. photographies and works created in a similar way as photographies;
6. moving pictures including works created in a similar way as moving pictures;
7. depictions of the scientific or technical kind like drawings, plans, maps, drafts, tables and plastic depictions.
(2) Works in the terminology used here are only personal creations of the author.”
author. Even though this definition is anything but accurate or concrete, it reveals some necessary elements for a work to be protectible under the law:

(1) The work must be a personal creation of the author. What this means is that objects trouves, objects that were not prepared by a human being, cannot be protectible works. It also bars everyday objects (so-called ready-mades) from protection. Accordingly an author cannot achieve protection for his “art” by simply proclaiming an everyday object to be art. Marcel Duchamp’s “Urinal” for example, is not protected because it is merely a urinal and the “author” did nothing but proclaim that it became art by its placement in a museum. On the other hand, Tinguely’s scrap metal sculptures are protected since the author performed an act of creation in this case. Essentially, there must be some human act of creation for the product of this creative process to be protectible under the UrhG.

Consequently, musical works must be such a personal human creation to be protected. Any composition, prepared with or without the aid of a machine, instrument or other device, which is put together or controlled by the creator himself must be considered a human creation and a personal creation of the author. Accordingly, almost

50 See, Haimo Schack, Urheber- und Urhebervertragsrecht, 103 (1997)
51 Marcel Duchamp placed a normal urinal in a museum and proclaimed that it was therefore art.
52 See, Haimo Schack, Urheber- und Urhebervertragsrecht, 79 (1997)
53 Id.; Some legal scholars have suggested that such proclamations of art should be regarded as a sufficient act of human creation. See Max Kummer: Das urheberrechtlich schützbare Werk (1968), 75; Max Kummer: Die Entgrenzung der Kunst und das Urheberrecht (1976), 89-115, 95; This view has not received much sympathy and has been rejected entirely by the vast majority of copyright scholars in Germany because what is protected must not be defined by the author but needs to be defined objectively. See Gerhard Schricker/ Ulrich Loewenheim, Kommentar zum UrhG, § 2 Nr. 6 2nd Ed. 1999; Eugen Ulmer: Urheber- und Verlagsrecht (1980); Haimo Schack, Urheber- und Urhebervertragsrecht (1997)
every piece of music satisfies this requirement, except for “creations” in which the
“author” expressly wishes to give up control over the progression of sounds.54

(2) The work must have some intellectual content. This does not render copyright law
content-based, but simply means that a work is only protectible if it is the author’s
individual expression of creativity. However, it does not mean that the work cannot have
practical functions, much less that it needs to be aesthetically pleasing in any way.55 The
requirement is a very low threshold to protection.

Pieces of music that satisfy the first requirement generally pass this threshold as
well. Since copyright is not content-based, protection is awarded to any kind of music
that is an individual expression in this sense, be it ‘muzak’, a symphony, a military march
or Metallica’s latest single.

(3) The idea in itself is not considered a protectible work. While fixation in a tangible
medium is not required in order to achieve protection, the work must be presented in a
form in which it can be perceived by others.56 Accordingly, a live performance or
broadcast and even improvised speech can be protected under the UrhG as long as they
are perceptible. There is no idea-expression dichotomy57 in the true sense because the
work is a personal ‘intellectual creation’ because of its content not its form.58 The
distinction only comes into play regarding the scope of the proprietary rights. With regard

54 See remarks regarding “4.33” by John Cage, supra, p. 8, footnote 41
55 Haimo Schack, Urheber- und Urhebervertragsrecht, 80 (1997)
56 Id, 80-81
57 Regarding this terminology and concept important to U.S. Copyright law, see infra, p. 95
58 Haimo Schack, Urheber- und Urhebervertragsrecht, 80-81 (1997)
to musical works this means nothing more than that the music must be available in some form that is perceptible, be it at a live concert, in sheet music or other forms.

(4) While the work does not need to be entirely novel it must be original in the sense that it was the author’s own creation as opposed to a copy or an imitation of another’s work.59 The work must furthermore be the creative expression of the author’s creative personality, which is commonly assumed where the idea behind the work could have been expressed differently.60 This is one of the reasons for the German rule that the author can only be an individual. Corporations have no personality, let alone a creative one; they cannot be authors in this sense and therefore cannot be copyright holders either.61 Almost any musical idea can be expressed in different ways wherefore it would be difficult to claim that a musical work does not deserve protection due to lack of originality. The rule that corporations cannot be copyright holders constitutes one major difference between the copyright laws of Germany and the United States.62

(5) Since ideas must remain freely available to everyone, only the concrete work is protectible. Concepts, methods, styles and the like are not protectible. For the same reasons and because they can hardly be the expression of the author’s creative personality, facts are not protectible subject matter.63 For example: Arnold Schoenberg’s

59 Id. at 82
60 Id. at 82-83 (stating that this is a low threshold rarely relevant to the question of protectibility)
61 Of course corporations can be assigned the rights to economically exploit a work, see infra, p. 16
62 See Craig Joyce, William Patry, Marshall Leaffer, Peter Jaszi, Copyright Law, 273 (5th Ed. 2000) (stating that in the United States the “work for hire doctrine” allows for corporate entities to be considered the author of an employee’s creation)
63 Haimo Schack, Urheber- und Urhebervertragsrecht, 82-83 (1997) (stating that by definition there can be no author of facts)
concept of "twelve tone music" is not protected by copyright while his individual compositions are.64

(6) Protection begins with the creation of the work, even if it has not yet been published. The copyright is not influenced by the legal age of the author or the legality of the work's content.65 As mentioned earlier, fixation, publication or formalities are not requirements for copyright protection.66

b. The scope of protection

Protection under the UrhG is twofold: The first group of protected rights is commonly referred to as the Urheberpersoenlichkeitsrecht (hereinafter: UPR), roughly translated, the author's personality-related rights in the work.67 The rights contained in these provisions are the result of the perception that the work is an expression and to some extent an extension of the author's personality to which he has the exclusive right.68 The provisions concerning the UPR are §§ 12-14 UrhG. The fact that they are dealt with before any economical rights of the author demonstrates how central the UPR is considered to be in German copyright law, the emphasis being on the protection of the author's creative personality rather than his or her economical interests.69

64 Id. at 83
65 Therefore works whose content is criminally relevant are still protectible subject matter, though the author cannot claim damages or assign valid licenses, since the law cannot promote or protect profit from illegal activities. Haimo Schack, Urheber- und Urhebervertragsrecht, 103 (1997); Oberlandesgericht [OLG] [Court of Appeals] Hamburg, Gewerblicher Rechtsschutz und Urheberrecht [GRUR] 1984, 663
67 The term "moral rights" does not reflect what stands behind the German term fully. This is why the attempt of further clarification was made.
68 Haimo Schack, Urheber- und Urhebervertragsrecht, 144 et. seq. (1997)
(1) As the general subject of copyright protection, § 11 UrhG states the personal and intellectual relationship between the author and his work.\(^{70}\) The droit d'auteur approach is clearly visible as shown by the emphasis on personal and intellectual relations of the author to his work. The use of the work is only mentioned in the second part of the section, although it may be economically and practically more important than the author’s moral rights today. While § 11 UrhG is only a general provision, the subsequent Sections clarify the extent of the author’s rights in particular.

(2) § 12 UrhG\(^{71}\) concerns the right to publish, clarifying that it is the author’s decision if, when and how his work is published.

(a) The work is published in this sense when it has been made available to the public with the permission of the author.\(^{72}\) Concerning musical works and sound recordings publication normally occurs when the work is made available to the general public for purchase through a publishing company or by the author herself. If the work is made available in conventional formats like records, cassette tapes or CDs it has been published

\(\text{id.}\) (stating that the UPR is the reason for any economical rights; the latter derive from it)
\(\text{§} 11\) UrhG: “Das Urheberrecht schützt den Urheber in seinen geistigen und persönlichen Beziehungen zum Werk und in der Nutzung des Werkes.”
Translation provided by author: “Copyright protects the author’s intellectual and personal relation to the work and the use thereof.”
\(\text{§} 12\) UrhG: “(1) Der Urheber hat das Recht zu bestimmen, ob und wie sein Werk zu veröffentlichen ist.
(2) Dem Urheber ist es vorbehalten, den Inhalt seines Werkes öffentlich mitzuteilen oder zu beschreiben, solange weder das Werk, noch der wesentliche Inhalt oder eine Beschreibung des Werkes mit seiner Zustimmung veröffentlicht ist.”
Translation provided by author: “(1) The author has the right to decide whether and if so, how his work is to be published.
(2) It is reserved to the author to describe the contents of his work publicly as long as neither the work nor the contents of the work have been published with his permission.”
\(\text{§} 6\) UrhG: “Ein Werk ist veröffentlicht, wenn es mit Zustimmung des Autors der Öffentlichkeit zugänglich gemacht worden ist.”
if the author’s permission was granted. The same should apply to publication on the Internet. If the work is disseminated on the Internet, be it in MP3 format or other formats, it is published if the author consented, it is unpublished as long as the author has not given her permission to the dissemination.73

(b) § 12 UrhG also assigns to the author the sole right to describe her yet unpublished work. This right reflects both moral and economical interests since publication is a prerequisite for financial exploitation of the work. It is designed to prevent publication against the author’s will to protect her opportunities to profit economically from publication as well as to protect her from undue criticism or misrepresentation or false attribution due to premature publication against her will.74 The right only goes toward first publication. The author has other rights that may allow her to prevent further unauthorized publications but the right granted in § 12 UrhG ends with the first authorized publication.75 With publication the author also loses certain rights, such as those granted in § 12 (2) UrhG regarding the relaying of the work’s content or the § 18 UrhG right to display exclusively. Certain uses of the work also become legal without permission upon publication, which will be dealt with in detail at a later stage of this

Translation provided by author: “A work is published when it has been made available to the public with the permission of the author.”
73 Haimo Schack, Urheber- und Urhebervertragsrecht, 150,151 and 188-189 (1997); see also Mathias Schwarz, Urheberrecht im Internet, Der Markenartikel 1996, 120, 122 (discussing the dissemination of “Voodoo Lounge” – Video by the Rolling Stones over the web); see also Frederike Hänel, Napster und Gnutella - Probleme bei der Übertragung von MP3-Dateien nach deutschem Urheberrecht, JurPC Web-Dok. 245/2000, Abs. 1-57 (2000), http://www.jurpc.de/aufsatz/20000245.htm (last visited 6/5/2001) (mentioning that regarding sound recordings, the “author” in this sense is the manufacturer)
74 Haimo Schack, Urheber- und Urhebervertragsrecht, 149-150 (1997); KG, Neue Juristische Wochenschrift [NJW] 1995, 3392, 3394 (Botho Strauss) and Stroenholm, GRUR 1963, 364
work. With regard to musical works on the Internet this important since the right to first publication clearly encompasses the right to first publication on the Internet – if the work has not been published in a different format beforehand, in which case the right to publication has ended and the rights to copy and electronically render the work will be the relevant provisions. However, § 12 UrhG still bears importance to the problems discussed here since quite a few musical works have been distributed over the Internet before being published with the author’s consent. Under § 12 UrhG this would be an actionable violation of the author’s right to first publication.

Even though the UPR is inalienable, the author may allow another to publish the work in conjunction with granting the other person rights concerning the use of the work. This grant of the right to publish and other rights related to the publication is vital in the context of the music industry. Artists generally grant these rights to their publisher/record company. This does not mean that the author assigns her §12 UrhG rights to the record company but rather that he allows these rights to be used/executed by another while the §12 UrhG right stays with the author.

(3) The author also has the right to be recognized as such. This may be important to her because only by being recognized through her works in public can the author achieve

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76 Haimo Schack, Urheber- und Urhebervertragsrecht, 150 (1997); compare §§ 48, 51, 59 UrhG
77 See infra, p. 20
78 The band Metallica for example filed their complaint against Napster Inc. after their song “I disappear” had been available through Napster’s service before authorized publication. See Lars Ulrich, Note, The Globe and Mail (Toronto, Canadian July 17th 2000)
79 Haimo Schack, Urheber- und Urhebervertragsrecht, 150 (1997), citing Eugen Ulmer Festschrift fuer Hubmann, 435
a reputation.\textsuperscript{80} It includes the right to decide whether and how the work is to be made recognizable as the work of the specific author, which is considered to be the most important result of § 13 UrhG.\textsuperscript{81} § 13 UrhG in conjunction with § 63 UrhG protects against copyright piracy and plagiarism by making citation of the author mandatory when the work is quoted.\textsuperscript{82} Internet users or others involved in the activities to be discussed here rarely claim authorship. Accordingly, this problem has no real impact on the issue of this thesis and will not be discussed further.

(4) Another result of the droit d’auteur approach is the author’s right to forbid the mutilation of her work or any other alteration that could endanger her valid personal or intellectual interests in the work (§ 14 UrhG – right to maintain the integrity of the work).\textsuperscript{83} The subject of protection is not the work itself but the author’s interest in it. A three-tier test is commonly applied to determine whether the right has been violated: First, it is to be determined whether the work has indeed been mutilated or altered. Second, it must be shown that the alteration or mutilation is in conflict with the author’s vested personal or intellectual interests, and finally the test compares the author’s

\textsuperscript{80} § 13 UrhG: "Der Urheber hat das Recht auf Anerkennung seiner Urheberschaft am Werk. Er kann bestimmen, ob das Werk mit einer Urhebenbezeichnung zu versehen und welche Bezeichnung zu verwenden ist."
Translation provided by author: "The author has the right to be recognized as such. He also has the right to decide whether the work is to be marked as being authored by him and in which fashion this is to be done."

\textsuperscript{81} Haimo Schack, Urheber- und Urhebervertragsrecht, 152-153 (1997) (clarifying that this does not give the author the protection against others revealing his or her true identity); Gerhard Schricker/Ulrich Loewenheim, Kommentar zum UrhG, § 13 Nr. 6 and Nr. 12 UrhG (2nd Ed. 1999)

\textsuperscript{82} Haimo Schack, Urheber- und Urhebervertragsrecht, 152-153 (1997)

\textsuperscript{83} § 14 UrhG: "Der Urheber hat das Recht, eine Entstellung oder eine andere Beeinträchtigung seines Werkes zu verbieten, die geeignet ist, seine berechtigten geistigen oder persönlichen Interessen am Werk zu gefährden."
Translation provided by author: "The author has the right to forbid any mutilation or alteration of his work which could interfere with his vested personal or intellectual interests in the work."
interests with the conflicting interests of others. As to the definition of alteration or mutilation it does not matter whether the alteration improves the work or has a negative impact. In the context of this thesis, the provision may be relevant when a work is made available on the Internet in a way that results in such a mutilation of the work. However, this should rarely be the case since the music distributed over the internet is normally copied from conventional sound carriers. It can hardly be referred to as an adaptation since it is an exact copy. The compression into MP3 format is not a mutilation or adaptation in this sense because the work is not changed significantly, it is simply made available in a different format, like the recording of a digital master onto tape. Furthermore, the author’s personal or intellectual interest in the work is not violated by the mere transformation of the work into a different format; her economic interest may be at stake but that is not the issue in § 12 UrhG.

(5) Another right resulting mainly from the UPR is the right to access. Codified in § 25 UrhG, it allows the author access to his work even if it is no longer his property, in order to make copies of it or alter it. This right is irrelevant in the context of this thesis, but it may be of help in comprehending the extensive reach of the UPR.

(6) Apart from the rights directly resulting from the UPR, copyright protects economical rights of the author (Verwertungsrechte). Other than many copyright laws,

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84 Haimo Schack, Urheber- und Urhebervertragsrecht, 155 (1997); Gerhard Schricker/Ulrich Loewenheim, Kommentar zum UrhG § 14 UrhG Nr. 18 (2nd Ed. 1999)
85 See, Frederike Hänel, Napster und Gnutella - Probleme bei der Übertragung von MP3-Dateien nach deutschem Urheberrecht, JurPC Web-Dok. 245/2000, Abs. 11 (2000), <http://www.jurpc.de/ausatz/20000245.htm> (last visited 6/5/2001); BGHZ 17, 266, 269 f. (stating that even though the copy in MP3 format is different technically, it is exact to the human perception and that this is sufficient to constitute reproduction/copying in the sense of the UrhG)
the UrhG does not contain a list of rights or a bundle of rights defined in the act itself. It grants the author the exclusive right to exploit his work in its tangible form and perform his work in the intangible form (§ 15 UrhG). While it seems like § 15 UrhG does list the author’s rights, this is a misperception. The word “insbesondere” (particularly) shows that the rights mentioned are not an exclusive enumeration but merely the most common and important. The author’s right to exploit his work is not limited to theses rights in any way. German copyright law operates on the premise that the author is entitled to profit economically from her work wherever possible. However this, and the fact that all rights mentioned except for § 16 UrhG only become relevant upon public use of the work, does not mean that only uses of the work targeted at profit need to be authorized.

86 Concerning economic interest violations see infra, pp. 20, 26, 32 et. seq.
87 § 15 UrhG: “(1) Der Urheber hat das ausschliessliche Recht, sein Werk in koerperlicher Form zu verwerten; das Recht umfasst insbesondere:
1. das Verfielfaeltigungsrecht (Paragraph 16)
2. das Verbreitungsrecht (Paragraph 17)
3. das Ausstellungsrecht (Paragraph 18)
(2) Der Urheber hat ferner das ausschliessliche Recht sein Werk in unkoerperlicher Form offentlich wiederzugeben (Recht der offentlichen Wiedergabe); das Recht umfasst insbesondere:
1. das Vortrags-, Auffuehrungs- und Vorfuehrungsrecht (Paragraph 19)
2. das Senderecht (Paragraph 20)
3. das Recht der Wiedergabe durch Bild- und Tontraeger (Paragraph 21)
4. das Recht der Wiedergabe durch Funksendungen (Paragraph 22)
(3) Die Wiedergabe ist offentlich wenn sie fuer eine Mehrzahl von Personen bestimmt ist, es sei denn, dass der Kreis dieser Personen bestimmt abgegrenzt ist und sie durch gegenseitige Beziehungen oder durch Beziehung zum Veranstalter personlich untereinander verbunden sind.”
Translation provided by author: “(1) The author has the exclusive right to exploit his work in its corporeal form; this right particularly includes:
1. the right to make copies (section 16)
2. the right to distribute (section 17)
3. the right to display (section 18)
(2) The author also has the exclusive right to publicly perform his work in non-corporeal form (right of public performance); this right particularly includes:
1. the right to performance, recital and presentation (section 19)
2. the right to broadcast (section 20)
3. the right to rendition through optical or audio-carriers (section 21)
4. the right to rendition through broadcast (section 22)
(3) The performance is public, if it targets a multitude of persons, unless the circle of persons is finite and there is some personal relation between these persons or the individual persons and the organizer/promoter.”
88 Haimo Schack, Urheber- und Urhebervertragsrecht, 168 (1997)
89 Id.; RGZ 128, 102, 113; BGHZ 17, 266, 282; BGHZ 116, 305, 308
Although there are certain uses that need not be authorized, copyright protection does not limit the author’s rights to economically relevant uses.\(^90\) The fact that use of the work in private is largely unrestricted\(^91\) is merely a reflection of the legislative decision to focus on the actions of the mediator rather than those of the consumers, since the latter are practically uncontrollable.\(^92\) The reasoning behind § 15 UrhG is founded on the belief that the author should have the opportunity to profit from every expansion of publicity of his work.\(^93\) For example: If the original work is sold, the circle of users is limited to the owner and persons somehow related to her. The author profits once, from the sale of the work. If hundreds of copies are prepared and sold, the circle of users is potentially larger and extends beyond the original buyer’s private sphere. In this case the author’s right to profit from the expansion of publicity and accessibility is reflected by her profits from granting the license to copy.\(^94\)

(a) Electronic distribution or electronic rendition? § 15 (2) UrhG\(^95\) vs. § 17 UrhG\(^96\)

One of the major questions in the context of musical works on the Internet is

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\(^90\) Haimo Schack, Urheber- und Urhebervertragsrecht, 168-169 (1997); BGHZ 17, 266, 279

\(^91\) This will be discussed in detail in the context of infringement actions, infra, pp. 32 et. seq.

\(^92\) Haimo Schack, Urheber- und Urhebervertragsrecht, 168-169 (1997)

\(^93\) Id. at 169

\(^94\) Id.; (Discussing that the above could easily be mistaken as an expansion of the author’s economical rights into the secondary market, which is not the case. The author has no right to control what happens to authorized copies that are already on the market an does not profit financially)

\(^95\) See footnote 87

\(^96\) § 17 UrhG: “(1) Das Verbreitungsrecht ist das Recht, das Original oder Vervielfältigungsstuecke des Werkes der Öffentlichkeit anzubieten oder in Verkehr zu bringen.
(2) Sind das Original oder Vervielfältigungsstuecke des Werkes mit Zustimmung des zur Verbreitung Berechtigten im Gebiet der Europaeischen Union oder eines anderen Vertragsstaates des Abkommens ueber den Europaeischen Wirtschaftsraum im Wegen der Vervielfältigung und Verkauf gebracht worden, so ist ihre Weiterverbreitung mit Ausnahme der Vermietung zulaessig.
(3) Vermietung im Sinne der Vorschriften dieses Gesetzes ist die zeitlich begrenzte, unmittelbar oder mittelbar Erwerbszweck dienende Gebrauchsüberlassung. Als Vermietung gilt jedoch nicht die Ueberlassung von Originalen oder Vervielfältigungsstuecken...”

Translation provided by author: “(1) The right to distribute is the right to offer to the public or put into circulation the original work or copies thereof.
whether § 15 (2) UrhG (rendition) or §§ 15 (1), 17 UrhG (distribution) should be applied to the offering of works for online use. All acts of exploitation mentioned in § 15 (2) UrhG require the public rendition of the work. As defined in § 15 (3) UrhG a rendition is public, if it is meant for a multitude of persons unrelated to each other and the author; the number of persons is irrelevant. A rendition in front of two persons can be public in this sense, while the rendition in front of a hundred persons at the author’s wedding is not. The term public is understood more broadly than in § 6 UrhG. With regard to musical works and their dissemination over the Internet, § 15 (2) UrhG has been suggested to grant a right to “electronic rendition”.

The offering of works for online use seems similar to cable transmissions of broadcasts, which fall under § 15 (2) UrhG. However, a cable broadcast (like TV or radio) is aimed at a broad public and has its origin with only one broadcast company, while transmission over the Internet happens at the individual request of the user. The

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(2) If the original or copies of the work have entered the market by way of disposal within the European Union or other member states of the Agreement on the Common Market with the consent of the rightful owner, further circulation is lawful, except renting.

(3) Renting as understood in the provisions of this act is allowing another to use the work for a limited time which is directly or indirectly aimed at economical profit. Renting is not the transfer of originals or copies.”

The remainder of § 17 UrhG concerns types of works irrelevant to this thesis.

97 See, Haimo Schack, Urheber- und Urhebervertragsrecht, 172 (1997) (Discussing that since the right to copy and the right to distribute are both transferable and are commonly transferred together, the reasoning for including a separate right to distribute is difficult to see. However, it must be noted that the right to distribute can be limited in time and geographical scope, which gives the author additional control over the distribution of the work)

98 Mathias Schwarz, Urheberrecht im Internet, Der Markenartikel 1996, 120, 215

99 Haimo Schack, Urheber- und Urhebervertragsrecht, 179-180 (1997)


101 Haimo Schack, Urheber- und Urhebervertragsrecht, 186-188 (1997)
user’s access to the work does not necessarily happen at the same time with a multitude of others. Yet this is considered to be a prerequisite for a “public” rendition by many scholars who claim that simultaneity is inherent to the term transmission.\textsuperscript{102} While this appears to be logical at first glance, the view is too restrictive. The language of § 15 (3) UrhG does not contain anything requiring access to be simultaneous.\textsuperscript{103} On the Internet, access to works is available to a multitude of unrelated persons, to anyone with a connection to the Internet. It must therefore be considered public under § 15 (3) UrhG. However, it cannot be considered a ‘broadcast’ in the traditional sense - this would indeed require simultaneous access. Accordingly, the right to make works available on the Internet for online use should be considered a new form of exploitation (by transmission) in non-tangible form under § 15 (2) UrhG.\textsuperscript{104} Under this presumption, the exploitative act reserved to the author is making the work available for online use. The relevant time should not be the time of actual access by the user but rather the time when the work is uploaded to a site and thereby made available for access. This understanding has the benefit of including all transitory copies made in order to upload as part of the § 15 (2) UrhG right to electronic rendition.\textsuperscript{105} This understanding also closes a gap in the legal protection provided by the UrhG since the Internet was certainly not thought of when the UrhG was drafted and consequently could not consider its implications.\textsuperscript{106}

\textsuperscript{102} Oberster Gerichtshof [OGH] GRUR Int. 1987, 609, 612 – Video booths, successive publicity (Austria); Mathias Schwarz, Urheberrecht im Internet, Der Markenartikel 1996, 120, 216 (comparing the situation to that of satellite transmissions before the EU directive concerning satellite and cable transmissions)

\textsuperscript{103} BGHZ 113, 159, 161 - Einzelangebot; Juergen Becker, ZUM 1995, 231, 245; Gerhard Schricker/Ulrich Loewenheim, Urheberrecht, Kommentar, § 15 Rn. 59-60 (2\textsuperscript{nd} Ed. 1999)

\textsuperscript{104} Haimo Schack, Urheber- und Urhebervertragsrecht, 187 (1997) (citing Art. 8 WIPO treaty (12/20/1996) “right of communication to the public”)

\textsuperscript{105} Haimo Schack, Urheber- und Urhebervertragsrecht, 188 (1997)

It has been suggested that the above view is inaccurate and that a different analysis is required where the supplier of the work for online use intended for the user to not only access the work online but also make copies of it. This case could indeed be understood as “electronic distribution” and fall within the scope of § 17 UrhG. However logical this may seem, it is impractical because in most cases the “supplier” cannot know or control whether or not the user will prepare a copy of the work. Generally, it seems inappropriate to let the supplier’s subjective views be decisive regarding the legal classification of an act. Still, there may be some merit to the “electronic distribution” approach. § 17 UrhG mentions two ways of distribution, _Inverkehrbringen_ (to enter into circulation) and _Anbieten_ (to offer to the public). The latter requires that the work be offered to the public. _Inverkehrbringen_ is interpreted broadly: It includes the sale of the work or copies as well as any other means of changing possession. Examples of putting into circulation apart from the obvious are giving blueprints to a potential client or furnishing a hotel room with copyrighted furniture. From a common sense point of view, the offering of music over the Internet may appear to be a form of distribution. However, offering music for download is essentially offering of works that do not exist yet, and concerning “offering to the public”, there is dispute about whether the copies offered must already exist. While some courts have held so, the _Bundesgerichtshof_ did not see this as a requirement because it was deemed especially

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107 Thomas Hoeren, _Ueberlegungen zur urheberrechtlichen Qualifizierung des elektronischen Abrufs_, Computer und Recht [CR] 1996, 517, 519
109 Haimo Schack, Urheber- und Urhebervertragsrecht, 173 (1997), BGH GRUR 1972, 141, 142
110 BGH GRUR 1985, 129, 130
111 KG GRUR 1996, 968, 969; but see OLG Duesseldorf GRUR 1983, 760, 761 (furnishing of a sales convention booth)
112 Kammergericht [KG] [Court of Appeals in Berlin] GRUR 1983, 174 (pirated video cassettes)
important to include pirated material made to order. The right to distribute, unlike the right to copy, is subject to exhaustion. It would create severe problems if the author had control over further distribution as well. Therefore, the right to distribute is exhausted with the first distribution by the author, in order to protect trade. Since exhaustion of the right constitutes a severe loss for the author, there are several requirements for exhaustion to occur. The first distribution must occur with the consent of the holder of the right by means of disposal, meaning contract of sale, gift or other contract of obligation. It is questionable whether most Internet transactions involving the transfer of protected music are based on a contractual relationship between the parties.

Even though at first glance the transfer of works over the Internet appears to be a distribution, this is not the case, mainly because § 17 UrhG concerns only the distribution in physical, tangible form. Digital files transmitted over the web can hardly be considered tangible or physical forms of the work. The right to distribute does not encompass the broadcast or other non-physical distribution of the work.

However, it could be argued that § 17 UrhG should be understood to cover the distribution of works in digital form nevertheless. It is accepted that copying a work onto a computer hard drive is physical copying under § 16 UrhG even though the physical nature of the copy is hardly discernible. From this premise, the step to accepting that

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113 BGHZ 113, 159, 163; *see also* Haimo Schack, Urheber- und Urhebervertragsrecht, 174 (1997); Ulrich Loewenheim, in Festschrift fuer Traub, 255; Gerhard Schricker/Ulrich Loewenheim, Kommentar zum UrhG, § 17 UrhG, Nr. 4 (2 Ed. 1999)
114 Haimo Schack, Urheber- und Urhebervertragsrecht, 175 (1997), BGHZ 112, 264, 277 (operating system)
115 Haimo Schack, Urheber- und Urhebervertragsrecht, 174-175 (1997)
116 *Id.* at 175; (Sale, gift and other such contracts are all obligations under German law. The property is transferred in a separate transaction and the concept of consideration is generally unknown.)
117 Mathias Schwarz, *Urheberrecht im Internet*, Der Markenartikel 1996, 120, 215-218
118 Haimo Schack, Urheber- und Urhebervertragsrecht, 173 (1997), citing BGHZ 11, 135, 144 (public playing of phonorecords), overturning RGZ 113, 413, 416 (Der Tor und der Tod)
119 See infra, pp. 26, 27
there may be non-physical distribution is not too great.\textsuperscript{120} This approach would indeed provide a simple solution to the problem of deciding how transmission over the Internet should be treated. Yet, it is incompatible with the requirement of physical distribution; an amendment to the copyright statute would be necessary. Distribution is the dissemination of physical copies of a work. In the online environment this is simply not the case; new copies are prepared every time a user downloads a work.\textsuperscript{121} These copies are indeed physical in nature once they have been created, but the transfer of data is not equivalent to the distribution of physical copies, the copy becomes physical but it is non-physical during transmission.

Furthermore, as Schwarz recognizes as well, exhaustion could not be applied to digital distribution since there would be no protection for further use of the works on the Internet, a consequence hardly compatible with author’s rights.\textsuperscript{122} Consequently, an extension of § 17 UrhG to cover digital distribution may well be a solution to the problems at hand, but it is not feasible under the current statute.\textsuperscript{123} The courts and even the legislative have now recognized that § 15 UrhG is to be applied.\textsuperscript{124}

\textsuperscript{120} Mathias Schwarz, \textit{Urheberrecht im Internet}, Der Markenartikel 1996, 120, 217
\textsuperscript{121} Haimo Schack, Urheber- und Urhebervertragsrecht, 188 (1997), Mathias Schwarz, \textit{Urheberrecht im Internet}, Der Markenartikel 1996, 120, 217; but see Arthur Waldenberger, \textit{Teledienste, Mediendienste und die Verantwortlichkeit ihrer Anbieter}, ZUM 1997, 181
\textsuperscript{122} Mathias Schwarz, \textit{Urheberrecht im Internet}, Der Markenartikel 1996, 120, 217-218
\textsuperscript{123} See also supra, p. 23
(b) The right to prepare copies – § 16 UrhG\(^\text{125}\)

The right to copy the work may be the most important of the author’s exclusive rights in the work. It is irrelevant how copies/reproductions are made; the replication of a painting by hand is as much copying in the sense of § 16 UrhG as is the manufacture of thousands of CDs containing copies of a work or sound recording. It is also irrelevant whether the copy is of transitory nature and whether the copy alters the size of the original work. The definition of copying under § 16 UrhG only requires that the copy be of such physical nature that the work can be recognized by the human senses, with or without the aid of a machine or device.\(^\text{126}\)

Accordingly, copying a musical work or sound recording\(^\text{127}\) onto a hard drive, CD-ROM, floppy disk or similar memory devices is clearly copying in this sense. Even saving data in the computer’s RAM constitutes copying.\(^\text{128}\) Concerning electronically transmitted works or copies of works no legal differences are apparent; the same rules apply.\(^\text{129}\) Therefore, the uploading or downloading of copyrighted works is copying under § 16 UrhG.

\(^{125}\) § 16 UrhG: “(1) Das Vervielfältigungsrecht ist das Recht, Vervielfältigungsstücke des Werkes herzustellen, gleichviel in welchem Verfahren und in welcher Anzahl.
(2) Ein Vervielfältigung ist auch die Uebertragung des Werkes auf Vorrichtungen zur wiederholbaren Wiedergabe von Bild- und Tonfolgen (Bild- oder Tonträger), gleichviel, ob es sich um die Aufnahme einer Wiedergabe des Werkes auf einem Bild- oder Tonträger oder um die Uebertragung des Werkes von einem Bild- oder Tonträger auf einen anderen handelt.”
Translation provided by author: “(1) The right to copy is the right to prepare copies of the work, no matter in which manner or in what quantity these are prepared.
(2) A copy is also the recording of the work onto a device for repeated playback or rendition of sounds or images (sound- or image carrier), no matter whether it is the recording of a rendition of the work onto such sound- or image carrier or whether it is the transposition of the work from on sound- or image carrier to another.”

\(^{126}\) Haimo Schack, Urheber- und Urhebervertragsrecht, 170-171 (1997)

\(^{127}\) This is equally true for other types of protected works.

\(^{128}\) Haimo Schack, Urheber- und Urhebervertragsrecht, 171 (1997), citing BGHZ 112, 264, 278 and MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511, 518 (9th Cir. 1993); see also Mathias Schwarz, Urheberrecht im Internet, Der Markenartikel 1996, 120, 215

\(^{129}\) Haimo Schack, Urheber- und Urhebervertragsrecht, 171 (1997), citing the European Communities suggestion for a protocol to the Berne Convention Art. 9, see generally Reinhold Kreile, Bericht ueber die
Unlike the UPR-related rights, the right to copy may be transferred. With regard to musical works this is generally the case. Musicians regularly transfer the rights to copy and distribute to their record company in their contract with the latter.\textsuperscript{130} This is relevant since it may mean that not only the author but also the record company could bring an action for infringement. In the case of a record company that maintains its own production of sound carriers as well, it could also bring an action for infringement of the sound recording copyright (§ 85 UrhG).

(c) Sound Recordings - § 85 UrhG

Section 85 UrhG grants the manufacturers of sound recordings the exclusive and independent right to copy and distribute the sound recording of a work.\textsuperscript{131} A sound recording is defined as any fixation of tones of a performance or other tones. This includes recordings of musical works and other perceptible sounds. The manufacturer of

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\textit{WIPO-Sitzungen zum moglichen Protokoll zur Berner Konvention und zum "neuen Instrument" vom 22.-24. Mai 1996, ZUM 1996, 964; This will be addressed in more detail in conjunction with application to the Internet. See infra, p. 32 et seq.}

\textsuperscript{130} Haimo Schack, Urheber- und Urhebervertragsrecht, 172 (1997)

\textsuperscript{131} § 85 UrhG: "(1) Der Hersteller eines Tonträgers hat das ausschliessliche Recht den Tonträger zu vervielfältigen und zu verbreiten. Ist der Tonträger in einem Unternehmen hergestellt worden, so gilt der Inhaber des Unternehmens als Hersteller. Das Recht entsteht nicht durch Vervielfältigung eines Tonträgers. 
(2) Das Recht erlischt 50 Jahre nach dem Erscheinen des Tonträgers oder, wenn seine erste erlaubte Benutzung zur öffentlichen Wiedergabe frueher erfolgt ist, nach dieser jedoch bereits 50 Jahre nach der Herstellung wenn der Tonträger innerhalb dieser Frist nicht erschienen oder erlaubterweise zur öffentlichen Wiedergabe benutzt worden ist...
(3) Paragraph 27 Abs. 2 und 3 sowie die Vorschriften des sechsten Abschnitts des Ersten Teils mit Ausnahme des Paragraphen 61 sind entsprechend anzuwenden."

Translation provided by author: "(1) The manufacturer of a sound recording has the exclusive right to copy and distribute this sound recording. Was the sound recording manufactured by a business, the owner of the business is considered the manufacturer. The right does not arise from the duplication of a sound recording.
(2) The right ends 50 years after publication of the sound recording or, if its first authorized use for public performance happened before that date, after this use but already 50 years after production of the sound recording if the sound recording was not published or lawfully used for public performance before the end of this time.
(3) Section 27 para. 2 and 3 and the provisions of the sixth division of the first part except for section 61 are to be applied accordingly."
a sound recording consequently holds the right in said recording even if the sounds are not a protectible work.\textsuperscript{132} § 85 UrhG grants some of the same rights the author holds regarding the work for the sound recording, including the rights granted in §§ 15-17 UrhG. Accordingly the manufacturer's right in the sound recording is affected by online copying and transfer in the same way as the author's right as far as §§ 15-17 are concerned.\textsuperscript{133}

(d) Performance and display - §§ 18, 19 UrhG

Sections 18 and 19 UrhG cover the rights display a work and the right to perform a work. These provisions are irrelevant in the context of this thesis. For the same reason the rights contained in §§ 20, 74-76 I, 87 94 UrhG are not discussed here.

c. Limitations of the author's rights – general overview

Limitations of copyright are contained in §§ 45-63 UrhG. While the rights attributed to the author are absolute and exclusive rights, they are not unlimited. Limitations are necessary to safeguard public interest. All limitations on copyright have in common that they generally do not limit the UPR but only the economic rights.\textsuperscript{134} Furthermore, the provisions in §§ 45-63 UrhG are not all true limitations; they are often closer in nature to affirmative defenses and will be presented here only shortly, while the ones relevant to the issue will be addressed in detail in the context of infringement.

\textsuperscript{132} Haimo Schack, Urheber- und Urhebervertragsrecht, 270 (1997)
\textsuperscript{133} Cf. Haimo Schack, Urheber- und Urhebervertragsrecht, 269 (1997) (Copying of a sound carrier includes not only the copying from a CD, record or other sound carrier device but also recording off the air if the material was played from a sound carrier Consequently, copying material from a sound carrier onto a computer is well within the scope of copying) Cf. supra, p. 26
\textsuperscript{134} Haimo Schack, Urheber- und Urhebervertragsrecht, 203-204 (1997)
actions under § 97 UrhG as justifications. The limitations concerning the author's rights apply to the manufacturer's rights in the sound recording as well.\footnote{\textsuperscript{135}}

(1) Temporal limitation - § 64 UrhG

The most important limitation on copyright is § 64 UrhG which limits protection of any copyrighted work to the life of the author plus 70 years.\footnote{\textsuperscript{136}} The right in a sound recording expires 50 years after its publication.\footnote{\textsuperscript{137}} The temporal limitations are true limitations. The transition of the work from the author's property to the public domain may seem incongruent with the proprietary, natural law philosophy. However, it must be considered that unlike material goods, immaterial goods slowly evolve from being the author's very own personal creation to being common good and knowledge. The legislature had to draw a clear line to determine when this point is legally reached.\footnote{\textsuperscript{138}}

(2) Geistige Auseinandersetzung - §§ 45-63 UrhG

§§ 45-63 UrhG provide several limitations to the author's rights and the sound recording rights in addition to the temporal limitation. These provisions generally serve to promote geistige Auseinandersetzung (intellectual dispute), as well as to ensure the copyright law's compliance with Art. 5 Grundgesetz (GG), which contains freedom of

\footnote{\textsuperscript{135}} § 85 (3) UrhG, supra, p. 27 (The temporal limitation is defined differently – 50 years after publication or first authorized public use of the sound recording)
\footnote{\textsuperscript{136}} § 64 UrhG: "Das Urheberrecht erlischt siebzig Jahre nach dem Tod des Urhebers."
\footnote{\textsuperscript{137}} Translation provided by author: "The copyright lapses seventy years after the author's death."
\footnote{\textsuperscript{138}} Haimo Schack, Urheber- und Urhebervertragsrecht, 204-205 (1997) (stating that the limitation is now the same in all European Union member states and giving examples for the transition from property to common good: well known quotes, pieces of "traditional" music or the like)
opinion, press, art and science. Copyright holders may not take from others what they needed themselves to create by means of copyright law; this would violate Art. 5 GG.

(a) Sections 48-50 UrhG concern news reporting about current events and are not relevant in the context of this thesis.

(b) Section 51 UrhG allows quotations from copyrighted works, including musical quotations. The provision allows three kinds of quotations: the Grosszitat (grand quote), the Kleinzitat (simple quote) and the Musikzitat (musical quote). All three have in common that they only benefit authors incorporating quotes in works that are

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139 Art. 5 GG: “(1) Jeder Mensch hat das Recht, seine Meinung in Wort, Schrift und Bild frei zu äußern und zu verbreiten, und sich aus allgemein zugänglichen Quellen ungehindert zu unterrichten. Die Pressefreiheit und die Freiheit der Berichterstattung durch Rundfunk und Film werden gewährleistet. Eine Zensur findet nicht statt. 
(3) Kunst, Wissenschaft, Forschung und Lehre sind frei. Die Freiheit der Lehre entbindet nicht von der Treue zur Verfassung.”

Translation provided by author: “(1) Every human has the right to freely express and distribute his opinion in speech, writing or image and to obtain information from publicly accessible sources unimpeded. The freedom of the press and the freedom of reporting through radio and film are guaranteed. There will be no censorship. 
(2) These rights find their limitations in the provisions of the universal laws, the statutory provisions for the protection of youth and the right to personal honor. 
(3) Arts, science, research and teaching are free. The freedom of teaching does not release from loyalty to the constitution.”

140 Haimo Schack, Urheber- und Urhebervertragsrecht, 211 (1997)

141 § 51 UrhG: “Zulässig ist die Vervielfältigung, Verbreitung und öffentliche Wiedergabe, wenn diein einem durch den Zweck gebotenen Umfang 
1. einzelne Werke nach dem Erscheinen in ein selbstandiges wissenschaftliches Werk zur Erläuterung des Inhalts aufgenommen werden, 
2. Stellen eines Werkes nach der Veröffentlichung in einem selbstandigen Sprachwerk aufgenommen werden, 
3. einzelne Stellen eines erschienenen Werkes der Musik in einem selbstandigen Werk der Musik angeführt werden.”

Translation provided by author: “The copying, distribution and public rendition in a reasonable amount with regard to the purpose is allowed 
1. of single works after their publication in order to include these in an independent scientific work for reasons of clarification of the content, 
2. of pieces of a work after its publication in an independent work of language, 
3. of pieces of a musical work after its publication in an independent musical work.”
copyrightable in and of themselves. The first two types of quotes may only be used to identify a source and require some connection in content between the works quoted and the new work.  

The musical quote allows the composer of a copyrightable musical work to include pieces of another’s copyrighted musical work. The musical quote may be of some relevance in the context of infringements on the Internet since an excerpt from a copyrighted work may be part of a new work posted on the web. However, this is hardly relevant for the issue of OSP and P2P liability since the alleged infringements in this context almost exclusively concern the copying of entire works of music.

(c) Section 52 UrhG allows public rendition of a copyrighted work without permission of the author under certain circumstances. Where the person offering or promoting such rendition gains no economic profit and the rendition is free of admission, it is permissible even without the author’s consent, yet the author must be compensated nevertheless. Other exceptions are made for religious services, renditions in schools for educational purposes limited to the students and for other social purposes not relevant in the online environment. Since § 52 UrhG may serve as a defense in an infringement action under § 97 UrhG, it will be discussed in detail there.

142 Haimo Schack, Urheber- und Urhebervertragsrecht, 213 (1997); Gerhard Schricker/Ulrich Loewenheim, Kommentar zum UrhG, § 51 Nr. 20 (2nd Ed. 1999)
143 Haimo Schack, Urheber- und Urhebervertragsrecht, 213-214 (1997) (giving an example of a musical quote: Peter Tchaikovsky’s Overture 1812, which contains the Marseillaise)
144 § 52 UrhG: “Zulässig ist die öffentliche Wiedergabe eines erschienen Werkes, wenn die Wiedergabe keinem Erwerbszweck des Veranstalters dient, die Teilnehmer ohne Entgelt zugelassen werden... Für die Wiedergabe ist eine angemessene Vergütung zu zahlen...”
Translation provided by author: “The public rendition of a published work is permissible without authorization if the rendition does not serve for profit of the promoter, the participants are admitted without a fee... A reasonable compensation must be paid...” [to the author]
145 § 52 UrhG; The reimbursement occurs through the GEMA, see infra, pp. 47-52
146 Infra, pp. 36-47
(d) Possibly the most interesting and important limitation in the context of this thesis is § 53 UrhG.\textsuperscript{147} Section 53 UrhG\textsuperscript{148} allows the copying of copyrighted works (and sound recordings) for private use if the work being copied was obtained lawfully. It is the most important defense in the context of infringements in the online environment and will therefore be addressed in detail as a “justification” in the context of § 97 UrhG.\textsuperscript{149}

\textsuperscript{147} § 53 UrhG: “(1) Zulaessig ist einzelne Vervielfaeltigungsstuecke eines Werkes zum privaten Gebrauch herzustellen. Der zur Vervielfaeltigung Befugte darf die Vervielfaeltigungsstuecke auch durch einen anderen herstellen lassen; doch gilt dies fuer die Uebertragung von Werken auf Bild- und Tontraeger... nur, wenn es unentgeltlich geschieht.

(2) Zulaessig ist, einzelne Vervielfaeltigungsstuecke eines Werkes herzustellen oder herstellen zu lassen 1. zum eigenen wissenschaftlichen Gebrauch, wenn und soweit die Vervielfaeltigung zu diesem Zweck geboten ist.
2. zur Aufnahme in ein eigenes Archiv, wenn und soweit die Vervielfaeltigung zu diesem Zweck geboten ist und als Vorlage fuer die Vervielfaeltigung ein eigenes Werk benutzt wird,
3. zur eigenen Unterrichtung uber Tagesfragen...
4. zum sonstigen eigenen Gebrauch,
a) wenn es sich um kleine Teile eines erschienenen Werkes... handelt
b) wenn es sich um ein seit mindestens zwei Jahren vergriffenes Werk handelt.

...(6) Die Vervielfaeltigungsstuecke duerfen weder verbreitet noch zur offentlichen Wiedergabe benutzt werden. Zulaessig ist jedoch, rechtmaessig hergestellte Vervielfaeltigungsstuecke von Zeitungen und vergriffenen Werken... zu verleihen...”

Translation provided by author: “(1) It is permitted to make single copies of a work for private use. These copies may be prepared by the person authorized to do so in this section or by others for this person, as far as transposition or copying onto an image- or sound carrier is concerned this is only permitted... if it is not done for profit.

(2) It is permitted to make single copies of a work or have single copies of a work prepared
1. for personal scientific use if and insofar as it is reasonable for this purpose,
2. for inclusion in a private archive if and insofar as it is reasonable for this purpose and the work copied is the users lawfully obtained work,
3. for the personal information about current events,
4. for other personal use
a) if only a small amount of a previously published work is copied
b) if a previously published work has been unavailable for at least two years.

...(6) The copies so prepared may not be distributed or used for public performance of the work. It is permitted however, to lend... copies of newspapers and unavailable works.”

\textsuperscript{148} See BGHZ 17, 266, 277-279 (before 1965, § 15 LUG offered a similar defense; it was considered a “true exception” though, which meant its application was construed narrowly by the courts)

\textsuperscript{149} Infra, pp. 47-52
d. Infringement actions - § 97 UrhG:

Section 97 UrhG is the most important of the provisions making violations of the author’s rights and sound recording rights actionable; it is the *Anspruchsgrundlage* (basis for a civil claim) for infringement.  

Objectively, § 97 UrhG requires that one of the rights protected in the statute be violated (*Rechtsverletzung*). This encompasses only absolute, exclusive rights. The language of the provision includes not only the rights stated in §§ 11, 14, 15, 16, 17, 18, etc. UrhG but also rights contained in §§ 74-76 I UrhG, 83 UrhG, 85, 87, 94 UrhG. The violation must also be *rechtswidrig* (unlawful). Unlawfulness is presumed whenever an exclusive right is violated, so that the defendant bears the burden of proving a justification for his or her actions to avoid liability.  

There must be an adequately causal (*sine qua non + adequacy*) relationship between the alleged infringer’s action and the violation of the exclusive right. In German private law, the *sine qua non* test is generally

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(2) Urheber, Verfasser wissenschaftlicher Ausgaben, Lichtbildner und ausübende Künstler koennen, wenn dem Verletzer Vorsatz oder Fahrlässigkeit zur Last faelett, auch wegen des Schadens, der nicht Vermögensschaden ist, eine Entschädigung in Geld verlangen, wenn und soweit es der Billigkeit entspricht.

(3) Ansprüche aus anderen gesetzlichen Vorschriften bleiben unberührt.”

Translation provided by author: “(1) Whoever violates the author’s right or any other right protected in this act without justification may be subject to a claim for removal of the impairment or disturbance to the protected right brought by the injured, and if there is a danger of recurring injury suit for an injunction may be brought; and if the injurer was negligent or acted intentionally he is subject to a claim for damages. Instead of damages, the injured may claim surrender of the profits made by the injurer and information regarding these profits.

(2) Authors, authors of scientific works, photographers and practicing artists may claim damages for immaterial damage as well if the injurer acted negligently or with intent if and insofar as it is reasonable.

(3) Claims arising under other provisions are not preempted.”

Criminal charges for copyright infringement can be brought under §106 Strafgesetzbuch (StGB) and will not be discussed here.

151 Haimo Schack, Urheber- und Urhebervertragsrecht, 289 (1997)

152 Id. at 290
limited by the so called “theory of adequacy”. This means that only such *sine qua non* contributions or actions are grounds for liability, which are not completely outside the scope of the normal course of events. The tests generally used today are either whether the “possibility of damage to the right was so remote that it could not reasonably be foreseen or taken into consideration under the normal course of events”, or whether “the [causal] event substantially increased the danger of damage to the protected right or not”. Furthermore, liability only arises when the damage is covered by the provision’s intended scope of protection. To show infringement and get the benefit of an injunction, it is not necessary for the plaintiff to prove that the infringer was at fault. Fault, meaning intent or negligence, must only be shown to recover damages.

B. Copyright protection in Germany and the Internet

1. Section 97 UrhG and the Internet – The individual user

The first question is whether the individual users actually infringe copyrights by transferring or exchanging copyrighted material over the Internet. Whether the individual user infringes the rights in the work and/or the sound recording by uploading, downloading or transferring copyrighted works over the Internet is technically irrelevant to the question whether OSPs or central entities at the core of P2P networks are liable for copyright infringement under German copyright law. It will nevertheless be discussed

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153 This theory was developed by *von Bar* (1871) and *von Kries* (1888) and generally accepted by the courts in 1902; see generally Palandt/Heinrichs, BGB, Introduction to § 249 Nr. 58 (59th Ed. 2000); RGZ 50, 222
154 Palandt/Heinrichs, BGB, Introduction to § 249 Nr. 58 (59th Ed. 2000)
155 *Id.* at § 249 Nr. 59, 60, citing RGZ 69, 59, RGZ 78, 272, RGZ 152, 401, RGZ 158, 38, BGHZ 3, 266, BGHZ 57, 255
156 Palandt/Heinrichs, BGB, Introduction to § 249 Nr. 62, 63 (59th Ed. 2000)
157 Haimo Schack, Urheber- und Urhebervertragsrecht, 295 (1997)
158 *See infra*, pp. 53, 58
since it is such a prerequisite in U.S. copyright law\textsuperscript{159} and the comparison may be useful in determining which solutions to the problem can be found.

a. \textit{Rechtsverletzung} – Violation of the author’s exclusive rights

Typical activities of Internet users that could be violations of the exclusive rights in a musical work or sound recording are:

- Downloading of music from a website or another user’s hard-drive,
- Making such files, located on their own hard-drive, accessible to others, and
- Uploading of published or unpublished works of this nature onto their own website or Bulletin Boards (BBS).\textsuperscript{160}

The uploading and downloading of copyrighted music onto or from the Internet constitutes copying of the work as stated above.\textsuperscript{161} Since § 16 UrhG assigns the rights to copy to the author, this copying, if unauthorized, is an infringement of this right, it is the \textit{Rechtsverletzung} (literally: injury to the right) required by § 97 UrhG. With regard to the rights in a sound recording, copying the former onto a computer or downloading it from the Internet or another user’s hard drive also constitutes a violation of the manufacturer’s exclusive right to reproduce the work (§§ 85, 16 UrhG) since the § 16 right applies to the sound recording in the same way as it applies to the work.\textsuperscript{162}

The user who posts a copyright-protected work on a BBS, his private homepage for online use and/or download or grants access to protected works stored on his hard

\textsuperscript{159} See infra, pp. 116 et. seq.
\textsuperscript{160} See Michael Neuber, Urheberrecht im Internet: Kapitel (Chapter) 3 C
\textsuperscript{161} Supra, pp. 26-27
\textsuperscript{162} See supra, p. 27
drive also violates the right to electronic rendition under § 15 (2) UrhG.¹⁶³ Even if the approach that considers the offer for use and download a matter of §17 UrhG were to be followed, a violation of the author’s exclusive right would have occurred, since §17 UrhG would have been violated in that case since it would grant the author the exclusive right to distribute her work, electronically or otherwise. Furthermore, it could be argued that the offer for download violates the right to copy yet another time, since it is adequately causal for other users’ infringements of § 16 UrhG by downloading the work.

If the work was unpublished and is made available on a user’s website, the proprietor of the site may also be in violation of the right to first publication (§ 12 UrhG) if the author did not consent.¹⁶⁴

b. Rechtswidrigkeit - Unlawfulness

The infringement must be unlawful for liability to arise under § 97 UrhG. In the case of copying by uploading or downloading the right to copy (§ 16 UrhG) regarding the work and the sound recording, and the § 15 (2) UrhG right to electronic rendition regarding the work, are violated wherefore the unlawfulness of such action is presumed. A defendant can rebut this presumption by asserting a justification.

(1) This is where § 53 UrhG¹⁶⁵ becomes important. If copying a work is justified under § 53 (1) or (2) UrhG it is not unlawful, so that a defendant can rebut the presumption by proving that the infringing activity falls within the scope of said section and thereby avoid liability.

¹⁶³ Supra, pp. 20-25
¹⁶⁴ See supra, p. 16
(a) Section 53 (1) UrhG allows the copying of protected works (and sound recordings) for private use.\(^{166}\) It grants a compulsory license by law.\(^{167}\) The provision does not differentiate between analog and digital copying, wherefore it is applicable to both in the same way.\(^{168}\) Private use is understood as making security copies and the like and the copies may only be used within a relatively close circle of family and friends.\(^{169}\) For example, a copy of a song on CD may be lent to a family member or close friend but not to a stranger, it may be played back in the presence of family members and friends but it may not be used in public.\(^{170}\) Section 53 (2) UrhG permits the same as paragraph one for non-private purposes under certain circumstances. However, the boundaries within which such reproduction is permissible under § 53 (2) UrhG are closely drawn.\(^{171}\)

(b) A far more controversial question is what the language of § 53 UrhG requires in addition to the private nature of the use. According to § 53 (1) UrhG, the copy must be a "reproduction of the work".\(^{172}\) In interpreting this language, it is unanimously recognized that the person preparing the copy need not be the owner of the source, which follows

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\(^{165}\) For the provision verbatim and author's translation, see supra, p. 32, footnote 147

\(^{166}\) Haimo Schack, Urheber- und Urhebervertragsrecht, 216 (1997), KG GRUR 1992, 168, 169; See, BGH GRUR 1978, 474, 476 (paragraphs (1) and (2) of § 53 UrhG only permit the preparation of "single" copies from an original that was lawfully obtained; how many "single copies" may be made under § 53 UrhG is disputed but courts have consistently held that up to seven copies are permissible); OGH GRUR Int. 1994, 857, 859 (Austria) (19 copies legal under § 53 UrhG in this case)

\(^{167}\) Til Kreutzer, Napster, Gnutella & Co., Rechtsfragen zu Filesharing-Netzen aus der Sicht des deutschen Urheberrechts de lege lata und de lege ferenda-Teil 1, GRUR 2001, 193, 200

\(^{168}\) Til Kreutzer, Napster, Gnutella & Co., Rechtsfragen zu Filesharing-Netzen aus der Sicht des deutschen Urheberrechts de lege lata und de lege ferenda-Teil 1, GRUR 2001, 193, 199


\(^{170}\) BGHZ 17, 376 (playback of copyrighted music at corporate event is not private, even if it is only for entertainment purposes and not for profit)
from § 53 (2) Nr. 2 UrhG.\textsuperscript{173} However, it is also widely recognized that the source for the copy must be in possession of the person preparing the reproduction legally.\textsuperscript{174} Nevertheless, there is a dispute about whether the source for the copy must be an original of the work, meaning the original or a licensed copy.\textsuperscript{175} There is no decisive decision from the courts on this issue\textsuperscript{176}, although there seems to be a tendency toward requiring a licensed copy as the source.\textsuperscript{177} Those scholars in opposition to requiring a licensed copy as the source of legal reproductions under § 53 UrhG argue that the legislative intended to relieve the user from any liability as long as the copies are used for private purposes.\textsuperscript{178} This would include copying by downloading or uploading material over the Internet, even where the user is not in possession of the work as long as the purpose is private.

However convincing this may seem, § 53 UrhG must be interpreted more narrowly. This becomes clear after a closer look at the systematics of the UrhG and legislative history of the provision. The limitations to the author’s exclusive rights are included because like all property, the copyright is subject to “Sozialbindung” (social context – property is constitutionally defined as being a privilege and an obligation to

\textsuperscript{171} See § 53 (2) UrhG and translation, supra, p. 32, footnote 147
\textsuperscript{172} Emphasis added by the author
\textsuperscript{174} Id.; see also KG GRUR 1992, 168, 169 (copies of dias)
\textsuperscript{175} Andreas Leupold/Dominik Demisch, Bereithalten von Musikwerken zum Abruf in digitalen Netzen, ZUM 2000, 379, 380; Juergen Weinknecht, Rechtslage bei MP3-Daten, <http://www.weinknecht.de/mp3.htm> (last visited 6/5/2001) (arguing that a licensed copy is necessary); but see Dietrich Harke, Musikkopien - illegal?, http://www.heise.de/c/t/00/05/112> (last visited 6/5/2001)
\textsuperscript{178} Mönkemüller, Moderne Freibeuter unter uns, GRUR Int. 2000, 663, 665; Dietrich Harke, Musikkopien - illegal?, <http://www.heise.de/c/t/00/05/112> (last visited 6/5/2001); Til Kreutzer, Napster, Gnutella &
This clarifies that the subject of the limitations can only be the personal and economical relations between the author and the work. The subject of protection is the work. The work, however, would not be affected where copies are prepared from unlicensed, i.e. already illegal, reproductions. Had the legislative meant to express this, it would have positively sanctioned the production of illegal copies and maintained this illegal situation by giving it the protection of the limitations. This was not the intention of the legislature. This analysis alone would be sufficient to determine that § 53 UrhG requires the source for a justified copy to be the original or a licensed copy thereof. Furthermore, § 53 UrhG is an Ausnahme (exception) and must therefore be interpreted narrowly, so as not to create an imbalance between the private nature of property and the obligation to the public it incurs for the owner. Another argument in favor of a narrow interpretation of § 53 UrhG is to be found in §§ 398 et. seq., 405 BGB, which apply analogously concerning contractually conferred rights to use a copyright. Contractually conferred rights to use cannot be acquired in good faith regarding ownership. §53 UrhG does not create this possibility by law because there is no

Co.: Rechtsfragen zu Filesharing-Netzen aus der Sicht des deutschen Urheberrechts de lege lata und de lege ferenda-Teil 1, GRUR 2001, 193


180 Id.


183 See § 398 BGB

184 Manfred Reh binder, Urheberrecht, §43 II, 10. Aufl. 1998

185 BGHZ 5, 116, 119.
objective element that would make the acquiring party worthy of protection. If there cannot be ‘good faith’ in contractual transfers of these rights, it cannot be created by law either, since this would be against the intentions of §§ 398 et. seq., 405 BGB. Ultimately, § 53 UrhG should be interpreted to require the source of the copy to be the original or a licensed copy thereof for the copy to be legal.

(c) The most important aspect of § 53 UrhG apart from the rule that copies for private personal use may only be made from lawfully obtained authorized copy is the rule that the copies legally made under § 53 UrhG may not be distributed (§ 53 (6) UrhG). This rule severely restricts the scope of what may be done with the copies legally prepared and it applies equally in the online environment.

(d) If a user merely copies a work onto her hard drive from a CD or other sound carrier she owns, she should be well within the scope of § 53 (1) UrhG, since this clearly constitutes copying for private use. The same must apply for “space-shifting” a copy from one of the user’s computers to another, no matter in what way this is done, including transfers via the Internet. If a user downloads a work, a copy of which she does not already own, from the Internet however, she cannot claim the justification under § 53 (1) UrhG, since the original was not lawfully obtained and the other user is generally not within the close circle of family and friends. It has been argued that § 53 UrhG should

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187 See, Andreas Leupold/Domonik Demisch, Bereithalten von Musikwerken zum Abruf in digitalen Netzen, ZUM 2000, 379, 385
apply as a justification in cases in which users take advantage of filesharing to copy protected works. The arguments in favor of such an application of § 53 UrhG are the same arguments that have caused the implementation of compulsory licensing for private use and copying in conjunction with an automatic fee imposed by requiring manufacturers of blank media to pay a fee to the GEMA (the German artists association...). The main argument is, that it is impossible to monitor all private reproduction activity and that such monitoring would not be in compliance with privacy laws, the constitutional guarantee of the "private sphere" and free speech guarantees. Therefore § 53 UrhG should be interpreted widely (even beyond the boundaries of its language possibly) in these cases. On the other hand, this scheme can be criticized as being too general and arbitrary and consequently unjust. The more uses there are for a certain device, the more general and arbitrary the rule seems because even those users that do not use the devices to copy protected works pay the included fee. The proponents of the compulsory licensing solution recognize this drawback but find it to be less dangerous and problematic than monitoring data-traffic and thereby invading the privacy of all users. They recognize that the reproduction of a copyrighted work cannot be free under German law, but propose that theirs is the only viable solution. Another argument brought forward in support of this approach is that it is practically impossible to

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192 Id.
193 Id.
194 Id.
rely on a traditional system of individual licensing in the context of the Internet and especially with the advent of P2P software. Finally, it is argued that the development of European law has taken the direction of allowing private digital copying in this manner, as indicated by the proposal for a Multimedia Directive.

While these arguments are convincing to some extent, they do not consider one vital aspect of the problem in the online environment – the magnitude of the userbase. The user of a tape recorder or a similar device may prepare copies and even grant persons within his circle of family and friends access to these without infringing copyright under § 53 UrhG. Regarding these media, the “compulsory license by law” solution of § 53 UrhG is certainly appropriate for the reasons brought forward. The difference between the “analog” user and the Internet user, however, is that the former will generally not create an archive of the works she owns for the express purpose of letting a multitude of persons unknown and unrelated to her prepare copies of the works. The owner of a CD collection does not invite unknown persons into his home to let them browse through and copy his CDs at will and such activity would not be considered justified under § 53 UrhG. The Internet user who grants access to the “folders” containing copyrighted material on his hard drive does exactly this, only in a digital manner. Why should the same activity suddenly be justified? Simply because it takes place in digital form? This can hardly be the case. Furthermore, the Internet user granting access to her hard drive, so that others can share her copies of protected works, can hardly claim that the millions of


196 Til Kreutzer, *Napster, Gnutella & Co., Rechtsfragen zu Filesharing-Netzen aus der Sicht des deutschen Urheberrechts de lege lata und de lege ferenda-Teil I*, GRUR 2001, 193, 200; compare Art. 5 II lit. b of
users that have the ability to download files from her are within her circle of family and friends. Yet this limitation of the § 53 UrhG justification is expressly contained in the law. It may be true that the compulsory licensing and automatic fee based solution would be the most viable one, but under the current law it is not feasible. Private copying under § 53 UrhG currently requires a legally obtained original source from which the copy is prepared which in turn means that that which is offered for copying illegally cannot be copied legally, even if the copy is meant for private use only. It may be true that the development of European law indicates a coming change towards the compulsory licensing scheme proposed by Kreutzer and others, but that point has not been reached yet and the law cannot be changed in anticipation of a new piece of legislation just because it would be more convenient. Offering copyrighted musical works and sound recordings for download without permission of the author remains illegal.

(e) A different analysis may be required where the user had legally obtained a copy of a work and then downloads a copy of the same work from the web. On the one hand there does not seem to be a reason to differentiate – the user makes a single copy for private use and the work was lawfully obtained. This appears to be the exact scenario of § 53 (1) UrhG and the legality of such activity its telos. On the other hand § 53 UrhG was

\[ \text{Supra, p. 32, footnote 147} \]
\[ \text{Infra, pp. 39-41} \]

\[ \text{Infra, pp. 39-41} \]
not intended to facilitate or legalize copying from any source but only from that copy that was lawfully obtained.\textsuperscript{201} Since the provision is a severe limitation to the author’s rights it should be construed narrowly in light of the premise of German copyright law that the author is the primary subject of protection and entitled to profit from exploitation of his or her work.\textsuperscript{202} The user may make a copy of the work from her original onto her computer or onto another medium with or without using the Internet in the process, but she must do so from the original or a licensed copy. The copying by download from the internet could pose a severe danger to the author’s rights since the whole concept significantly facilitates illegal copying and arguably contributes to wide-scale copyright piracy by supporting services that are primarily used for just that. Any user could indeed copy works without having lawfully obtained a copy from which to reproduce the work, thanks to the Internet. It could furthermore be argued that it is difficult enough to determine whether the user who claims to be justified under § 53 UrhG had actually lawfully obtained a copy of the work in “normal” cases; in the online environment it is practically impossible. In addition, the rule that the copy may only be made from the original or a licensed reproduction is equally valid for both paragraphs of § 53 UrhG.\textsuperscript{203} However, the user also has the right to prepare copies for private use and it could be argued that there is no reason to punish those who have adhered to the law and lawfully obtained the original by restricting this right simply because of the manner in which the legal copies are prepared. This may be convincing to some extent, but the argument ignores that § 53 UrhG was introduced as an exception and must be interpreted narrowly


\textsuperscript{202} BGHZ 5, 116, 119; see also supra, p. 18
to protect the author. It is not meant to endorse or facilitate any form of illegal copies. There is no way around the requirement that the source of a copy, to be justified under § 53 UrhG, must be the original or a licensed copy thereof.\textsuperscript{204} It should not be forgotten that § 53 UrhG was introduced for practical reasons – the inability to control individual infringements on a large scale – not as a favor to the public.\textsuperscript{205} Consequently, the unauthorized download of protected works over the Internet is not justified under § 53 UrhG even if the user had legally obtained a copy of the work.

(f) A user may also be justified under § 53 (2) 1. UrhG. This may be the case where the copy was made for the user’s own scientific purposes and the reproduction was necessary. It seems improbable that a user will download musical works for scientific purposes at all and even if that were the case, there would be serious doubt to whether this form of copying was necessary. Section 53 (2) 2 cannot serve as a justification for unauthorized copying by downloading, since it too only allows the reproduction from the lawfully obtained original.\textsuperscript{206} Numbers 3. and 4 a. of § 53 (2) UrhG cannot be called upon either, since the download neither serves as a means of information concerning current events, nor is it transmitted by broadcast (Nr. 3), and it is much less a printed work as required for Nr. 4 a. In rare cases a justification may be found in § 53 (2) Nr. 4 b, if the work has been unavailable for two years or more. Accordingly, § 53 UrhG only supplies a justification for the violation of § 16 UrhG by downloading in the rarest of cases.

\textsuperscript{203} Supra, pp. 32-43
\textsuperscript{204} Supra, pp. 32-43
\textsuperscript{205} Amtl. Begruendung [official statement], published in: GRUR 45 (1965) 240, 287
\textsuperscript{206} Supra, pp. 32-43
(g) When a user posts works located on his hard drive on the Internet for download by others and thereby makes these available to a multitude of anonymous users, he usually makes another copy of the work. In this case, he cannot claim any justification under § 53 UrhG, as shown above, and even though the compulsory licensing approach may ultimately prove to be a viable solution, it is not the solution found by the present law. The copy is not made for any of the purposes mentioned in § 53 (2) UrhG, it is made available to the public in violation of § 53 (6) UrhG and the copying does not occur for purely private use under § 53 (1) UrhG since it is intended to be accessible to a multitude of persons outside the user’s circle of family and friends. As far as sound recordings are concerned, the same analysis applies. Accordingly, there is no valid justification for the copying of sound recordings under § 53 UrhG either.

(h) The last possible justification under § 53 UrhG may be the permission to have copies of a work on a sound carrier prepared by others without reimbursement for oneself (§ 53 (1) 2. 2 UrhG). While the preparation of copies is indeed free at many of the music sites or through P2P networks, this alone does not satisfy the requirements of § 53 UrhG. The courts have determined that the person preparing the copies for another must be individually instructed by the other to copy one certain work. It is also more than questionable whether the electronic request to download a file creates the required contractual relationship between the persons involved at all. The perception that § 53 (1) 2.2 UrhG was not intended to encompass the activities at issue is further backed by

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207 Regardless whether the work is posted on the user’s homepage or on a BBS.
208 Supra, pp. 32-43
the fact that digital copies were unknown to the legislators at the time the provision was enacted. The goal behind § 53 (1) 2.2 UrhG was to enable persons who could not afford the technical means to copy to reap the benefits of § 53 UrhG. The provision must not be abused to circumvent the strict requirements set forth in § 53 (1) I UrhG and in cases of doubt the provision is to be interpreted narrowly, since it is an exception.

(2) A user posting works for download or allowing access to her hard drive for that purpose could, however, claim to be justified under § 52 UrhG, asserting that the uploading of the work to his homepage concerns § 15 (2) UrhG rather than § 16 UrhG. In truth, both provisions are affected because the work is generally copied (§ 16 UrhG) before it can be made accessible to others on, and transferred over the Internet (§ 15 (2) UrhG). Regarding infringement of §15 (2), §52 UrhG may have relevance as a justification. Where a user posts a published work on his private homepage or on a BBS, he could claim that it is a public “electronic rendition” of the work, that he has no economic interest and that the other users, the public, are not charged an admissions fee. Under such circumstances, the user legally need not obtain permission from the author.

210 Mathias Schwarz, Recht im Internet, Stand: September 2000, 3-2.2, S. 81
212 Bundestags-Drucksache 4/270, S.74.
213 Frederike Hänel, Napster und Gnutella - Probleme bei der Übertragung von MP3-Dateien nach deutschem Urheberrecht, JurPC Web-Dok. 245/2000, Abs. 43 (2000), <http://www.jurpc.de/aufsatz/20000245.htm> (last visited 6/5/2001); see also Nordemann, Urheberrecht, Kommentar, 9. Aufl., § 53, Rn. 2. (§ 53 (1) 2.2 UrhG does not provide a justification for a copy shop owner who makes copies of a rare essay to sell them to students – nothing else can apply to the user who contributes to the excessive illegal copying of a work by making it available in a peer to peer filesharing system)
214 For verbatim text of § 52 UrhG and translation, see supra, p. 31, footnote 144
215 Til Kreutzer, Tauschboersen wie Napster oder Gnutella verletzen nicht das Urheberrecht, http://www.heise.de/tp/deutsch/inhalt/te/4857/1.html (last modified 2/7/2001) Til Kreutzer, Napster,
It is argued by some that § 52 UrhG allows making protected works available for download, even if the copies were made from other users’ hard drives in the first place.\footnote{216} The argument is that copies legally made under § 53 UrhG may then also be displayed or rendered legally under § 52 UrhG, even outside the user’s circle of family and friends, in spite of § 53 (6) UrhG, which specifically forbids this.\footnote{217} However convincing this may seem at first glance, it has been clarified that copies made by download are not justified under § 53 UrhG.\footnote{218} Accordingly, those copies could not be legally rendered under § 52 UrhG. Furthermore, even under § 52 UrhG, the user is required to pay a fee to the author (through GEMA\footnote{219} or otherwise). This is generally not the case in online scenarios, wherefore the offering of material for download is not justified.\footnote{220} Whether § 52 UrhG justifies the public offering for download notwithstanding, the users who then download the work would still not be justified under either § 52 UrhG or §53 UrhG.\footnote{221} Even if a download were justified under § 53 UrhG, it would not be permissible to render or display the material under § 52 UrhG, since § 53 (6) UrhG explicitly forbids the public distribution and display of copies made for private use.\footnote{222}

To overcome this, Kreutzer argues that § 52 UrhG “limits” § 53 (6) UrhG; that it should not apply when § 52 UrhG applies. This proposition is based on the argument that if the opposite were true, the determination whether or not a copy could be displayed

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\begin{itemize}
  \item Gnutella & Co., Rechtsfragen zu Filesharing-Netzen aus der Sicht des deutschen Urheberrechts de lege lata und de lege ferenda-Teil I, GRUR 2001, 193, 201
  \item \footnote{Til Kreutzer, Napster, Gnutella & Co., Rechtsfragen zu Filesharing-Netzen aus der Sicht des deutschen Urheberrechts de lege lata und de lege ferenda-Teil I, GRUR 2001, 193, 201}
  \item \footnote{Id.}
  \item \footnote{Supra, pp. 32-47}
  \item \footnote{See generally, Ulrich Andryk, Muiskerrecht, 24-36 (1995) (describing GEMA and its role)}
  \item \footnote{See id., These 1-3}
  \item \footnote{§ 53 (6) UrhG, see supra p. 32, footnote 147}
\end{itemize}
legally under § 52 UrhG would depend on the opportunity to access the original or an authorized copy, and that these facts are irrelevant regarding the author’s interests.\textsuperscript{223} However, there is no basis in the law for this proposition.\textsuperscript{224} Copies of CDs, for example, that were legally prepared under § 53 (1) UrhG may not be displayed publicly, but only in the circle of family and friends and there is no reason to apply the law differently, simply because the copies are offered in the online environment instead of the “brick and mortar” world.\textsuperscript{225} The systematics of the UrhG also suggest that § 53 (6) UrhG limits § 52 UrhG rather than the opposite, because usually the exception or limitation is positioned after a more general provision in the law. Furthermore, like § 53 UrhG, § 52 UrhG is an exception limiting the rights of the author and must therefore be interpreted narrowly. Accordingly it cannot be applied to offers for downloads at individual requests; such cannot be understood as a rendition in the sense of § 52 UrhG.\textsuperscript{226}

(3) Making the copy available by granting access to one’s hard drive for anyone with access to the Internet is another act that constitutes copyright infringement (§§ 15 (2), 16 UrhG). This is exactly what persons using Napster or other P2P systems do.\textsuperscript{227} First of all, this activity again is adequately causal for the preparation of copies by others, which is sufficient to constitute an infringement of § 16 UrhG, the right to copy. Like above, a

\textsuperscript{223} Til Kreutzer, *Napster, Gnutella & Co.: Rechtsfragen zu Filesharing-Netzen aus der Sicht des deutschen Urheberrechts de lege lata und de lege ferenda-Teil 1*, GRUR 2001, 193, 203


\textsuperscript{225} Cf. id.

\textsuperscript{226} Id.

\textsuperscript{227} This is essentially what Napster or other P2P users engage in. The P2P software facilitates the direct contact between two computers thereby enabling users to “open” their hard drives to others while online. For a detailed description of centralized and decentralized P2P systems, see infra p. 53 et. seq., p. 136 et. seq.; see generally, Til Kreutzer, *Napster, Gnutella & Co.: Rechtsfragen zu Filesharing-Netzen aus Sicht des deutschen Urheberrechts de lege lata und de lege ferenda-Teil 1*, GRUR 2001, 193, 195-196
user may assert § 53 UrhG as a defense, but again the copies downloaded by others were not prepared for the uses specified in § 53 UrhG and are beyond the circle of family and friends. Secondly, the right to (electronic) rendition (§ 15 (2) UrhG) will be infringed as well. Regarding this, neither § 53 UrhG nor § 52 UrhG provide a justification, for the reasons discussed above.\textsuperscript{228} Again, the analysis comes to the same result for sound recording rights since these include the rights described in §§ 15-17 UrhG.\textsuperscript{229}

(4) If a user only sends one copy to another user (via email for example)\textsuperscript{230}, the situation may be different. Schwarz argues that individual communication is not relevant to copyright, even if protected works are communicated.\textsuperscript{231} While it is true that individual communication as such is irrelevant in the context of § 15 UrhG since it is not public\textsuperscript{232}, it is hard to understand why the copying for “communication” of protected works should not be considered an infringement under §§ 16, 97 UrhG, especially since an infringement of § 16 UrhG need not be public. Schwarz recognizes that the work is necessarily copied many times in the process of being “communicated” over the Internet, but argues that this is irrelevant since these copies are transitory and serve exclusively for the individual communication that he considers irrelevant.\textsuperscript{233} If making copyrighted material available to the public is in the realm of § 15 (2) UrhG, this does not mean that the download is not a reproduction under § 16 UrhG. The user who posts material for download by others violates § 15 (2) UrhG by making the material available while the user who downloads this material violates § 16 UrhG by copying it onto her computer.

\footnotesize{\textsuperscript{228} Supra, pp. 32-49  
\textsuperscript{229} Supra, p. 27  
\textsuperscript{230} This rarely occurs in real life, but for the sake of argument the scenario is included.  
\textsuperscript{231} Mathias Schwarz, Urheberrecht im Internet, Der Markenartikel 1996, 120, 216}
Equally, the sender in individual communication makes material available and the recipient copies it by saving the email, and more importantly the attachment, onto his or her hard drive. It is of course correct that the sender in individual communication does not violate § 15 (2) UrhG since there is no publicity to the communication. However, it is incorrect to assume that unauthorized copying of protected works is legal simply because it occurs within or because of private individual communication. Any unauthorized copying that is not justified is still a violation of the author’s § 16 UrhG right. Since copying is only justified under § 53 UrhG where the user copies from his or her own original and the recipient in this scenario copies from another’s original, there is no justification to be found in § 53 UrhG. If someone were to send an unauthorized copy of a work in the mail, it would not be less of an infringement simply because the letter containing the infringing work was individual communication. There is no reason to treat electronic communication any different unless the individual communication takes place between family members or close friends. In that case, the justification under § 53 UrhG should apply.

(5) In the end, the violation of the author’s (and/or the sound recording manufacturer’s) rights by the individual users cannot be justified under any of the justification provisions in the UrhG.

222 § 15 (3) UrhG requires publicity, see supra, p. 19, footnote 87
233 Mathias Schwarz, Urheberrecht im Internet, Der Markenartikel 1996, 120, 216
234 Cf. supra, pp. 32-47
c. Identity of the Infringer - Causation

The next question must be the identity of the infringer. § 97 UrhG shows that not only the person(s) directly performing the infringing activity can be infringers, but rather that anyone who causes or contributes to the infringement is liable. The test is whether the alleged infringer adequately caused the infringement. Obviously, the individual user’s preparing a copy and making it available to others is sine qua non for the infringement. It is also foreseeable and within the scope of the normal course of events that the acts performed by the user will result in a violation of the author’s rights. Schwarz calls this “Vervielfältigung auf Distanz” (reproduction at a distance) and recognizes that the reproduction can be attributed to the person allowing the download as well, as long as she can determine and decide who may access and download the material.

d. Fault

As mentioned above, fault need not be shown in order to get an injunction, but only to recover damages. Nevertheless, the issue will be discussed here since claims for damages are very relevant in the context and the potential damages could be immense.

Fault for civil liability-purposes is defined in § 276 BGB. Since intent is already present where the alleged infringer knows that his action may lead to the result

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236 *Id.* at Abs. 34
237 For the concept of adequate causation, see supra, p. 34
239 § 276 BGB: “Der Schuldner hat, sofern nicht ein anderes bestimmt ist, Vorsatz und Fahrlässigkeit zu vertreten. Fahrlässig handelt, wer die im Verkehr erforderliche Sorgfalt ausser acht lasst...”
declared illegal by law and accepts this possibility (dolus eventualis)\textsuperscript{240}, the individual users who transfer copyrighted music over the Internet are clearly at fault. It can hardly be argued that they do not know of the results of their actions and they may even see the possibility that they might be violating copyright law.\textsuperscript{241} Not only are they aware that their actions create a copy of the work or allow others to do so, they are also largely aware that this may constitute copyright infringement and they willfully act in spite of this knowledge. Even where the user does not have knowledge of copyright law and accordingly cannot positively know of the possibility of infringing the former, she has intent when knowing the facts that constitute infringement.\textsuperscript{242} The individual users act intentionally when they engage in the infringing activities described and are consequently at fault.

2. Section 97 UrhG and the Internet – P2P liability before Directive 2000/31/EC

The next important question is whether and how there can be liability for copyright infringement in the context of P2P systems. In answering this question two distinctly different systems of peer-to-peer filesharing must be distinguished – centralized and decentralized networks.\textsuperscript{243}

\textsuperscript{240} Palandt/Heinrichs, BGB, §276 Nr. 10 (50\textsuperscript{th} Ed. 2000); see also RGZ 57, 241 (stating that the perpetrator need not know that her actions are illegal)
\textsuperscript{241} Til Kreutzer, Tauschboersen wie Napster oder Gnutella verletzen nicht das Urheberrecht, <http://www.heise.de/tp/deutsch/inhalt/te/4857/1.html> (last modified 2/7/2001) (stating that 28% of users and 42% of non-users of filesharing systems are convinced that their actions violate copyright law)
\textsuperscript{242} Palandt/Heinrichs, Introduction to §249 (59\textsuperscript{th} Ed. 2000)
a. Centralized P2P networks - Napster

In centralized systems like Napster, the individual users’ computers are connected via a central server network, maintained by a central P2P “provider”. Each user becomes a member of the so-called "Napster Music Community". The central servers prepare lists of all files available from all members currently logged onto the system and a search engine allows users to browse the files for certain artists or titles. The central entity also provides the users with each other’s IP-addresses necessary to complete a file transfer.

b. Decentralized P2P networks - Gnutella

In decentralized systems like Gnutella on the other hand, the individual users' computers are not connected via a central server or server network. The exchange of files also happens from one user to the other (peer-to-peer), but the users have to obtain other users' IP addresses and available files themselves. There is no central entity providing services and the software necessary for the file transfers is available on the Internet from a multitude of sources. For this reason, there can be no liability for anyone but the users. They, as was shown above, are indeed liable for copyright infringement unless one of the rare cases of justified copying under § 53 UrhG is at hand.

244 See also infra, pp. 136 et. seq.
245 See generally A&M Records, Inc. v. Napster, 114 F.Supp 2d, 896, 912 (N.D. Cal. 2000), aff’d in part, rev’d in part, and rem’d, 239 F.3d 1004 (9th Cir. 2001) (describing the Napster service)
247 Cf. supra, pp. 32-47
c. Legal evaluation of P2P networks

Three main questions arise regarding centralized P2P systems. First, can the files be transferred legally under § 53 UrhG? Second, is the author’s right to transmission of the work infringed and third, can the (central) P2P “provider” be held liable for the infringements as well.

Generally, it is clear that German copyright law protects the author from unauthorized copying and transfers over the Internet, be it through peer-to-peer filesharing or otherwise because downloading of such files creates copies stored on the users’ computers’ hard drive (or at least in the computers’ RAM) and the right to reproduce (§ 16 UrhG) is reserved to the author.\(^{248}\) Since the law requires that the author must profit from every economically relevant exploitation of her work, offering a file for download is relevant to copyright as well. It violates the author’s right to electronic rendition (§ 15 (2) UrhG), as shown above.\(^{249}\) These infringements are the unjustified violations of a right required under § 97 UrhG.

Whether the central entities at the heart of a centralized P2P system incur liability for these infringements as well is the real question. It has been argued that this is not the case because the software and services provided are merely a device to copy materials and the development, manufacture and public offer of devices for copying material are not forbidden under the UrhG or any other German law.\(^{250}\) This is generally correct. The software and services provided by a central P2P “provider” are indeed only tools for “reproduction at a distance” and can be regarded as devices for copying under German

\(^{248}\) Supra, pp. 16, 53  
\(^{249}\) Supra, pp. 47-53  
\(^{250}\) Til Kreutzer, Tauschboersen wie Napster oder Gnutella verletzen nicht das Urheberrecht, <http://www.heise.de/tp/deutsch/inhalt/te/4857/1.html> (last modified 2/7/2001); Til Kreutzer, Napster.
law. VCRs, CD writers, even double VCRs especially intended to facilitate copying of videotapes and other such devices capable of copying protected works are not illegal. However, it has also been recognized that the manufacturers of equipment capable of illegal copying must do what is in their power to prevent infringements because they are mittelbare Stoerer (indirect disturbances) under § 1004 BGB.252

Those regarding filesharing as legal for the individual user consequently deny any liability on the central entity’s part because there is no violation of a right by the individual users and the central entities never prepare a copy of the material themselves. The argument is made that, even if the individual user were liable, a P2P “provider” could only be liable as an accessory of some kind.253 Yet the proponents of this understanding go on to argue that the Teledienstgesetz (TDG) would exclude or at least limit such liability.254 As will be seen, the TDG is not applicable to copyright issues, wherefore the last argument fails entirely.255 Furthermore, the UrhG does not require that the infringer commit the infringing activity herself but rather regards any act adequately causal to the infringement as sufficient to find liability.256 This should certainly not be labeled accessory liability. As was shown, the individual users do infringe copyright by transferring protected music through the use of the P2P network in most cases wherefore

Gnutella & Co.: Rechtsfragen zu Filesharing-Netzen aus Sicht des deutschen Urheberrechts de lege lata und de lege ferenda-Teil 2, GRUR 2001, 307

251 BGHZ 17, 266, 290; BGH GRUR 1964, 91, 92; BGHZ 42, 118, 127; BGH NJW 1984, 1106


254 Id.; see also Till Kreutzer, Napster, Gnutella & Co.: Rechtsfragen zu Filesharing-Netzen aus Sicht des deutschen Urheberrechts de lege lata und de lege ferenda-Teil 2, GRUR 2001, 307, 308 et. seq.

there is certainly room for liability on the central entity’s part; the unlawful
*Rechtsverletzung* is present. The central entity is also causal for the infringements since
the users employed its software, routing services and cataloguing functions in performing
the infringing act. Since the users’ activities are the primary purpose of the P2P system,
the systems today are designed for the exchange of music and great numbers of musical
works and sound recordings are protected by copyright, it can hardly be argued that the
central entity’s causal contribution was outside the normal course of events. It is the
normal course of events. Causation as required by § 97 UrhG is present.\(^\text{257}\)

Another argument based on the legality of copying devices is that the
manufacturer’s obligation to prevent illegal copying to the best of her abilities\(^\text{258}\) could be
satisfied by posting a notice warning users that they will violate copyright law when
transferring protected works over the system.\(^\text{259}\)

It is true that the manufacturer (only) has the obligation to prevent infringements
to the best of her abilities. Whether posting a simple warning alone satisfies this
obligation is questionable, however. The problem remains unresolved and will largely
depend on the extent of the abovementioned obligation. At the present time, the software
and services provided by an entity maintaining a centralized P2P system should not be
regarded as illegal, but liability could arise if the entity does not take all steps it can
possibly take to prevent its network from being used for copyright infringement.

\(^{256}\) *Id.*, at These 4 (2001)
\(^{257}\) *Cf. supra*, p. 52
\(^{258}\) BGHZ 17, 266, 290; BGH GRUR 1964, 91, 92; BGHZ 42, 118, 127; BGH NJW 1984, 1106
Section 97 UrhG and the Internet – OSP liability before Directive 2000/31/EC

OSPs could be liable for copyright infringement under § 97 UrhG as well. The concept of contributory or vicarious infringement as it is relevant in U.S. copyright law is unknown in German copyright legislation. There is no legal requirement for the individual user to have infringed in order to prove (indirect) infringement by a third party. Section 97 UrhG applies to OSPs the same way it applies to the individual user. Of course, cases in which liability for an OSP would arise even though the individual user did not infringe are rare, if not purely theoretical. The TDG (Teledienstgesetz) which is part of the IuKDG (Informations-und Kommunikationsdienstegesetz) now limits the liability of OSPs for illegal activities performed by others under certain circumstances.

The new European Directive 2000/31/EC also mandates a limitation of such liability. Both will be addressed in the context of several cases dealing with the problem of OSP liability.

a. Rechtsverletzung – Violation of exclusive rights

For an OSP to be liable, there must also be a Rechtsverletzung (injury to the right) as described above regarding the liability of the individual user. Where the individual user transfers copyrighted material over the Internet without authorization, a Rechtvserletzung occurs. This does not mean that the individual user needs to infringe

259 Til Kreutzer, Napster, Gnutella & Co.: Rechtsfragen zu Filesharing-Netzen aus Sicht des deutschen Urheberrechts de lege lata und de lege ferenda-Teil 2, GRUR 2001, 307, 308
260 See infra, pp. 116 et. seq.
263 See infra, pp. 62 et. seq.
264 Supra, pp. 35-36
265 See supra, p. 36
in order for the OSP to be liable. If the user can successfully claim a justification for his actions, and the OSP cannot, the OSP may technically still be liable, since copies are made on its servers in the course of the transfer. However, this situation will be rare. All this notwithstanding there will be a violation of the right to copy (§ 16 UrhG), a violation of the right of electronic rendition (§ 15 (2) UrhG) and possibly a violation of the right to first publication (§ 12 UrhG) where the work was previously unpublished.\footnote{Supra, pp. 14-15}

b. \textit{Rechtswidrigkeit - Unlawfulness}

Again, unlawfulness is presumed and an OSP would have to rebut the presumption by proving a justification. An OSP could hardly claim to have copied for private purposes under § 53 UrhG since the purpose of the transitory copies is not one of the purposes specified in the provision but rather occurs incidentally during the OSP’s business procedures. A justification under § 52 UrhG is equally unlikely since OSPs generally do not provide their services, including Internet access, for free as required by the provision and could therefore not claim the justification.

c. \textit{Causation}

For the OSP to be liable for copyright infringement, it must have adequately caused or contributed to the infringement.\footnote{Cf. supra, p. 34} On the one hand it could be argued that it is possible for users to act as their own access providers and therefore an OSP is not absolutely necessary to access the Internet and infringe the copyright therein. On the other hand this is not only unrealistic (hardly any individual user has the financial or
technical abilities to be his/her own provider), but also irrelevant. Where an OSP’s services were used in accessing the Internet and uploading or downloading copyrighted material without authorization, the OSP was *sine qua non* for the infringement. If the OSP had not provided the user with access to the Internet, the infringement would not have occurred. The services provided by the OSP, which constitute the causal action, are not outside the scope of the normal course of events (inadequate) either. Causation in the sense required by the UrhG is present.\(^\text{268}\)

d. Fault

As mentioned above, fault is not a prerequisite for finding copyright infringement, but it is necessary to prove fault in order to recover damages.

An OSP whose service whose subscribers engage in infringing activity will argue that it had no intent for this to happen and did not encourage it either. Again, the standard of § 276 BGB is to be applied to determine whether intent was present or not. It can be argued that the OSP generally has no actual knowledge of any particular infringement of copyright by its subscribers and therefore cannot have intent – there can be no intent without knowledge. On the other hand, it is not necessary for the OSP to have actual knowledge of a particular infringement. Intent is present where the alleged infringer was aware of her actions being causal for a certain result – not the actions of another, the individual user – or of the facts that constitute infringement even though she does not know the law. An OSP certainly knows that the services provided to subscribers can be used and are used in a manner that is adequately causal for infringement. Whether this

\(^{268}\) Cf. OLG München, Urteil vom 08.03.2001, 29 U 3282/00, available at <http://normative.zusammenhaenge.at/faelle/urhg_aol.html> (last visited 6/5/2001)
can be regarded as sufficient to constitute intent was not resolved clearly in any decision, yet it was addressed in the infamous “CompuServe” decision that will be discussed shortly. It was also addressed in a slightly different context in the “AOL case”, which will also be discussed in the following. The court in that case found that the OSP was grossly negligent at least, but probably acted intentionally, when it provided a forum in which users could post and exchange MIDI files because the OSP knew that most MIDI files were copyrighted and even advertised for the forum with the availability of current titles. Whether this finding shows that OSPs are generally negligent with regard to music exchange activities between their subscribers is unclear. The court came to the result mentioned, even though the forum was not monitored regularly by AOL, and there was no editorial control exercised by AOL either. This indicates that the court would have found negligence or intent on the part of an OSP in the other scenarios (web pages that offer music, BBS, P2P filesharing and other forms of data transfer employing the OSP’s network in the process of copying and/or transferring a file over the Internet). On the other hand, liability would be overextended to encompass liability for activities that are vital not only to an OSP’s business but also to the functionality of the Internet itself. This result would not be practical; it would ignore reality.

In the end, it is questionable whether intent still has relevance in the context of OSP liability for material not posted by OSPs themselves since the introduction of the LuKDG (including the TDG) and in light of European Directive 31/2000/EC.

\[269\] Infra, p. 64
\[270\] Infra, p. 69
\[272\] Id.
The TDG provides limitations of liability for content not provided by an OSP itself. The relevant provision, § 5 TDG, differentiates between three situations. It first clarifies that the standards of liability for an OSP’s own content are no different in the online environment than in the “real world” (§ 5 (1) TDG). As far as foreign content is concerned it distinguishes between content created by others but provided by the OSP and content to which the OSP merely provides access. Liability for the first kind of foreign content can only arise where the OSP has knowledge of the content and is technically able to prevent use of this content with reasonable effort (§ 5 (2) TDG). Liability for foreign content to which an OSP merely provides access is eliminated entirely (§ 5 (3) TDG). However, the TDG was designed to address “responsibility” for content in general, in both criminal and civil matters and there is considerable

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273 § 5 Telekommunikationsdienstegesetz [TDG] [Telecommunications-services Statute]:
“(1) Diensteanbieter sind für eigene Inhalte, die sie zur Nutzung bereithalten, nach den allgemeinen Gesetzen verantwortlich.
(2) Diensteanbieter sind für fremde Inhalte, die sie zur Nutzung bereithalten, nur dann verantwortlich, wenn sie von diesen Inhalten Kenntnis haben und es ihnen technisch möglich und zumutbar ist, deren Nutzung zu verhindern.
(3) Diensteanbieter sind für fremde Inhalte, zu denen sie lediglich den Zugang vermitteln, nicht verantwortlich. Eine automatische und kurzzeitige Vorhaltung fremder Inhalte auf Grund Nutzerabfrage gilt als Zugangsvermittlung.
(4) Verpflichtungen zur Sperrung der Nutzung rechtswidriger Inhalte nach den allgemeinen Gesetzen bleiben unberührt, wenn der Diensteanbieter unter Wahrung des Fernmeldegeheimnisses gemäß §85 des Telekommunikationsgesetzes von diesen Inhalten Kenntnis erlangt und eine Sperrung technisch möglich und zumutbar ist.”

Translation provided by author: “(1) Service providers are liable for their own content which they provide for use by others under the law.
(2) Service providers are liable for foreign content, which they provide for use by others only when they have knowledge of this content and have the technical ability to prevent this content from being used with reasonable effort.
(3) Service providers are not liable for foreign content to which they merely provide access. An automatic and short-term presentation of such content to fulfill a user-request constitutes the provision of access in this sense.
(4) Obligations under the law to disable use or access to illegal content are not affected by this provision if the provider has knowledge of this content and the technical ability to prevent use or access to this content with reasonable effort while preserving the secrecy of telecommunication according to §85 of the Telecommunications-statute.”
controversy about its applicability to copyright infringement cases.\(^2\) In the following, the most important cases dealing with OSP liability and the applicability of the TDG to copyright issues will be discussed.

e. Cases addressing provider liability and the applicability of the LuKDG/TDG

(1) The "Mailbox" Case\(^2\) (October 1995)

The defendant maintained a "Mailbox Service"\(^2\) from his computer under the pseudonym "Black Moon". Subscribers to his service could access the former and download computer programs from said "mailbox". At least 30 programs were available for download, to four of which the joint plaintiff held the copyright. It remains unclear how many programs were actually downloaded by subscribers to the defendant's service. It is however clear, that the defendant would not allow a download unless the subscriber would upload a "new" program to the "mailbox".

The court found the defendant guilty of criminal copyright infringement by distribution of protected works under § 106 UrhG.\(^2\) It reasoned that the defendant had knowledge of the infringements committed by his subscribers and even knew that he was

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\(^2\) Amtsgericht [AG] [Trial Court] Nagold - Urteil vom 31. Oktober 1995 - Ds 25 Js 1348/94, <http://www.netlaw.de/urteile/agnag_1.htm> (last visited 6/5/2001) ("Mailbox: Download"): The names of parties to a trial are not disclosed in publications in Germany although the trials are public. Parties are referred to by pseudonyms such as 'A' and 'B'. In some cases the parties' identities are known to the author through the press, in others they are not.

\(^2\) This kind of service is roughly equivalent to a Bulletin Board Service [BBS].

\(^2\) § 106 UrhG (1): "Wer in anderen als den gesetzlich zugelassenen Faellen ohne Einwilligung des Berechtigten ein Werk oder eine Bearbeitung oder Umgestaltung eines Werkes vervielfaeltigt, verbreitet oder öffentlich wiedergibt wird mit Freiheitsstrafe bis zu 3 Jahren oder mit Geldstrafe bestraft. (2) Der Versuch ist strafbar."

Translation provided by author: "(1) Whoever copies, distributes or publicly renders a work or a derivative work thereof without the author's permission in cases other than those permitted by law will be punished by imprisonment of up to 3 years or fine."
infringing himself as he had been charged with criminal copyright infringement before. The court specifically addressed that the defendant was capable of controlling upload and download traffic to the "mailbox" and by requiring an upload for a download encouraged infringements. It found it to be irrelevant that the defendant could not be proven to have uploaded any material himself. The court further stated that the provider of a "mailbox" service must secure copyrighted works on his service against download by others. 278

This decision was not discussed excessively among the German legal community since it is stringent and correct in its analysis of the facts and application of the law.

(2) The "CompuServe Case"

A famous, or rather infamous, case addressing responsibility and liability of OSPs in Germany is the criminal case against CompuServe. 279 Although it did not address copyright issues but dealt with the criminal responsibility of the OSP CompuServe and its CEO for providing access to illegal material, some interesting conclusions may be drawn from the decision.

The defendants were CompuServe Deutschland GmbH (hereinafter CompuServe Germany), the German branch of the American OSP, owned entirely by CompuServe, Inc., and its CEO, Mr. Somms. Unknown persons had posted pornographic images and

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276 "Mailbox: Download"
279 Including images of children being sexually abused. Pornographic images are not generally illegal, but their distribution to persons under the age of 18 is. "§184 Strafgesetzbuch [StGB] [Criminal Code] Verbreitung pornographischer Schriften... (3) Wer pornographische Schriften (§ 11 Abs. 3), die Gewalttätigkeiten, den sexuellen Mißbrauch von Kindern oder sexuelle Handlungen von Menschen mit Tieren zum Gegenstand haben, 1. verbreitet."
violent videogames, that were illegal in Germany, on the American branch's news-
servers. CompuServe Germany provided access to these servers to the subscribers,
which exclusively contracted with the American corporation. After the German D.A.'s
office had named 282 forums in which such images were present, CompuServe, Inc.
disabled access to these. CompuServe Germany would not have been able to do so
without 'cutting the wire' to the U.S. Three months later, after the distribution of
software to protect children from accessing these sites, access was restored. The
German prosecutors did not consider this sufficient and filed suit. CompuServe alleged
that it had only restored access to such newsgroups that did not contain illegal material.

2. öffentlich ausstellt, anschlägt, vorführt oder sonst zugänglich macht...wird, wenn die pornographischen
Schriften den sexuellen Missbrauch von Kindern zum Gegenstand haben, mit Freiheitsstrafe von drei
Monaten bis zu fünf Jahren, sonst mit Freiheitsstrafe bis zu drei Jahren oder mit Geldstrafe bestraft...”
Translation provided by author: “...(3) Who
1. distributes,
2. publicly displays, performs or otherwise makes accessible
pornographic literature which has as its subject violence, sexual abuse of children or sexual activities of
humans with animals... will be punished by imprisonment of three months to five years, if the
pornographic literature contains sexual abuse of children, otherwise by imprisonment of up to three years
or a fine.”

Games that present a positive image of fascism and or violence are legal in Germany but may not be
sold or distributed to persons under the age of 18. The Strafgesetzbuch (criminal code, hereinafter StGB):
§ 1 Gesetz über jugendgefährdende Schriften [GjS] [Statute on writings dangerous to the youth]: “(1)
Schriften, die geeignet sind, Kinder und Jugendliche sittlich zu gefährden, sind in eine Liste aufzunehmen.
Dazu zählen vor allem unsittliche, verrohend wirkende, zu Gewalttätigkeit, Verbrechen, Rassenhaft
anreizende sowie den Krieg verherrlichende Schriften. Die Aufnahme ist bekanntzumachen...”
§ 3 GjS: “Eine Schrift, deren Aufnahme in die Liste bekanntgemacht ist, darf nicht...
2. an einem Ort, der Kindern und Jugendlichen zugänglich ist oder von ihnen eingesehen werden kann,
ausgestellt, angeschlagen, vorgeführt oder sonst zugänglich gemacht werden...”
§ 21 GjS: “Wer eine Schrift ... 2. entgegen § 3 Abs. 1 Nr. 2 am dort bezeichneten Orten ausstellt,
anschlägt, vorführt oder sonst zugänglich macht, ...wird mit Freiheitsstrafe bis zu einem Jahr oder mit
Geldstrafe bestraft...”
Translation provided by author: “§ 1GjS (1): “Writings that could endanger children and youth morally are
to be included in a list. Immoral writings, writings that incite or promote violence, crime and racism and
writings that idolize war are specifically considered to be such writings. The inclusion in the list must be
publicized...”
§ 3 GjS: “(1) A writing of which the inclusion in the list has been publicized may not... 2. be displayed,
performed or otherwise made accessible in a place that is accessible to children and youth or where these
could perceive it...”
§ 21 GjS: “Whoever displays, performs or otherwise makes accessible a writing in violation of § 3 para. 1
Nr. 2 in one of the places described therein...will be punished by imprisonment of up to one year or a fine.”
but that they were unable to prevent users from posting such illegal content in other newsgroups.\(^{283}\)

The court found the CEO guilty. It reasoned that the original “crime”, the violation of § 184 StGB,\(^{284}\) had been committed by CompuServe, Inc. by providing access to the newsgroups containing the material and that CompuServe Germany had participated in the criminal act by maintaining a permanent connection to the U.S. which enabled German users to access the newsgroups.\(^{285}\)

The court held that CompuServe Germany did not qualify for the limitation under § 5 (3) TDG because it is a service provider rather than a mere access provider. The court found CompuServe Germany to be a service provider since it did not have any relationship with CompuServe, Inc. subscribers. The court also declined to apply the limitation in § 5 (2) TDG. It reasoned that CompuServe, Inc. and CompuServe Germany had knowledge of the material and that it was technically possible for the American company to disable access. The court found that therefore, even though CompuServe Germany could not disable access to the material without “cutting the cable” to the United States, CompuServe Germany was liable; it saw the American company’s ability to disable access as sufficient.\(^{286}\)

The decision was widely regarded as wrong. It is already questionable whether CompuServe, Inc. had any obligation to disable access to the concerned newsgroups, even if the names of these contained clues about illegal content. It must be considered


\(^{283}\) Id.

\(^{284}\) See supra, p. 65, footnote 280

that there may have been plenty of legal content in these newsgroups and unconditional total disabling of access would have been a violation of free speech both in Germany and the U.S. Whether there may have been a moral obligation to shut down a newsgroup called “alt.pictures.children.sex” notwithstanding, there was no legal obligation for CompuServe Germany or CompuServe, Inc. to do so. Yet even if there were sufficient grounds for such an obligation, it is far fetched to transfer this responsibility and obligation (and consequently the criminal responsibility) to the CEO of CompuServe Germany, who was indisputably technically unable to exercise any control or influence over the news-servers.287 Furthermore, the decision must be criticized for its flawed interpretation of the law, particularly of § 5 (2) and (3) TDG.288 The TDG was meant to provide a stable and secure set of boundaries for modern telecommunications-providers. In pursuit of this goal, the liability of providers of such services was limited; they were not meant to be liable if others abused technical means they provide.289 Section 5 (3) TDG clearly eliminates liability for merely “opening the doorway” that may lead to illegal content.290 This is even contained in the Amtliche Begruendung (official statement):

“[D]em Diensteanbieter, der fremde Inhalte lediglich, ohne auf sie Einfluß nehmen zu können, zum abrufenden Nutzer durchleitet, obliegt es nicht, für diese Inhalte einzutreten. Er soll nicht anders behandelt werden als ein Anbieter von

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286 *Id.*
288 § 5 TDG; see supra, p. 62, footnote 273
Telekommunikationsdienstleistungen. Denn der bloße Zugangsvermittler leistet keinen eigenen Tatbeitrag."

This and the language of § 5 TDG itself show that the court was wrong in holding that CompuServe Germany was not an access provider. Nowhere in the statute is it required that an access provider must have a contractual relationship with the users, the term access provider is not even mentioned in the statute. CompuServe Germany merely enabled the German subscribers of CompuServe, Inc. to access the service they had subscribed to; it was a mere conduit. Accordingly, the court should have found the defendant not guilty because of § 5 (3) TDG. The court also went too far in attributing CompuServe, Inc.’s ability to disable access to the CEO of CompuServe Germany. This would have strange consequences: If the CEO of the German branch could not have convinced his American superior that his behavior is illegal in Germany, or if the American company chose to ignore the situation, the only way for the German CEO to avoid criminal liability would have been to “cut the line” to the States, terminate service and ignore the contractual obligation to the American company. This result can hardly be correct. The court misapplies § 5 TDG all over when it finds that the content became CompuServe Germany’s own content by appropriation when CompuServe, Inc. offered access to the content and thereby ‘made it it’s own’, even though it had been posted by unknown subscribers. This analysis ignores that the material was produced by others, posted by others and that none of these persons had any relationship with either

291 Amtliche Begründung zum Regierungsentwurf des Informations- und Kommunikationsdienstegesetz [luKDG] [Statute on Information- and Communications-services], Bundestags-Drucksache 13, 7385, (1996); Translation provided by author: “It is not within the responsibility of the provider to stand up for content, which it merely provides access to for the user without being able to control the content. He shall not be treated different from providers of other telecommunications services, because the ‘mere conduit’ does not contribute to an illegal act.”

CompuServe company other than their subscription. This cannot be sufficient to find that
CompuServe, Inc., which did not even have knowledge of the actual content, wished to
regard these materials as its own. For many of these reasons, the defendant appealed.

The Landgericht, which handled the appeal, overturned the trial court’s decision,
holding the defendant not guilty because of a lack of intent and because of the limitation
of liability under § 5 (3) TDG. It based its decision on several arguments, including the
ones brought forward in the above criticism of the Amtsgericht’s decision. First, it
clarified that the CEO of CompuServe Germany could not be considered to have acted
collusively with CompuServe, Inc. because he was obliged to follow CompuServe, Inc.’s
directives, and consequently had no significant control over corporate actions. The court
also recognizes that the defendant had done all he could to convince CompuServe, Inc. to
disable access to the disputed sites but that he had no means to force the mother-
corporation to act. Furthermore, the court finds § 5 (3) TDG to be applicable in spite of
the fact that CompuServe Germany had no contractual relationship with CompuServe
subscribers. The court sees no reason to restrict applicability of the provision to providers
with their own subscribers, but rather relies on the language of the provision, stating that
there is no liability for providing access to foreign material, with or without knowledge of
its content. The Landgericht’s decision was correct.

293 AG München I, MMR 1998, 429
295 Id.
(3) The “AOL decision”

The defendant in this case was AOL Germany, a corporation owned in equal parts by AOL Online, Inc., Dulles Virginia and Bertelsmann Online AG. The plaintiff “Hit Bit” was one of the largest German producers of MIDI files. The defendant offered a newsgroup in which subscribers could exchange such files. Among the files available were GETDOWN.MID, SAMBAD-1.MID and MACFREED.MID. These files, to which the plaintiff held the copyright, had been posted to the newsgroup by unknown subscribers to the defendant’s service. They could be downloaded and saved to hard-drive or floppy disk. The plaintiff contended that this was a violation of its exclusive rights under the UrhG and filed suit. It argued that the plaintiff had contributed to the violations because it had provided unmonitored memory to subscribers and thereby not only facilitated but also induced the uploading and downloading of copyrighted material. The plaintiff further contended that the defendant had known that these activities of its subscribers would violate others’ copyright because it knew that the likelihood of licensing agreements between the copyright holder and the subscribers was minimal. The defendant on the other hand argued that she had not had positive knowledge of the infringements and could therefore not be held liable according to § 5 (2) TDG. The defendant further argued that it had taken steps to prevent infringements by informing

296 Id.

297 LG Muenchen, Decision of March 8 2001 &#8211; 29 U 3282/00, ZUM 2000, 418; OLG München, Urteil vom 08.03.2001, 29 U 3282/00, available at <http://normative.zusammenhaenge.at/faelle/urhg_aol.html> (last visited 6/5/2001); In Germany the names of plaintiffs and defendants are not included in the published decision. Parties and witnesses are identified by letters such as “A” or “M”. For the identity of the parties, see Martin Kretzschmer, Datenspakete im Netz der Paragraphen – Bedeutet MP3 das Ende der westlichen Eigentumsordnung? NZZ Online Netzstoff 2000, Neue Zuercher Zeitung (August 4th 2000)

298 These files represent the songs “Get down”, “Samba de Janeiro” and “Freedom”.


300 § 5 TDG. see supra 62, footnote 273
and warning subscribers against unauthorized copying. The plaintiff countered that § 5 TDG “only applies to content accessible on servers themselves when the violation of copyright is apparent from the content itself”.\textsuperscript{301}

The Landgericht found in favor of the plaintiff insofar as the plaintiff’s rights under the UrhG were violated by making the MIDI files at issue accessible. Insofar as the complaint was directed against uploading of such files, the court found for the defendant.\textsuperscript{302} The court found that the plaintiff held the right of the sound carrier manufacturer granted in § 85 UrhG and the adjunctive economic rights under §§ 15-17 UrhG, as well as the rights under § 73 UrhG, which had been transferred to them by witness “M”. The decision further states that the defendant was liable under § 5 (2) TDG, § 97 UrhG because granting access to downloadable files constitutes a violation of the rights to distribute and the right to reproduce.\textsuperscript{303} The court reasoned that the defendant had limited intent (\textit{dolus eventualis}) because the works concerned were all popular music, for which the life plus 70 years term was obviously not over, and that this should have been known to the defendant. The court recognized that § 5 (2) TDG requires “\textit{Kenntnis}” (knowledge) of the (infringing) content. While acknowledging that the defendant had no actual knowledge of the content, the court decided that knowledge of the content and knowledge of a violation of rights can be present separately, and that the defendant should have known of the violation of rights. It reasoned that the probability of a violation of rights was high and discernible in the case, and that the rights-holder would be defenseless in situations like this if “knowledge” meant only knowledge of the actual

\textsuperscript{301} LG Muenchen, Decision of March 8 2001 &\#8211; 29 U 3282/00, ZUM 2000, 418; OLG München, Urteil vom 08.03.2001, 29 U 3282/00, available at <http://normative.zusammenhaenge.at/faelle/urhg_aol.html> (last visited 6/5/2001)

\textsuperscript{302} Id.

\textsuperscript{303} Id.
Essentially the court found an obligation to monitor and screen for files with titles or names that are well known and probably contain infringing material. The court equates knowledge with the possibility to know through use of "scouts" and an obligation to know through such screening and monitoring. However, the court finds this obligation to be limited to content already posted, because screening before uploading of material is impossible.

The defendant appealed, arguing that MIDI files are not sound carriers within the meaning of § 85 UrhG, that the plaintiff did not "record" an artistic work but rather performed a purely technical act, and that the correct plaintiff would have been AOL, Inc. because the defendant merely provides a dial up connection hub/node for AOL, Inc., has no influence over the newsgroups or BBS and has no contractual relationship with AOL, Inc.'s subscribers.

The Oberlandesgericht, which handled the appeal, found for the plaintiff. It held that the defendant was guilty of violating the plaintiff's rights under §§ 75 (2) and 85 (1) UrhG and was liable under § 97 (1) 1 UrhG without any limitation of liability under § 5 TDG. The decision first clarifies that MIDI files are sound carriers within the meaning of § 85 UrhG because they are devices for the potentially repetitive replay of progressions of sounds and notes. The court compared them to records or CDs which also do not contain the sounds themselves but like MIDI files allow the replay of a progression of sounds through various analog or digital "commands" embedded in the

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303 Id.
304 Id.
305 Id.
sound carrier. It also states that the creation of MIDI files is a creative enough process to justify protection of the author under § 73 UrhG. Therefore the downloading and uploading of these files were held to be reproductions of said sound carriers and consequently a violation of the author’s and the manufacturer’s rights to reproduce the work in copies. 309

It was further brought forward by the defendant that § 5 (3) TDG eliminates any liability on the part of the defendant. The court found § 5 TDG to be inapplicable to copyright or related rights. It interpreted the term “Inhalte” (contents) in § 5 (2) TDG to mean only such content which allows for a determination of legality from the content itself because it would be strange to hold a provider liable when it has knowledge of the content but not of the copyright and at the same time to find no liability when the provider knows of the copyright but not of the content. This, the court reasons, follows from the mention of “illegal content” as “content” in § 5 (4) TDG, even though this argument alone was not considered decisive. 310 The court also analyzed the legislative history of the TDG to show its inapplicability to copyright. The TDG is part of the IuKDG, which was the result of a federal commission’s findings that there was a need for uniform and reasonable statutory boundaries for the modern communications environment to make the laws, including those on intellectual property, compatible with the technological advances in communications technology. 311 The court refers to the Amtliche Begründung (official statement) behind the draft of the IuKDG, which states that any changes in intellectual property laws should be put off until a later date,

308 Id.
309 Id.
310 Id.
311 Amtliche Begründung zum Reg.Entwurf des IuKDG, Bundestags-Drucksache 13, 7385, 16 (1996)
specifically until after the World Intellectual Property Organization [WIPO] conference of 1996.\textsuperscript{312} The \textit{Amtliche Begrundung} for the final version of the luKDG also states that the thought process about necessary adaptations of intellectual property laws was incomplete, that the WIPO conference may yield new results and that European harmonization of intellectual property laws so far only covered the protection of databases and their distributors.\textsuperscript{313} The court also considers that the TDG was enacted as a result of widespread public controversy about pornographic and violent content on the Internet and the infamous “CompuServe case”. In light of this, the court was convinced that the legislative had not meant to change any of the present copyright law by enacting the TDG but rather wished to resolve the criminal liability for such content that is illegal in and of itself, while putting changes of copyright law off until a later date.\textsuperscript{314}

The defendant also claimed that it could not have had knowledge or the equivalent thereof through its “scouts” because the copyright notice for the MIDI files was not contained within the files but in a text file, and that it had posted notices to newsgroup users warning about copyright violations. The court did not find this convincing, but rather held that such notices are insufficient to prevent copyright violations on the Internet because of the increased anonymity, especially since the “defendant’s reluctance to disclose the identities of the “uploaders” shows that these can

\textsuperscript{313} Amtliche Begrundung zum Regierungsentwurf des luKDG, BT-Drucksache 13, 7385, 39 (1996)
count on such anonymity".\(^{315}\) It further found that the use of “scouts” to screen for copyrighted material shows that the defendant was aware of copyright violations in its newsgroups and knew that the notice posted was insufficient to prevent violations. Lastly the court finds the use of “scouts” to be insufficient to determine whether or not an uploaded work is copyrighted.\(^{316}\)

f. Conclusion regarding the applicability of the TDG to copyright issues

The decisive question, as the court recognized as, is whether or not the TDG should be applied in the context of copyright. The language of the statute does not provide a simple answer. The definition of the term “content” is one of the central points in finding such an answer.\(^{317}\) In scholarly discussion, it has been recognized that the term is not defined in the TDG. Some have suggested that it should be defined independently from §5 TDG, but in accordance with § 2 (1) TDG, as including only combinable data and information in the form of sounds, images and text\(^{318}\). However, this view has been criticized because it would exclude computer programs.\(^{319}\) The criticism is mainly based on the argument that it would be unjust to let the industry-regulating provisions of the TDG apply to service providers without limitation while limiting the provisions beneficial to them to certain areas of the law.\(^{320}\) At first sight, the language of § 5 TDG does not seem to contain any limitations as to its applicability. This perception would be

\(^{315}\) OLG München, Urteil vom 08.03.2001, 29 U 3282/00, available at <http://normative.zusammenhaenge.at/faelle/urhg_aol.html> (last visited 6/5/2001)
\(^{316}\) Id.
\(^{317}\) Id.
\(^{319}\) Gerald Spindler, Haftungsrechtliche Grundprobleme der neuen Medien, NJW 1997, 3193, 3195
\(^{320}\) Id.
congruent with the legislative intention of creating a law to address the issue of responsibility for content in the online environment in its entirety. However, liability under § 5 TDG is dependent on the service provider’s knowledge of the content itself, not the proprietary situation of that content. From knowledge of the content, a service provider would not necessarily know whether that content is copyrighted at all and who the copyright owner is. Yet this is what matters most in the copyright context. It would be strange to create a dependency between the copyright and the content in this manner.\textsuperscript{321} A limitation of liability based on knowledge necessarily coincides with the presence of various levels of intent - knowledge is intent (\textit{dolus eventualis} or \textit{lesser dolus directus}).\textsuperscript{322}

If liability is to be limited to intentional actions as is indicated by the official statements,\textsuperscript{323} the object of such intent would have to be the copyright in order to find a reasonable applicability of § 5 TDG in copyright cases. Yet the knowledge of the proprietary situation of the content is not addressed in § 5 TDG, which indicates that it should not be applied to copyright cases. The focus on knowledge of the actual content indicates strongly that § 5 TDG only affects liability for content that is illegal in and of itself, not liability for legal content, which may not be reproduced due to proprietary reasons.\textsuperscript{324} Thorough interpretation of the statutory language consequently indicates that § 5 TDG is not applicable to copyright issues. This understanding is strongly backed by the legislative history, as discussed by the court. The enactment of the new European

\textsuperscript{321} Cf. OLG München, Urteil vom 08.03.2001, 29 U 3282/00, available at <http://normative.zusammenhaenge.at/faelle/urhg_aol.html> (last visited 6/5/2001)
\textsuperscript{322} In Germany \textit{dolus eventualis} (limited intent) is commonly defined as knowledge of the likelihood of the illegal result of an action with or without a voluntative element. \textit{Dolus directus} exists in two forms, one requiring only certain knowledge of the result, the other form of intent requiring the acting party to want the result to happen. \textit{See generally} Palandt/Heinrichs, BGB Introduction to §249 (59th Ed. 2000)
\textsuperscript{323} Amtliche Begrundung zum Reg.Entwurf des IuKDG, Bundestags-Drucksache 13, 7385, 39 (1996)
\textsuperscript{324} OLG München, Urteil vom 08.03.2001, 29 U 3282/00, available at <http://normative.zusammenhaenge.at/faelle/urhg_aol.html> (last visited 6/5/2001)
Directive may obliterate the problem anyhow, but the court was correct in finding the TDG to be inapplicable. This is backed even more by the fact that § 5 MdStV (Mediendienststaatsvertrag), a uniform state law, is virtually identical with §5 TDG.\textsuperscript{325} The states have no legislative power concerning copyright.\textsuperscript{326} The congruence between the MdStV and the TDG, which were passed as related laws, shows that neither the state legislatures nor the federal legislature intended for these statutes to be applied to copyright law. This is in complete accord with the historical materials which indicate the same, as was stated by the court as well. In the end, the court was correct in finding the TDG to be inapplicable in copyright cases.\textsuperscript{327} 

Unfortunately this leaves the question about the presence of intent in many case scenarios unresolved and there is no clear indication in the UrhG or the BGB on how this dilemma could be resolved. A possible solution could indeed be the enactment of a provision similar to §5 TDG. Whether or not a regulation of copyright liability similar to the §5 TDG will be enacted, or whether it already has been mandated by the European Directive or the WIPO treaties is a different question that will be addressed in the following.

\textsuperscript{325} See <http://www.netlaw.de/gesetz/mdstv.html> (last visited 6/5/2001); see also OLG München, Urteil vom 08.03.2001, 29 U 3282/00, <http://normative.zusammenhaenge.at/faelle/urhg AOL.html> (last visited 6/5/2001)
\textsuperscript{326} See supra, p. 3

a. The WIPO treaties

At the end of 1996 the international community agreed upon two treaties as a reaction to the changes brought about by digital communications technology. Concerning the issue at hand, especially electronic publishing, the most relevant of these treaties is the WIPO Copyright Treaty (WCT). The WCT is complemented by the WIPO Performances and Phonograms Treaty (WPPT). Although both treaties are not in force yet, they have already had a significant influence on national legislation; for example the U.S. Digital Millennium Copyright Act and the draft EU-Directive on the harmonization of copyright in the information society. What is relevant in this context is that the WCT clarifies that the act of making copyrighted material available online is the exclusive right of the author or copyright owner. An agreement on the exact scope of the reproduction right in the online environment could not be reached. However, a statement was issued, that the reproduction right is to be fully valid in the digital environment, and that the storage of protected subject matter in digital format in

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330 *id.*
331 *See id.* (As of February 1, 2001, 22 States have ratified the WCT, 36 I.L.M. 65 (1997) and 20 the WPPT, 36 I.L.M. 76 (1997). Both treaties require 30 instruments of ratification or accession)
332 *See infra.* p. 98
electronic media is a reproduction under Article 9 of the Berne Convention. There was also an agreement that merely providing the physical facilities allowing a communication (including the communication of protected works) should not amount to a communication relevant in the context of copyright because such would not be within the meaning of the Berne Convention or the WCT itself. It should be noted that the WCT makes the three-step test contained in the TRIPS agreement applicable in the online environment. The test allows states to enact limitations and exceptions to the exclusive rights granted in certain cases when such limitations do not interfere with the normal exploitation of the work and do not unreasonably interfere with the author's legitimate interests. Since the treaties are the result of international efforts toward harmonization, they only provide a rough framework in need to be filled in detail by national legislation.

One issue that needs to be worked out and is already addressed in some national legislation is the online offering of copyrighted material in digital format to the public. This is undisputedly an act covered by copyright, and consequently requires the copyright owner's authorization. Under which circumstances intermediaries should be liable or exempt from liability for copyright infringement, the very topic of this thesis, is less clear and the subject of debate.

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335 WCT statement “Concerning Article 1(4) The 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 36 I.L.M. 65 (1997) and <http://www.wipo.int/treaties/ip/copyright/statements.html#3> (last visited 6/5/2001)

The European Union has made an effort to legislate some of the details necessary to breathe life into the WIPO treaties by enacting Directive 2000/31/EC, which will be dealt with in the following. In the U.S., the Digital Millenium Copyright Act is the result of the WIPO treaties as well.\textsuperscript{337} It will be addressed at the appropriate point.

b. Directive 2000/31/EC\textsuperscript{338}

On June 8, 2000 the European Parliament and Council passed Directive 2000/31/EC of the European Communities “on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market”.\textsuperscript{339} The directive is in force and requires the member states to amend their national laws according to its provisions. The directive is specifically meant to

“[c]ontribute to the proper functioning of the internal market by ensuring the free movement of information society services between the member states” and “approximate[s]... certain national provisions on information society services relating to the internal market, the establishment of service providers, commercial communications, electronic contracts, the liability of intermediaries, codes of conduct, out-of-court dispute settlements, court actions and cooperation between member states”\textsuperscript{340}

\begin{itemize}
\item \textsuperscript{337} See id.
\item \textsuperscript{339} Official Journal L 178, 17/07/2000, p. 0001-0016, See also Christiane Schulzki-Haddouti, SPIEGEL ONLINE (May 4\textsuperscript{th} 2000) <http://Internet.spiegel.de/netzwelt/politik/0,1518,74909,00.html> (last visited 5/5/2001)
\end{itemize}
(1) Service Provider liability according to the Directive

§4 of the directive specifically addresses the issue of intermediary service provider liability. The term “service provider” is defined as any natural or legal person providing “information society services”, which in turn is defined in directive 98/34/EC as amended by directive 98/48/EC.\(^{341}\): “2. service, any information society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of that service.” Directive 98/34/EC was meant to encompass OSPs, as can be deducted from the language in the preamble: “…information society services also include services consisting of the transmission via a communication network, in providing access to a communication network or in hosting information provided by a recipient of the service.”\(^{342}\) There has been no change to that definition. Both, the preamble to 98/34/EC and the definition in 98/48/EC, clearly include the services provided by an OSP.\(^{343}\) Whether P2P providers are also included in the definition remains to be determined. The above definition of an information society service can be understood as to encompass at least centralized P2P networks. The entities at the center of these systems provide a service, namely software and, as for example in the case of Napster, cataloguing and search functions at the individual request of their users by electronic means, namely the Internet. Even though they do not provide this service for “remuneration”, they can be said to be included in the definition since it does not require remuneration as a decisive element but rather states that such services are


generally not provided for free. On the other hand, decentralized P2P systems that only provide software to enable users to share files peer to peer, should be outside the scope of that definition, because software is not a service in the traditional understanding but rather a product and because there is no central entity that could be called a service provider. It seems that centralized P2P systems can be included in the Directive’s definition of “information society service provider” while decentralized networks are clearly outside the definition’s scope for lack of any form of “service provider”.

The standards for liability, in countries other than Germany, before the Directive was passed will not be addressed for reasons of practicality, since these standards vary in the Member States.³⁴⁴

(a) “Mere conduit” – § 4 Article 12 of Directive 2000/31/EC

Section 4 Article 12 concerns the liability of service providers for their transmission of information through their communication networks at the request of their users. This encompasses providing Internet access, the opportunity to upload and download data, including copyrighted music files, and email services as becomes clear from the language of the provision. The member states are required to amend their laws so that a service provider’s liability is eliminated if the provider complies with a set of conditions:

³⁴³ See also, Christiane Schulzki-Haddouti, SPIEGEL ONLINE (May ⁴ᵗʰ 2000) <http://Internet.spiegel.de/netzwelt/politik/0,1518,74909,00.html> (last visited 5/5/2001)
³⁴⁴ To illustrate this one may compare the natural law based copyright laws of Germany or France with the completely different, non-natural law based copyright law of the United Kingdom. The difference still remains on a national level and in other fields than the liability of service providers in the online environment due to the principle of subsidiarity, according to which the European Legislature will not regulate issues that are more efficiently regulated on a national level.
“1.[s]hall ensure that the service provider is not liable...on condition that the provider:

(a) does not initiate the transmission;
(b) does not select the receiver [sic! recipient] of the transmission; and
(c) does not select or modify the information contained in the transmission.

2. The acts of transmission and provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the information transmitted insofar as this takes for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.

3. This Article shall not affect the possibility for a court... in accordance with Member States’ legal systems, of requiring the service provider to terminate or prevent an infringement.”

These requirements are generally easy to meet for an OSP, since the transmissions requested by a subscriber are normally carried out in the manner required automatically. A central P2P entity should come within the scope of the safe harbor as well, since it has even less measures to control the transmissions between its members because they interconnect directly without the central P2P entity as an intermediary. There is no case law accessible yet, so the application and functionality of the Directive, or rather the amended national laws, is hard to determine. On the one hand, it could be argued that OSPs cannot be held liable for copyright infringements committed by individual users using the OSPs’ networks as a conduit. For example, if a subscriber to an OSP’s service downloads a copyrighted piece of music from a website or BBS not maintained by the
OSP, from another user’s hard-drive or from any other source not controlled by the OSP, the OSP should be exempt from liability; even though the individual user would be liable for copyright infringement under the current German copyright law in most cases.\textsuperscript{345} On the other hand Article 12 of the Directive eliminates liability “for the information transmitted”.\textsuperscript{346} This language could be interpreted like §5 TDG to address only liability for content that is illegal in and of itself, not legal content that is illegally transmitted.\textsuperscript{347} It remains to be seen how the Directive will be applied in practice and how the member states will amend their national laws. However, the similarity to § 5 TDG is striking and the language of Article 14 of the Directive further suggests, that there is a difference between liability for “information” and liability for “activities”. Copyright infringement is an activity and the content copied is not illegal in and of itself. Consequently, it seems that Article 12 of the Directive is akin to § 5 TDG and should not be applied to copyright infringement.

(b) Caching – Article 13 of Directive 2000/31/EC

Article 13 extends the limitation on liability to “caching” or other means of “making more efficient the information’s onward transmission to other recipients…” under similar conditions as Article 12. Article 13 requires that “…(a) the provider does not modify the information” This requirement already contained in Article 12 should be easy to fulfill for service providers since the storage of information generally does not modify the latter. This condition may be intended to ensure that the original information

\textsuperscript{345} See supra, p. 53
\textsuperscript{347} See supra, pp. 73-77
is not changed in order to claim that it was not infringing. Article 13 further requires that
"(b) the provider complies with conditions on access to the information" and "complies
with rules regarding the updating of the information, specified in a manner widely
recognized by the industry". Again, these are conditions, which are found in the DMCA
as well. The next condition for the exemption from liability is that the provider "does
not interfere with the lawful use of technology, widely recognized and used by the
industry, to obtain data on the use of the information".

Finally, a service provider is required to

"[a]ct expeditiously to remove or to disable access to the information it has stored
upon obtaining actual knowledge of the fact that the information at the initial
source of the transmission has been removed from the network, or access to it has
been disabled or that a court or an administrative authority has ordered such
removal or disablement."

These conditions make clear that a provider must not grant access to information that is
not legally accessible to users for one reason or the other; it refers to privacy issues as
well as to criminal liability and copyright infringements and should be simple to comply
with. Again, there is no sufficient practical experience yet to determine the exact
interpretation of the conditions by the courts or their actual functionality. However, it is
clear that an OSP is exempt from liability as long as it complies with the requirements,
even though the individual user may well be liable under German copyright law.

Article 13 of the Directive cannot apply to central P2P entities because the
material transmitted is never passed through the entities' netoworks and consequently not

348 This part of the Directive directly corresponds to 17 U.S.C.A. § 512 (b) (West Supp. 2000); see infra,
pp. 98 et seq.
“cached.” Just like Article 12, Article 13 does not preclude the Member States’ authorities from “requiring the service provider to terminate or prevent an infringement.”

(c) Hosting – Article 14 of Directive 2000/31/EC

Service provider liability is also limited in the context of “hosting”, which includes web page, Bulletin Board or any other “information society” hosting service that “consists of the storage of information provided by a recipient of the service”. Again the service provider must meet certain conditions to come within the scope of the liability limitation. It is required that

“(a) [t]he provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which illegal activity or information is apparent; or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.”  

The language of these requirements is rather straightforward and there should be little confusion as to what a provider must do to take advantage of the safe harbor. Since this provision also addresses liability for “illegal activity”, it should apply to copyright infringement even if Article 12 of the Directive should not. Unfortunately, if Article 12 is not applied to copyright infringement, a gap would be left in the regulations

349 See supra, p. 53
351 The similarity to the DMCA is apparent, even though Art. 14 is shorter and a bit less complicated.
regarding service provider liability, because Article 14 of the Directive only addresses hosting, not transmission. It remains to be seen how this gap will be filled.\footnote{See infra, pp. 169 et. seq. for the author's suggestions}

Regarding central entities at the core of centralized P2P networks, Article 14 of the Directive has some importance regarding cataloguing or listing services provided to the users. The actual transmissions, carried out by the users themselves cannot come within the scope of a provision regulating “hosting”. However, if a central entity provides lists of users’ files, chat rooms and the like, this could be considered hosting and should come within the scope of the provision. Accordingly, central P2P entities should be able to take advantage of the safe harbor. Whether they will actually be able to do so, considering their general knowledge of ongoing filesharing including sharing of copyrighted material, is questionable and largely depends on the solutions found by national legislatures in implementing the Directive’s mandates.

(d) No Obligation to Monitor – Art. 15 of Directive 2000/31/EC

Finally, Article 15 of the Directive 2000/31/EC clarifies that

“[M]ember States shall not impose a general obligation on providers… to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.”

(2) Outlook

It remains to be seen how Directive 2000/31/EC will be implemented by the various member states but it clearly mandates a limitation of liability for OSPs in
accordance with the Agreement reached regarding the “hosting” while implementing
the WIPO treaties’ mandate to preserve and protect the rights of the copyright holders in
the online environment. Unfortunately, it is unclear whether it adequately addresses the
issue of liability for transmission in Article 12. This will again largely depend on the
implementation in the member states. Regarding the liability of central entities in
centralized P2P systems, the issue remains as clouded as before, even though Article 14
should cover apply to some of these entities’ activities.

C. Conclusion as to the present state of the German law:

Before the introduction of European Directive 2000/31/EC, the law in Germany,
while relatively clear on the questions regarding the liability of individual users
(including the users of decentralized P2P networks), had not resolved the problem of OSP
or centralized P2P liability to a satisfactory extent. While the appellate decisions in the
CompuServe case and the AOL case had found reasonable solutions, there was no
certainty that courts would not make the same mistakes as the CompuServe trial court
had made. The finding of the AOL court that the TDG should not be applied to copyright
cases was sound and in accord with the legislative intentions and goals, yet it left a
large question mark about the standards to be applied in determining liability for
“foreign” content that violates copyright; especially regarding the question of intent or

355 Cf. supra, pp. 77-79 and see infra, pp. 169 et.seq. for the author’s suggestions
356 Supra, pp. 69, 75
357 Supra, pp. 75-77
negligence on the part of OSPs. The problem of liability of central entities at the core of centralized P2P systems was and remains unresolved as well.

These holes in the law can now be closed in enacting national law in accordance with Directive 2000/31/EC, which provides a wide range of liability limitations to be regulated in detail by the national legislative. It remains to be seen how Germany will adapt her laws to adhere to the relatively indefinite standards set forth in the Directive. A more detailed and thorough regulation of the liability for transmission of information that is not illegal but was illegally transmitted or copied is to be hoped for.
CHAPTER II: COPYRIGHT LAW IN THE UNITED STATES

A. Copyright protection in the U.S. – general overview

Copyright in the United States is governed by the Copyright Statute of 1976.\(^{359}\)

However, in any discussion of copyright law in the United States it is necessary to start with a look at the intellectual property clause in the Constitution, Art. I § 8 Clause 8: “The Congress shall have power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”

1. Philosophical and historical background

What the Framers had in mind when they adopted this provision in 1787 is uncertain.\(^{360}\) The language of the clause seems to place heavy emphasis on the promotion of science, i.e. learning, for the public welfare, by providing the author with an economic incentive to create. This language suggests that this was regarded as the primary purpose of the provision.\(^{361}\) However, the notion of author’s rights was not unknown to the Framers either, as can be seen in the use of the words “to secure” in conjunction with the rights of authors. If there is no right beforehand, how can it be secured?\(^{362}\) Or is this merely the result of a different use of language? The ambiguity in the clause is probably the result of the same ambiguity and uncertainty about the purpose of copyright

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\(^{360}\) Craig Joyce, William Party, Marshall Leaffer, Peter Jaszi: Copyright Law, 19 (5th Ed. 2000)

\(^{361}\) Id.
protection in England.\textsuperscript{363} Therefore a brief look at English copyright history is appropriate at this point.\textsuperscript{364}

In England, the printing press was introduced in 1476 by William Claxton.\textsuperscript{365} Just like in continental Europe, it practically marked the beginning of the development of copyright law. The new technology not only created competition among publishers and booksellers but also worried the crown, since it provided the means to spread heretic and anti-royal texts with greater ease than ever before.\textsuperscript{366} The beginnings of copyright law in England consequently were censorship provisions. In 1534 it was prohibited for anyone to publish printed material without the approval of royal censors and a license. In 1556 the first "copyright" (more a privilege) was granted by the crown.\textsuperscript{367} In 1557 a publishing monopoly was created; mainly for political reasons.\textsuperscript{368} The newly created "Stationers' Company" was bestowed with the sole right to print and publish books.\textsuperscript{369} This monopoly continued until 1694 when the Licensing Act of 1662 lapsed for the last time and was not renewed.\textsuperscript{370} The Stationers' Company lobbied for a new Licensing Act because they feared competition and wished to secure their monopoly. The result was the Statute of

\textsuperscript{362} Id. at 19, citing Barbara A. Ringer, Two Hundred Years of American Copyright Law, in Two Hundred Years of English and American Patent, Trademark and Copyright Law 117, 126 (Am. Bar Ass'n ed., 1977)
\textsuperscript{363} Craig Joyce, William Party, Marshall Leaffer, Peter Jaszi: Copyright Law, 20 (5th Ed. 2000)
\textsuperscript{365} Craig Joyce, William Party, Marshall Leaffer, Peter Jaszi: Copyright Law, 15 (5th Ed. 2000)
\textsuperscript{366} Id. at 16
\textsuperscript{368} Robert P. Merges, Peter S Menell, Mark A. Lemley: Intellectual Property in the New Technological Age, 345-346 (2000) (stating that the "Stationers" were trusted by the crown not to publish dissident or heretical material, in effect the creation of the Stationers Company was intended as a form of censorship)
\textsuperscript{369} Craig Joyce, William Party, Marshall Leaffer, Peter Jaszi: Copyright Law, 19 (5th Ed. 2000)
Anne, passed in 1710.\textsuperscript{371} For the first time in English copyright history, the Statute granted rights to the authors themselves, not only to the publishers. The Statute contained a system of formal requirements for protection such as registration, notice and deposit. The term of this right was limited to 14 years, renewable for another 14 years by the author.\textsuperscript{372} The Stationers’ Company backed this new development, even though it broke with their monopoly. The argument that the public would be served by securing the rights of the authors first appeared in this context. It provided to the Stationers a seemingly “public-spirited” argument.\textsuperscript{373} The notion of a perpetual natural or common law copyright much like the droit d’auteur\textsuperscript{374} came up in Donaldson v. Beckett, when a publisher argued that the author had had such a perpetual copyright before the introduction of the Statute of Anne and that the statute merely served to protect that right.\textsuperscript{375} Both in England and in the U.S. the notion of a perpetual copyright was dismissed, at least for published works.\textsuperscript{376}

The development of copyright law in the United States shows its English heritage in many ways. Even before the adoption of the copyright clause, all former colonies except for Delaware had passed copyright laws that mostly contained the English approach taken in the Statute of Anne.\textsuperscript{377}


\textsuperscript{373} Craig Joyce, William Party, Marshall Leaffer, Peter Jaszi, Copyright Law, 17-18 (5\textsuperscript{th} Ed. 2000)

\textsuperscript{374} Of course the continental European copyright is not perpetual. See supra, p. 28


\textsuperscript{376} Haimo Schack, Urheber- und Urhebervertragsrecht, 50 (1997); see also for the U.S., Wheaton v. Peters, 33 U.S. (8 Pet.) 591, (1834) (The Supreme Court court regarded a reward to the author as secondary in relation to the utilitarian intentions behind copyright.)

The copyright clause itself shows that the primary purpose of copyright is not understood to be the protection of the author or his "intellectual" property but rather the protection of the public domain, the promotion of learning and the protection of public access to copyrighted works. Copyright is generally not understood as a proprietary right of the author resulting from natural law theory, but as a privilege granted to the author (This understanding seems to be diminishing due to globalization-induced efforts to achieve uniformity in copyright legislation). The creation/work is not considered the author's property in the true meaning of the word. The author merely benefits from the grant of a limited statutory monopoly. This approach is intended to create an incentive for the author to create thereby promoting the "progress of science" (learning). This notion mirrors the preamble to the Statute of Anne, which must be regarded as its source.

Even though U.S. copyright law has changed significantly since the adoption of the copyright clause and has lately taken a course away from the statutory monopoly approach and towards moral rights and natural law theory, it seems fair to say that the original philosophy behind copyright protection in the United States was the utilitarian, or statutory monopoly approach; it is still the predominant one.

382 8 Anne, c. 19 (1710): "An Act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned."
2. The Copyright Statute of 1976

Congress exercised the power granted in the copyright clause in 1790 and enacted the first U.S. copyright statute which resembled the Statute of Anne.\(^{385}\) The original scope of the act, limited to books, was expanded by a number of court decisions and amendments to include prints, musical compositions, dramatic works, photographs, sculptures and artistic works.\(^{386}\) The Act was revised and amended in 1831 and 1870 before a completely new statute was enacted in 1909 which broadened the scope of copyright further by encompassing "all writings" and extending the term to 28 years and a second term of the same duration.\(^{387}\) An entirely new statute, which changed the face of U.S. copyright law significantly, was enacted in 1976. It has been amended various times since then, but continues to be the copyright law of the United States. It will be discussed in detail in the following.

a. Requirements for protection – subject matter of copyright\(^{388}\)

(1) Original works of authorship (17 U.S.C. § 102)

(a) To be protected by copyright law a work must be *de minimis* original. This means that it must not be a copy of a preexisting work but rather a distinguishable variation from existing works. It need not be entirely novel, yet some interpretative choices in

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\(^{386}\) Id.; see also Bleistein v. Donaldson Lithographing Co. 188 U.S. 239 (1903) (chromolithographs)


\(^{388}\) 17 U.S.C. § 102 (a): “Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.” (1994)
arrangement, selection or coordination must have been made by the author. There is no
requirement of artistic merit, aesthetics or the like. Very few works lack the creativity
to pass this de minimis threshold. Musical works, like they are concerned here, are
original in this sense if they are not copies of prior works and satisfy the de minimis
standard, which will usually be the case. If a musical work is not copyrightable subject
matter because it lacks originality, it is of no concern to infringement in the online or the
offline environment after all.

(b) A problem may arise where the work is functional or mechanical. While such
works certainly require labor in their creation they may not be creative in the sense of §
102. Since the “sweat of the brow” justification for copyright has been rejected by the
Supreme Court, the test can only be that set out by the originality requirement. This
however, is not relevant in the context of this thesis since musical works are rarely
functional at all. The problem will therefore not be discussed further.

(2) The idea/expression dichotomy

The copyright statute offers no protection for ideas themselves but only for the
concrete expressions thereof in order to prevent copyright from inhibiting other authors
from employing ideas from prior works in creating their own. Protection of ideas

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391 Id.
393 Baker v. Selden, 101 U.S. 99, (1879) ("...But there is a clear distinction between the book, as such, and the art which it is intended to illustrate.")
would destroy the basis of creation.\textsuperscript{394} In the context of this thesis this point has little relevance since the works affected by online copying and transfers are almost exclusively copyrighted and musical works rarely, if ever, are purely an idea or even just the only possible expression of an idea.

(3) Fixation in a tangible medium of expression

The expression of an idea must be fixed in a tangible medium in order to be protected under the statute.\textsuperscript{395} This condition is not as strict as it may seem at first glance: It is sufficient if the work is fixed in a medium “now known or later developed” from which it “can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device”.\textsuperscript{396} It makes no difference what form, manner or medium of fixation is used.\textsuperscript{397} While there may be several difficult problems in the area of fixation, these are not relevant here. Musical works are fixed as soon as they are written down as sheet music, recorded onto any sound carrier, be it the master tape, a CD, a cassette or the hard drive of a computer.\textsuperscript{398} The only problem that may be relevant to some extent is whether saving a musical work in a computer’s RAM constitutes fixation or whether it is too transitory in its nature. However, even this will not be decisive to the questions at issue since the question is whether certain activities are sufficient to find contributory or vicarious infringement of copyright. If there is no fixation, there is no copyright and accordingly, the questions asked here would not arise in that case.

\textsuperscript{394} See, L. Ray Patterson, \textit{A response to Mr. Y'Barbo's reply}, 5 Intell Prop. L. 235 (1997)
\textsuperscript{395} 17 U.S.C. § 102 (a) (1994)
\textsuperscript{396} 17 U.S.C. § 102 (a)
\textsuperscript{398} Id. at 405, see also Craig Joyce, William Party, Marshall Leaffer, Peter Jaszi: \textit{Copyright Law}, 74 (5\textsuperscript{th} Ed. 2000)
b. Scope of protection – §§ 106\textsuperscript{399}, 106A rights and limitations

(1) The exclusive rights of the copyright holder

(a) The exclusive right of the copyright owner to reproduce the work in copies (or phonorecords) is the most fundamental right granted by the statute and the most relevant in this context. Reproduction under § 106 is not limited to exact copying but encompasses "substantially similar" reproductions by any means "now known or later developed... from which the work can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device."\textsuperscript{400} This definition includes copying via the Internet, as will be seen in the relevant case law, as well.\textsuperscript{401}

(b) The copyright holder also has the exclusive right "to distribute copies...of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending."\textsuperscript{402} Distribution normally requires the physical transfer of ownership.\textsuperscript{403} In the online environment however, instead of a transfer of possession of a physical object, the digital transfer of files is the standard.\textsuperscript{404} The ITTF White Paper had suggested that

\textsuperscript{399} 17 U.S.C. § 106; "Subject to sections 107 through 118, the owner of copyright under this title has the exclusive right to do and authorize any of the following:
(1) to reproduce the copyrighted work in copies or phonorecords;
(2) to prepare derivative works based on the copyrighted work;
(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending;
(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes and pictorial, graphic or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly."


\textsuperscript{401} See A&M Records, Inc. v. Napster, Inc., 114 F.Supp. 2d 896, 912 (N.D.Cal. 2000) aff'd in part, rev'd in part, and rem'd, 239 F.3d 1004, 1014 (9th Cir. 2001); see infra, pp. 102 et. seq.

\textsuperscript{402} 17 U.S.C. § 106 (3), (4)

\textsuperscript{403} Thomas J. Smedinghoff, ed., Online Law-The Spa's legal guide to doing business on the Internet, 155, 158 (1996)

\textsuperscript{404} Id.
digital transmissions of copyrighted works are a form of distribution.\textsuperscript{405} This kind of transmission copyright was not enacted with the DMCA however.\textsuperscript{406} The digital transfer of copyrighted works caused considerable insecurity about whether the digital transfer of works could be regarded as a distribution before the WIPO treaties.\textsuperscript{407} The WPPT affords protection to producers and performers of "phonograms," or sound recordings, including the right to distribute their works in the form of phonograms, including digital distribution – a "right of communication to the public" by "wire or wireless means", including "the making available to the public... works in such a way that members of the public may access these works from a place and at a time individually chosen by them."\textsuperscript{408} The treaty was implemented as Title I of the DMCA, but § 106 was not changed or modified.\textsuperscript{409} The transfers of copyrighted musical works and sound recordings are infringements of the distribution right as acknowledged by the courts.\textsuperscript{410}

(c) Further rights granted to the copyright holder include the right to prepare derivative works, the right to perform certain types of works and the right to display certain types of works publicly.\textsuperscript{411} These rights are largely irrelevant to this thesis and will not be discussed further.

\textsuperscript{406} Craig Joyce, William Party, Marshall Leaffer, Peter Jaszi: Copyright Law, 496 (5th Ed. 2000)
\textsuperscript{407} Id.; For references to the treaties, see supra, p. 77
\textsuperscript{408} World Intellectual Property Organization: Performances and Phonograms Treaty, Dec. 20, 1997, art. 2(b), reprinted 36 I.L.M. 76 (1997), Arts. 7 & 8. (The Treaty also recognizes the following rights for performers: 1) a moral right to be "identified as the performer of his performances" (Art. 5); 2) the right to control the broadcasting and communication of their unfixed performances (Art. 6); 3) the right of rental (Art. 9); and 4) the right to make their works available to the public (Art. 10). Producers of phonograms are basically afforded the same rights as performers in Articles 11-14), compare supra, p. 77
\textsuperscript{409} Craig Joyce, William Party, Marshall Leaffer, Peter Jaszi: Copyright Law, 496 (5th Ed. 2000)
(2) Limitations to the copyright holder’s rights

The rights granted to the copyright holder are limited by “sections 107 through 118” of the copyright act and must be “read in conjunction with these provisions.” The limitations include the temporal limitation of 70 years *post mortem auctoris*, which serves to enhance and protect the public domain, thereby serving the “promotion of science.”

The most important limitation in the context of this thesis is the “fair use doctrine”, now codified in § 107. Under this doctrine it is permissible for an individual to reproduce a work in copies “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.” The primary purpose of the fair use doctrine is to increase the amount of information available to the general public, thereby encouraging learning and creating more opportunity to do so, which also serves the constitutional goal of the “promotion of science.” As will be seen, the doctrine has great relevance for the question of online infringement by individual users and consequently also for the question of indirect liability for those infringements by OSPs and other entities.

3. OSP liability before and after the DMCA

The Digital Millenium Copyright Act (DMCA) was signed into law on October 28, 1998. It was specifically designed to address copyright issues arising due to the increasing importance of the Internet. The DMCA contains detailed Safe Harbor

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411 See 17 U.S.C. §§106, 106 (A)
413 17 U.S.C. §107
414 17 U.S.C. §107
Provision in its Title II, now § 512 of the copyright statute. These safe harbors were included to limit the liability of "Online Service Providers" (OSPs). This term is defined broadly to include "Internet Access Providers" (IAPs), "Internet Service Providers" (ISPs) or any other entity that provides services "such as Internet access, email, chat-room and web page hosting", even if these activities are incidental to the entity's business and not the primary part thereof. This limitation of liability is intended to maintain the functionality of the Internet by establishing relatively clear boundaries within which there is no threat of monetary liability for OSPs.

Before the DMCA was introduced the so-called White Paper (Information Infrastructure Task Force (hereinafter: ITTF), Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights) had been prepared by the ITTF. This Task Force had been created by the Clinton Administration to examine the necessity of changes in the law to address the rise of new communications technology, especially the Internet, and its report became publicly available in September 1995. The White Paper addressed copyright issues among other things and suggested that the standards for vicarious and contributory liability for copyright infringement should not be changed because of the emergence of new technology. The Working Group thought it premature to reduce liability of any service

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417 Mark D. Robins, Digital Millenium Copyright Act defenses for Providers of online storage services and information location tools, 16 NO. 6/7 Computer Law. 11 (1999)
418 17 U.S.C. § 512 (k)(1) (West Supp. 2000); See also Robert P. Merges, Peter S. Menell, Mark A. Lemley, Intellectual Property in the new Technological Age, 975 (2000); All types of providers will be referred to as OSPs in the following.
419 Mark D. Robins, Digital Millenium Copyright Act defenses for Providers of online storage services and information location tools, 16 NO. 6/7 Computer Law. 11 (1999)
provider in the online environment because it would stifle the "development of marketplace tools". The White Paper regards service providers as a type of "electronic publisher". Consequently, it describes a reduction of liability as an unfair advantage, the refusal to take responsibility. The main arguments against a limitation of liability brought forward in the White Paper are that OSPs could seek indemnification from their subscribers in infringement cases and that they are in a better position to stop infringements than the copyright holders. Furthermore, the White Paper considers OSPs to be an "intermediary" dealing in copyright-protected works. Therefore, the White Paper argues, they should not be treated different from any other intermediaries. Proponents of holding OSPs strictly liable for online infringements committed by subscribers have argued an analogy to manufacturers that launch a product. If a product is foreseeably defective or dangerous, the manufacturer is strictly liable under products liability standards and, the strict liability faction argues, by analogy, OSPs should be strictly liable for infringements because their services foreseeably lead to copyright infringements. While this argument by analogy may seem intriguing, it is flawed. In tort, a manufacturer is held strictly liable for products that are inherently defective or dangerous. The "product" provided by an OSP is not defective at all, it is not "unsafe in its intended use"; it is rather the intentional misconduct committed by customers of the OSPs that cause infringements. It is not the product, like a defective car, that causes injury but the behavior of the user – if a car is used in committing a crime, the manufacturer should

surely not be liable for the injuries caused by the crime. Tort theory teaches that an intentional act by a party other than the manufacturer breaks the chain of causation and that there is no liability for this act and the consequences on the side of the manufacturer. Consequently, the analogy to strict liability in tort is false and cannot provide grounds for holding OSPs liable for subscriber infringements. The White Paper nevertheless asserts that OSPs should be held (strictly) liable for reasons of ‘fairness’ because OSPs profit from subscriber induced infringements and provide the means to commit online infringement in the first place. However, this reasoning is shaky at best. First of all, the manufacturers of computers, modems, disk drives, CD drives, CD writers and other devices necessary to commit online infringements should be strictly liable under this reasoning as well; they benefit from the infringements through the sale of this equipment to infringers, arguably more so than the OSPs which only receive a flat fee, independent from any infringing activity. This issue is exactly what the Supreme Court resolved in Sony v. Universal City Studios (hereinafter: Sony): “The sale of copying equipment, like the sale of other [staple] articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate... purposes” or even just “capable of substantial non-infringing uses.” The services provided by OSPs are clearly capable of uses that do not infringe copyright in the least;

425 See id. at 667
426 See, Timothy L. Skelton, Internet Copyright Infringement and Service Providers: The case for a negotiated rulemaking alternative, 35 San Diego L. Rev. 219, 268-269 (1998)
428 See Timothy L. Skelton, Internet Copyright Infringement and Service Providers: The case for a negotiated rulemaking alternative, 35 San Diego L. Rev. 219, 269-270 (1998)
429 Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984) – Copyright owners had sued the manufacturer of VCRs for contributory copyright infringement. The Supreme Court found that the practice of "time-shifting" where a consumer records a TV show to watch it at a later time was a substantially non-infringing use that qualified the VCR as a staple article of commerce.
the majority of uses is non-infringing.\textsuperscript{432} Under Sony, strict liability for OSPs is not a possibility, however convenient this could be. If the analogy between manufacturers and OSPs is to be applied at all, it cannot be applied without also applying the Sony rule, which clearly provides a release from liability for staple articles of commerce, like Internet access, or online services.\textsuperscript{433}

Even though the White Paper led to initiatives for legislation,\textsuperscript{434} its suggestions are not what eventually became the law in the DMCA. Even more interestingly, the courts did not follow the White Paper’s suggestions either but rather created limitations for OSP liability in two cases that were decided within two months after the White Paper was released.\textsuperscript{435} To fully comprehend the cases and the DMCA’s provisions, a clear distinction is to be made between direct copyright infringement on the one hand and vicarious and contributory infringement on the other.\textsuperscript{436}

a. OSP/ISP liability before the DMCA – Direct infringement?

Liability for direct copyright infringement arises where a party itself violates one of the copyright holder’s exclusive rights: the rights to reproduce, distribute, display and publicly perform a work or the right to prepare derivative works.\textsuperscript{437}

\textsuperscript{431} \textit{Id.} at 442
\textsuperscript{432} \textit{See}, Timothy L. Skelton, \textit{Internet Copyright Infringement and Service Providers: The case for a negotiated rulemaking alternative}, 35 San Diego L. Rev. 219, 270-271 (1998)
\textsuperscript{433} \textit{See id.} at 270
\textsuperscript{435} Frank Music Corp., No. 93 Civ. 8153 (S.D.N.Y.; the case was settled); Religious Technology Center v. Netcom On-Line Communication Services, Inc., 907 F. Supp. 1361 (N.D. Cal. 1995)
\textsuperscript{436} \textit{See} ALS Scan, Inc. v. RemarQ, Inc., 239 F. 3d 619, 622 C.A. 4 (Md.) 2001
\textsuperscript{437} 17 U.S.C. § 106
In the context of OSP liability, the reproduction right and the distribution right are the most relevant. This is easily explained by the fact that transmissions over the Internet necessarily involve at least partial copying of the material to be transferred and constitute a form of distribution by making the material available to a large public.\(^{438}\)

(1) **Cubby v. CompuServe (October 1991)**

Although this case (hereinafter: Cubby) does not revolve around copyright issues, it may provide some insights about the general issue of OSP liability for subscriber activities and is considered a “watershed” decision because it first addressed the issue of OSP liability for third party conduct.\(^{439}\) CompuServe was sued for defamatory statements that subscribers had posted in a chat room maintained by CompuServe.\(^{440}\) The analogy to copyright issues is to be found in the distinction between the “publisher” and the “distributor” of defamatory statements: A publisher of such statements is strictly liable while a distributor can only be held liable if it had knowledge or reason to know of the statements. This distinction is similar to the distinction between direct and contributory infringement in copyright.\(^{441}\) The court did not hold CompuServe strictly liable but rather found that:


\(^{439}\) *See* Timothy L. Skelton, *Internet Copyright Infringement and Service Providers: The Case for a Negotiated Rulemaking Alternative*, 35 San Diego L. Rev. 219, 244 (1998)


"[C]ompuServe has no more editorial control over such a publication than does a public library, book store, or newsstand, and it would be no more feasible for CompuServe to examine every publication... than it would be for any other distributor [emphasis added]... First Amendment guarantees have long been recognized as protecting distributors..."\(^{442}\) As a distributor, CompuServe could only be liable if it had had knowledge or reason to know of the statements. The court found that CompuServe did not have knowledge of the statements, especially since the chat room itself was operated by a subcontractor rather than by CompuServe directly.\(^{443}\)

In another defamation case, \textit{Oakmont v. Prodigy}\(^{444}\) (hereinafter: Oakmont), the court went the other way and held the OSP liable for defamatory statements posted on the OSP's network. The court saw the OSP as a publisher and therefore strictly liable because Prodigy had "held itself out to the public and its members as controlling the content of its... bulletin boards" and because Prodigy exercised this control by actively using technological measures and manpower to monitor the BBS' and delete illegal or offensive content.\(^{445}\) This decision shows that the result in Cubby cannot be relied on entirely; a hint at the controversy and difficulties surrounding the issue.\(^{446}\)


Before the DMCA was introduced, an ISP was held liable for direct copyright infringement in 1993 in *Playboy Enterprises v. Frena* (hereinafter: Frena). The defendant hosted a bulletin board service (BBS) on which he posted his own original photographs. Subscribers to his service were permitted to browse and download these images onto their computers and could also post images themselves. Several images, to which the plaintiff held the copyright, were posted on the BBS by subscribers. The defendant had not posted any of these images. He even removed them from the BBS once he had become aware of them. The court considered this irrelevant and found the defendant’s activities to be infringements of the plaintiff’s copyright anyway:

"[I]t does not matter that Defendant... may have been unaware of the copyright infringement. Intent to infringe is not needed to find copyright infringement. Intent or knowledge is not an element of infringement, and thus even an innocent infringer is liable for infringement."\(^{449}\)

The court correctly states that neither intent nor knowledge are elements of copyright infringement.\(^{450}\) However, the court ignores that the Internet cannot operate without "passive" reproduction and distribution of material, copyrighted or not. The automatic operations performed by the OSP, or more accurately its networks, at the

\(^{447}\) *Playboy Enterprises,* Inc. v. Frena, 839 F. Supp. 1552 (M.D. Fla. 1993); Similarly, in *Playboy Enterprises,* Inc. v. Webbworld, Inc., 968 F.Supp. 1171, 1174-1175 (N.D. Tex. 1997) (holding web site operator liable for direct copyright infringement by selling access to copyrighted images that had been uploaded to a BBS by others), see also infra, p. 105.

\(^{448}\) *Playboy Enterprises,* Inc. v. Frena, 839 F. Supp. 1552, 1554 (M.D. Fla. 1993)

\(^{449}\) Id.

users’ request are inherent to the Internet’s structure.\textsuperscript{451} If every copy made and distributed by an OSP in the course of fulfilling a user’s request were to constitute copyright infringement, the scope of liability ensuing would be practically limitless. For example, liability would not be limited to the OSP reacting to its subscriber’s request, but rather extend to an unknown number of other computer users and other OSPs whose networks were involved in the transfer of the file. Data is not transferred directly from the OSP to the users but travels through a multitude of computers, each of which make at least a partial copy of the file sent.\textsuperscript{452} Suppose an email containing infringing material is sent from New York to Boston, it could theoretically pass through computers in Seattle, Houston and Athens before reaching its destination. All these computers made a copy or partial copy of the email in process.\textsuperscript{453} Under Frena, the owners of these computers would be liable for copyright infringement. This seems not only curious, but simply wrong, since none of the persons involved had anything to do with the infringement except for the fact that their computers were automatically used in the process of transmission. An analogy outside the online environment could be extending liability to the U.S. Postal Service for transporting infringing material. The only difference is that the Postal Service does not make any copies of the letters transported, which may seem significant, considering that copying is one of the author’s exclusive rights.\textsuperscript{454} However, in the online context, these copies are only made because the “transport” of files would be impossible

\textsuperscript{451} Alfred C. Yen, \textit{Internet Service Provider Liability For Subscriber Copyright Infringement, Enterprise Liability, And the First Amendment}, 88 Geo. L. J. 1833, 1842 (2000); See also Timothy L. Skelton, \textit{Internet Copyright Infringement and Service Providers: The Case for a negotiated rulemaking alternative}, 35 San Diego L. Rev. 219, 219-242 (1998)

\textsuperscript{452} Alfred C. Yen, \textit{Internet Service Provider Liability For Subscriber Copyright Infringement, Enterprise Liability, And the First Amendment}, 88 Geo. L. J. 1833, 1842 (2000)

\textsuperscript{453} Timothy L. Skelton, \textit{Internet Copyright Infringement and Service Providers: The Case for a negotiated rulemaking alternative}, 35 San Diego L. Rev. 219, 229-234 (1998)

\textsuperscript{454} 17 U.S.C. § 106
without them, just like transporting letters would be impossible without means of transportation. If the Postal Service had to copy letters in order to forward them to the recipient for some hypothetical reason, it would certainly not be in anybody's interest to hold the Postal Service liable for copyright infringement. Such liability is far beyond the scope of copyright protection as intended by the Copyright Statute or the constitutional Copyright Clause. It would ultimately inhibit technology because it would extend liability to processes and actions vital to the Internet's functionality and thereby at the very least slow down the introduction of any innovation related to this kind of technology. The "promotion of science"\textsuperscript{55} (i.e. learning) has no benefit from inhibiting technology. Furthermore, the mere automatic transfer of infringing material arguably has no direct economic impact. Yet copyright is intended, among other things, to protect the author's economic interests to ensure an incentive to create, thereby promoting learning for the public benefit.\textsuperscript{456}

(3) Religious Technology Center v. Netcom (November 1995)

Not surprisingly, other courts did not follow the decision in Frena. In Religious Technology Center v. Netcom On-Line Communication Services, Inc. (hereinafter: Netcom), the court held that Netcom, the ISP involved in the case, was not liable for direct copyright infringement in a situation strikingly similar to the one in Frena.\textsuperscript{457} The Scientology affiliate Religious Technology Center had filed suit against the operator of a BBS, Tom Klemesrud, his subscriber Dennis Erlich and the ISP Netcom for direct

\textsuperscript{455} U.S. Const, art. 1, § 8, cl. 8: "...to promote the progress of science..."; see also L. Ray Patterson, A response to Mr. Y'Barbo's reply, 5 J. Intell Prop. L., 235 (1997)
\textsuperscript{456} Craig Joyce, William Patry, Marshall Leafer, Peter Jaszi, Copyright Law, 19-20 (5th Ed. 2000)
vicarious and contributory copyright infringement. Erlich, a critic of Scientology, had posted excerpts from Scientology literature, to which Religious Technology Center held the copyright, in a newsgroup on Netcom’s Usenet server using Klemesrud’s BBS. From the BBS the posting was sent to be posted on Netcom’s Usenet server, which then spread the postings throughout the entire Usenet system. Netcom did not exercise any direct control over this automatic process. Scientology requested the removal of the material to which it held the copyright and sued the Klemesrud and Netcom for copyright infringement after they had refused to comply, and had demanded that Scientology prove its copyright.\(^{458}\) Religious Technology Center contended that, although Netcom’s server was not the point of origin of the allegedly infringing material, Netcom should be held liable for direct, contributory and vicarious infringement and argued in part based on the decision in Frena. The court clearly rejected the approach taken in Frena for the reasons stated above:

“[P]laintiff’s theory would create many separate acts of infringement and, carried to its natural extreme, would lead to unreasonable liability... It would also result in liability for every single Usenet server in the worldwide link of computers transmitting Erlich’s message to every other computer. These parties, who are liable under plaintiff’s theory, do no more than operate... a system that is essential if Usenet messages are to be widely distributed. There is no need to construe the Act to make all of these parties infringers.”\(^{459}\)


\(^{458}\) Religious Technology Center v. Netcom On-Line Communication Services, Inc., 907 F. Supp. 1361 (N.D. Cal. 1995); see also Elizabeth McNamara, Online Service Provider Liability under the Digital Millenium Copyright Act, 17 Fall Comm. Law. 5, 5-6

Not only is there no need to construe the statute that broadly, it seems to contradict the very purpose of U.S. copyright to some extent. Three of the (arguably) constitutional purposes of copyright, the protection of the public domain, the promotion of learning and the “right” to access, can hardly be brought in sync with such an extension of liability. Copyright protection against any automatic act of transmission would ultimately limit access to protected and unprotected works and shift the burden of proof from the copyright owner to the alleged infringer. As the Netcom court stated:

“[W]here 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 functioning of the Internet.”

The court also held that: “although copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant’s system is merely used to create a copy by a third party.”

While the first two arguments are convincing, the last one seems flawed. If copyright really is a strict liability statute, there is no need for an element of volition. Causation may indeed be required even under strict liability, but it is entirely dependent on the definition of causation whether there is causation in these cases or not. It cannot be denied that the OSP/ISP’s service is sine qua non for the infringement, since the infringement would not and could not occur without the OSP/ISP acting as an intermediary. While the provider’s automatic activity is certainly not intended to

462 Id. at 1370
contribute to infringements, it is a contributory cause for the infringement and hence causation is present even though volition is not. Since strict liability and a requirement of an element of volition are something of an oxymoron, the court’s argument is inaccurate. Even though the result in Netcom is correct, the court relies on some flawed argumentation. Yet, this does not render the decision as such any less valuable and correct. It clarifies that a “system that ‘incidentally makes temporary copies’ should not subject its operator to liability for copyright infringement” because the operator does not cause or induce the infringement.\footnote{See James A. Henderson, Aaron D. Twerski, Intent and Recklessness in Tort: The Practical Craft of Restating Law, 54 VNLR 1133 (19xx)}

(4) \textit{Sega v. MAPHIA} (December 1996)

Other courts have followed the decision in Netcom.\footnote{Timothy L. Skelton, Internet Copyright Infringement and Service Providers: The Case for a negotiated rulemaking alternative, 35 San Diego L. Rev. 219, 252 (1998), quoting Religious Technology Center v. Netcom OnLine Communications, Inc., 907 F. Supp. 1361, 1370 (N.D. Cal. 1995); This holding will be of great importance in the context of vicarious and contributory infringement, \textit{infra}, pp. 116 et. seq.} In \textit{Sega Enterprises, Ltd. v. MAPHIA}\footnote{See Marobie-FL, Inc. v. National Association of Fire Equipment Distributors, 983 F.Supp. 1167, 1178 (N.D. Ill. 1997); Sega Enterprises v. MAPHIA, 948 F. Supp. 923, 931-932 (N.D. Cal. 1996)} (hereinafter: Sega), the BBS operator Chad Sherman (a.k.a. “Brujo Digital”) provided the MAPHIA BBS for users of the Sega gaming console, to which games could be uploaded. Subscribers to the BBS could also download games from the site and were encouraged to use hardware sold by MAPHIA to facilitate the copying of games from Sega compatible read-only-memory game cartridges.\footnote{948 F.Supp. 923 (N.D. Cal. 1996)} The court in Sega followed Netcom, even though the defendants in Sega were involved in the infringement to a much greater extent than Netcom.\footnote{Id. at 927-929} It argued that while the defendant “solicited others to
upload games...Sega has not shown that [defendant] himself uploaded or downloaded the files or directly caused such uploading or downloading".469 The court correctly recognizes that concerning direct copyright infringement, it "has no bearing...whether [defendant] knew his BBS users were infringing on Sega's copyright, or encouraged them to do so."470 Consequently, the court held that the defendant in Sega was not liable for direct copyright infringement, but that the defendant's activities should rather be analyzed under contributory or vicarious infringement standards.471 By those standards, the defendant was held liable for copyright infringement, even though there had been no direct infringement.472

The Sega court's quotations from Netcom show that it discounted Frena for the same reasons and consequently decided to follow Netcom.473 The decision correctly recognizes that direct infringement requires direct involvement. Where the alleged infringer did not infringe herself, there can only be liability for contributory or vicarious infringement. Whether the Sega court reached the correct decision regarding these forms of liability will be addressed later.474

469 Id.
470 Id.
471 Id.; See also 932, Footnote 5 (The court explicitly mentions that its decision is consistent with an earlier decision in the same case, where Sega was granted injunctive relief because it had shown that someone was infringing its copyright. The earlier decision did not make a specific conclusion as to whether the defendant was liable for direct copyright infringement or contributory or vicarious infringement. See Sega Enterprises, Ltd. v. MAPHIA, 857 F.Supp. 679, 686 (N.D. Cal. 1994)
472 Sega Enterprises, Ltd. v. MAPHIA, 948 F.Supp. 923, 936 (N.D. Cal. 1996)
473 Id. at 932
474 Infra, p. 111
The defendants in *Playboy v. Webbworld* (hereinafter: Webbworld) operated a commercial adult website. The images were collected from adult-oriented newsgroups by a program that automatically scanned for adult images and copied them onto Webbworld’s servers while deleting any accompanying text. Subscribers to Webbworld’s site were allowed to access and download these images for a flat monthly fee. Playboy sued for direct and vicarious copyright infringement after having discovered many copyrighted images from its magazine on the site. The court found Webbworld directly liable holding that “the evidence unequivocally shows that Webbworld electronically reproduced, distributed and displayed [Playboy’s] protected images.” Webbworld argued on the basis of the Netcom decision that it merely served as a conduit between subscribers and adult oriented newsgroups. The court rejected this argument, reasoning that Webbworld, unlike Netcom, did not provide access to the Usenet system but rather sold adult images to persons who already had access to the system. The court also weighed the fact that Webbworld actively sought the images and copied them for its own commercial purposes heavily against Webbworld. Furthermore, the decision compares Webbworld to a shop-owner who may choose the sources of the products to sell. Webbworld [had] the ability to choose its newsgroup sources. Clearly a newsgroup named “alt.sex.playboy” might instantly be perceived as problematic from the standpoint of federal copyright law.”

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478 *Id.* at 16
479 *Id.* at 17-18
the scanning software without considering a system for oversight, the court rejected Webbworld’s argument that it had no control over the ‘automatic’ operations of its scanning software.

The decision comes to a reasonable result, considering that Webbworld did actively seek out and copy images from newsgroups knowing that many of these would be copyrighted and being ignorant towards these copyrights and any form of oversight or control of its scanning software. However, the court is mistaken in reasoning that the Netcom situation was different because Netcom only “provided Internet access”. Netcom was certainly a passive conduit but it did not provide Internet access to the BBS subscribers at all, but rather provided a Usenet news feed.\(^{(480)}\) Nonetheless, the decision in Webbworld is correct and can be distinguished from Netcom because Netcom was passive whereas Webbworld actively caused the infringements; it was no a conduit.\(^{(481)}\)

(6) Evaluation of the decisions regarding direct infringement

It seems the decisions in Netcom and Sega are not only more reasonable than the Frena decision, but are also more compatible with the Constitution. The Copyright Clause names the promotion of science (e.g. learning) as one of the reasons for creating copyright in the first place and clearly serves to protect the public domain in pursuit of this goal.\(^{(482)}\) It could well be argued that the Internet promotes learning and accessibility of materials for the promotion of learning. The Internet also widens the public domain in


\(^{(481)}\) Id.

\(^{(482)}\) U.S. Const. art. 1, §8 cl. 8: “Congress shall have Power... To Promote the Progress of Science... , by securing for limited Times, to Authors... the exclusive Right to their... Writings... ”. See Craig Joyce, William Patry, Marshall Leaffer, Peter Jaszi, Copyright Law, 19-20 (5\(^{th}\) Ed. 2000); L.Ray Patterson, *A response to Mr. Y’Barbo’s reply*, 5 Intell Prop. L. 235 (1997)
the sense that materials are made accessible in a way and format previously not available. Extending OSP-liability for copyright infringement to such an extent as the Frena decision would, could practically disable the Internet, thereby limiting opportunity for learning. It is questionable whether a decision that could limit learning in such a drastic way as Frena is fully compatible with the constitutional Copyright Clause and the standards of interpretation it sets forth regarding the copyrights laws passed under it.

b. OSP/ISP liability under the DMCA – No Direct Infringement

The DMCA eliminates OSPs (monetary) liability for direct copyright infringement for their passive transmission, re-transmission and temporary storage of infringing material on their network. This language covers exactly the situations addressed in the cases above with regard to direct infringement.

To avoid liability, the ISP must comply with a few basic requirements stated in 17 U.S.C. § 512 (a):

"[A] service provider shall not be liable... by reason of the provider’s transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if-

(1) the transmission of the material was initiated by or at the direction of a person other than the service provider;"

483 See Alfred C. Yen, Internet Service Provider Liability For Subscriber Copyright Infringement, Enterprise Liability, And the First Amendment, 88 Geo. L. J. 1833, 1842 (2000)
(2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;

(3) the service provider does not select the recipients of the material except as an automatic response to the request of another person;

(4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and

(5) the material is transmitted through the system or network without modification of its content."

It is clear from the use of the conjunction "and" in the statute, that all the requirements listed must be met conjunctively to be safe from liability.\(^{485}\) The conditions cover all the activities typically performed by an OSP/ISP in the normal course of providing Internet access and services: If, for example, a subscriber to AOL uploads an image to a bulletin board, the "transmission of the material" was "initiated by a person other than the service provider", the image travels through AOL's network "automatically", AOL does not "select the recipients" or modify the image transmitted and the copy made by AOL in order to carry out the user's request will generally not be

\(^{485}\) Alfred C. Yen, Internet Service Provider Liability For Subscriber Copyright Infringement, Enterprise Liability, And the First Amendment, 88 Geo. L. J. 1833, 1842 (2000)
stored for longer "than reasonably necessary". In this example, AOL would be well within the scope of the safe harbor concerning direct infringement.

17 U.S.C. § 512 (a) clarifies that OSPs are not liable for direct copyright infringement if they merely perform the operations commonly necessary to keep the Internet and their services functional and running. To take advantage of the safe harbor, an ISP must further "adopt policies for termination of subscribers who are repeat infringers" and "implement technical measures that have been developed by industry consensus and are used by content providers to protect their work." These requirements should be easy to meet for any OSP. The requirement not to store such material for a longer time than reasonably necessary will be easy to comply with once it has been clarified what amount of time is reasonable in his sense.

c. OSP/ISP vicarious/contributory liability before the DMCA

Liability for contributory copyright infringement arises where a party has "induced, caused or materially contributed to an infringing activity of a third party while having knowledge of the infringement or at least reason to know of it". The central question regarding this standard in the online environment is under which circumstances a party should be considered to have knowledge or reason to know of the infringement. The DMCA, although not directly mentioning the question, provides some answers.

486 What period of time is to be considered "reasonable" in this sense is yet to be determined.
487 Alfred C. Yen, Internet Service Provider Liability For Subscriber Copyright Infringement, Enterprise Liability, And the First Amendment, 88 Geo. L. J. 1833, 1883 (2000)
489 Mark D. Robins, Digital Millenium Copyright Act defenses for Providers of online storage services and information location tools, 16 NO. 6/7 Computer Law. 11, 13 (1999)
Liability for vicarious copyright infringement is determined by a different standard. Such liability is incurred where "the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of the copyrighted materials – even in the absence of actual knowledge that the copyright monopoly is being impaired." This type of liability is addressed in the DMCA as well, as can be seen in the mention of "direct financial benefit" in 17 U.S.C. § 512 (c) (1) (B).

(1) Vicarious liability

Concerning vicarious liability, it has been generally accepted that "dance-hall proprietors" are liable for copyright infringements committed by performers, while landlords are not liable for copyright infringements committed by their tenants. The reasoning behind this rule is that landlords rent out space for a fixed fee and consequently do not profit from any copyright infringement committed by the tenant. Therefore, a landlord, while maybe having the right and ability to supervise the tenant, has no financial interest in a tenant’s infringing acts unless the rental fee depends on the tenant’s commercial activities. The constellation in the "dance hall" cases was different. These usually involved a venue for musical performances having hired a musician to play copyrighted musical works without obtaining a license. Even though the musicians or

490 Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304, 307 (2nd Cir. 1963)
493 See Dreamland Ballroom, Inc. v. Shapiro, Bernstein & Co., 36 F. 2d 354 (7th Cir. 1929) (holding dance hall vicariously liable for hiring an orchestra that played infringing music); KECA Music, Inc. v. Dingus McGee’s Co., 432 F. Supp. 72 (W.D. Mo. 1977) (cocktail lounge held liable for performance of infringing
music suppliers were hired as independent contractors, the courts in these cases found vicarious liability, because the defendants had both the “right and ability to supervise” the hired musicians’ performance and prevent infringements, and they also “had a direct financial benefit” from the infringements in the form of admissions fees. In the online context, the question consequently is whether OSPs resemble landlords or “dance-hall proprietors”.

The two major cases concerning vicarious liability of OSPs addressed this question and held that OSPs resemble landlords rather than “dance-hall proprietors”.

(a) Religious Technology Center v. Netcom (November 1995)

In Netcom, the court assumed the critic’s postings to be copyright infringements and analyzed the vicarious liability issue under this premise. It held that while Netcom (the OSP) may have had the ability to supervise postings sent through its network, it had no direct financial interest and was therefore not vicariously liable. At this point, the court addressed the distinction between landlords and “dance-hall proprietors”. The court in Netcom found that the relationship between an OSP and its subscribers is like the relationship between landlord and tenant since the subscribers usually pay a flat fee for the OSP’s services. Accordingly, the OSP had no direct financial benefit from

works by hired musicians); Famous Music Corp. v. Bay State Harness Racing and Breeding Association, 554 F. 2d 1213 (1st Cir. 1977) (racetrack held vicariously liable for hiring supplier of infringing music for customers); Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F 2d 1159 (2nd Cir. 1971); Fonovisa Inc. v. Cherry Auction, Inc., 76 F. 3d 259 (9th Cir. 1996)

494 See Alfred C. Yen, Internet Service Provider Liability For Subscriber Copyright Infringement, Enterprise Liability, And the First Amendment, 88 Geo. L. J. 1833, 1845 (2000), citing Fonovisa Inc. v. Cherry Auction, Inc., 76 F. 3d 259, 262 (9th Cir. 1996)

495 Alfred C. Yen, Internet Service Provider Liability For Subscriber Copyright Infringement, Enterprise Liability, And the First Amendment, 88 Geo. L. J. 1833, 1844 (2000)


497 Supra, p. 107

infringements committed by the subscriber, even though the ability and right to supervise are present. Consequently, the court found no liability for vicarious infringement.499

(b) Fonovisa v. Cherry Auction (January 1996)

This case (hereinafter: Fonovisa) did not involve the Internet or other online communications but has been quoted by subsequent Internet-related decisions on the issue of contributory and vicarious liability.500 Fonovisa contended that Cherry Auction was liable as a vicarious and contributory infringer because it organized and operated "swap meets" where pirated music was exchanged on several occasions, but lost in District Court.501 The Ninth Circuit handled Fonovisa’s appeal502 and held Cherry Auction liable for vicarious infringement. The court found that Cherry Auction had had the right and ability to supervise the infringing activities and had also directly benefited from the infringements (Shapiro, Bernstein -Test). It reasoned that Cherry Auction had the right and ability to supervise because required concessionaires to sign agreements requiring them to adhere to certain rules, patrolled the venues of the auctions and controlled both promotion of and access to the events.503 The court further stated that Cherry Auction had a direct interest in the infringements because it gained “substantial financial benefits from admissions fees, concession stand sales and parking fees, all of which flow directly from customers who want to buy counterfeit recordings…”504

499 Id.
500 Timothy L. Skelton, Internet Copyright Infringement and Service Providers: The Case for a negotiated rulemaking alternative, 35 San Diego L. Rev. 219, 252-253 (1998)
502 Fonovisa, Inc. v. Cherry Auction, Inc., 76 F. 3d 259 (9th Cir. 1996)
503 Id. at 262
504 Id. at 263
The Ninth Circuit also held Cherry Auction liable for contributory infringement. This will be addressed in the discussion of contributory infringement.

(c) Marobie-FL v. NAFED (November 1997)

Another case dealing with the issue of OSPs' vicarious liability for copyright infringement is Marobie-FL, Inc. v. National Association of Fire Equipment Distributors (NAFED) (hereinafter: Marobie). The plaintiff in this case held the copyright in clip art which was used by and had been developed for the fire service industry. The defendant owned a web site maintained on the network of its ISP, Northwest Nexus, Inc. (hereinafter: NN) on which plaintiff's copyrighted images were available for download. Marobie sued NAFED for direct copyright infringement and its ISP NN for direct, vicarious and contributory infringement. Both parties moved for summary judgement.

The difference between the factual scenario in this case and in Netcom is quite obvious: While NN was sued for its subscriber's behavior, Netcom was sued for the behavior of its subscriber's customer. While Netcom had no relationship with this customer, NN had a direct formal relationship with NAFED; it provided more than a mere "gateway". Marobie argued that while Netcom had only provided a gateway and had been too distant from the infringement to be liable, NN was closer to the infringer.

505 Id. at 264
506 983 F.Supp. 1167 (N.D. Ill 1997)
507 Id. at 1171; Clip art are computer generated simplified images sold to consumers to be incorporated into their own computer generated works, often used in publications like newsletters, see generally, Timothy L. Skelton, Internet Copyright Infringement and Service Providers: The Case for a negotiated rulemaking alternative, 35 San Diego L. Rev. 219, 257 (1998).
508 Marobie, 983 F.Supp. 1167, 1171-1172 (N.D. Ill 1997)
509 Id. at 1172
510 Id.
because of the formal relationship with NAFED, providing more than just Internet access but storing the infringing files on its network. Therefore, Marobie argued, NN should be held liable.\textsuperscript{511} The court however, followed Netcom. It first clarified that there was no room for direct liability under Netcom, noting that NN did indeed provide more services than Netcom had, but that NN “only provided the means to copy, distribute or display plaintiff’s works, much like the owner of a public copying machine.” The court held that because the lack of actual engagement in infringing activities by NN, it could not be directly liable.\textsuperscript{512}

The court goes on to hold that there was no vicarious infringement. It found that there was no direct financial interest on NN’s side due to the flat fee paid for its services by NAFED and that there was a triable issue of fact concerning the ability to supervise and control.\textsuperscript{513}

While the result in Marobie is consistent with Netcom and correct, it is based on flawed argumentation in parts. The court fails to recognize that Netcom had not provided Internet access to the BBS subscribers at all. This factual mistake does not taint the argumentation, however, since the arguments brought forward in Netcom are applicable and valid nonetheless. Unfortunately, the Marobie court also relies on an inaccurate standard when it addressed the issue of contributory infringement. Instead of asking whether or not NN had knowledge of the infringements it finds a triable issue of fact regarding NN’s ability to control and supervise, a question that is only relevant

\textsuperscript{511} Alfred C. Yen, \textit{Internet Service Provider Liability For Subscriber Copyright Infringement, Enterprise Liability, And the First Amendment}, 88 Geo. L. J. 1833, 1847 (2000)


\textsuperscript{513} \textit{Id.}
concerning vicarious liability.\textsuperscript{514} This mistake is unfortunate but does not render the decision wrong in its result, considering that contributory infringement was only addressed in a motion for summary judgment.

(d) Evaluation of the cases

The results in both Netcom and Marobie present a viable and practical solution to the problem of OSP liability within the scope of their factual constellations. It is indeed hard to see how a provider who is paid a flat rate for its services could be considered to directly benefit from an infringement committed by either its subscriber or its subscriber’s customers. Suffice to say that there is no direct financial benefit to the OSP in these cases, not even indirectly, since they do not profit from a subscriber’s site being popular due to the availability of infringing material, for example. The question whether the OSP has “the right and ability to supervise” its subscriber’s activity is slightly harder to answer. The decisions in Marobie and Netcom illustrate a trend towards a narrow understanding of vicarious liability for OSPs. According to this narrow understanding, a provider cannot be said to have the “ability and right to supervise” because she could have theoretically detected and prevented copyright infringements.\textsuperscript{515} Certainly an OSP has the right to monitor the sites it hosts on its network and certainly it is theoretically possible not only to monitor all those sites but also to prevent infringements by taking down or disabling potentially infringing sites. Accordingly, the narrow understanding of the “ability” standard mentioned above could be contested. However, it is practically

\textsuperscript{514} Timothy L. Skelton, \textit{Internet Copyright Infringement and Service Providers: The Case for a negotiated rulemaking alternative}, 35 San Diego L. Rev. 219, 258-259 (1998)

\textsuperscript{515} Alfred C. Yen, \textit{Internet Service Provider Liability For Subscriber Copyright Infringement, Enterprise Liability, And the First Amendment}, 88 Geo. L. J. 1833, 1849 (2000)
impossible for an OSP to do so. For one, there is simply too much content posted by subscribers for the provider to supervise. Of course the argument could be made that "ability" does not necessarily imply practicality. Yet, if vicarious liability arises where there is the "ability to supervise", this must mean more than the remote and purely theoretical possibility. The law should not require the impossible since it will only be accepted and followed if the behavior required by it is practically feasible. It may be dogmatically correct to consider OSPs "able" to supervise, because it is technically possible, but such dogmatisms would lead to laws that are incongruent with technological reality and development, societal perception of the issue and practicality. The decisions in Marobie and Netcom acknowledge this and show a way out of the dilemma by their narrow interpretation of the "ability to supervise".

Furthermore, serious 1st Amendment concerns could arise if OSPs disabled access to sites simply because the material posted could possibly be infringing. What if it is not? To avoid liability, providers would be likely to take down any site that is even remotely "suspicious" of containing infringing material. This seems problematic in light of the subscribers’ free speech rights.

Taking into account all the above, the courts in Marobie and Netcom seem to have "gotten it right" concerning liability for vicarious infringements.

(2) Contributory Liability

Liability for contributory infringement was a problematic issue for OSPs before the DMCA. The question of liability came down to the question of knowledge of an
infringement or reason to know of it, since the services provided by the OSP are contributory in practically any case of copyright infringement over the Internet.\footnote{Supra, pp. 98 et. seq.}

(a) \textit{Fonovisa v. Cherry Auction} (January 1996)

As discussed above, the Ninth Circuit found Cherry Auction vicariously liable for copyright infringements by sale of counterfeit recordings at its swap meets. The court also held Cherry Auction liable for contributory infringement because Cherry Auction “with knowledge of the infringing activity, induce[d], cause[d] or materially contribute[d] to the infringing conduct of another”.\footnote{Fonovisa, Inc. v. Cherry Auction, Inc., 76 F. 3d 259, 264 (9th Cir. 1996) (applying the ‘Gershwin test’), see Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F. 2d 1159, 1162 (2nd Cir. 1971)} The Ninth Circuit had no doubt about Cherry Auction’s knowledge of the infringing activities, especially since the meets had been “raided” by the local sheriff's department before, and held that “providing the site and facilities’ for the infringements established contributory liability.\footnote{Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 262, 263 (9th Cir. 1996)}

(b) \textit{Sega v. MAPHIA} (December 1996)

The Sega court addressed the issue of contributory infringement.\footnote{Sega Enterprises v. MAPHIA, 948 F. Supp. 923, 932-936 (N.D. Cal. 1996)} While it had followed Netcom in dismissing liability for direct infringement, the decision mentions Fonovisa\footnote{Fonovisa, Inc. v. Cherry Auction, Inc., 76 F. 3d 259, 264 (9th Cir. 1996)} concerning contributory infringement: “providing the site and facilities for known infringing activity is sufficient to establish contributory liability.”\footnote{Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 262, 263 (9th Cir. 1996)} However, the court did not adopt this standard as decisive, but rather also considered Netcom’s higher standard for contributory infringement under which “substantial participation” is
necessary to find liability.\textsuperscript{522} Neither standard was adopted specifically, since the defendant in Sega would have been liable under both.\textsuperscript{523} MAPHIA clearly knew of the infringements and not only provided the site and hardware that facilitated infringements, but also encouraged these. Furthermore, the hardware was necessary to commit the acts of infringement in the first place. After having established a case of contributory infringement, the Sega court dismissed the defendants fair use defense and found liability for contributory infringement of Sega’s copyright.\textsuperscript{524} In light of the defendant’s blatant disregard of Sega’s copyright, the substantial contribution to the infringements committed by the BBS subscribers by providing the site and the hardware necessary to reproduce the works, the court seems to have been correct. The scenario could be considered a model case for contributory infringement in the online environment.

(c) \textit{Playboy v. Hardenburgh} (November 1997)

Another one of the relatively few cases addressing the issue is \textit{Playboy Enterprises, Inc. v. Russ Hardenburgh} (hereinafter: Hardenburgh).\textsuperscript{525} Hardenburgh operated a BBS from which subscribers could download files, mostly adult images, and were also encouraged to upload files, including adult images and other files. Uploaded images were screened for pornographic and copyrighted content, yet Playboy Enterprises found 412 photographs to which it held the copyright on the BBS. The court found that the defendant had “constructive knowledge” of the infringements because he had encouraged users to upload adult images while knowing of Playboy’s publication. The

\textsuperscript{521} \textit{Id.} at 264
\textsuperscript{523} Sega Enterprises v. MAPHIA, 948 F. Supp. 923, 933 (N.D. Cal. 1996)
court further stated that it was "...disingenuous for Defendants to assert that they were unaware that copies of photographs from Playboy magazine were likely to find their way onto the BBS."\textsuperscript{526}

This decision and the reasoning behind it seem harsh if interpreted as imposing upon BBS operators a duty to not only screen, but specifically seek infringing material on their BBS’ and remove it.\textsuperscript{527} The reading of Hardenburgh need not be that broad however. Suffice to say that it only specifically imposes such a duty on providers who make their services specific to a genre of content that is economically valuable – such as the adult content in Hardenburgh. It may be possible to read the decision even more narrowly. Since Hardenburgh’s employees screened the uploads for infringing content, they should have had knowledge of the infringing materials. Without regard to whether the narrowest interpretation of the decision is possible, the broad reading of the case faces some challenges of incompatibility with copyright doctrine.\textsuperscript{528} Imposing on OSPs a duty to monitor for infringement may be in conflict with the decision in the well-known “Sony” case for example. In Sony, the issue was whether Sony could be held liable for contributory infringement because Sony Betamax VCRs were used to record television shows “off the air”. \textsuperscript{529} The Supreme Court found that Sony was not liable for contributory infringement because VCRs are “capable of substantial noninfringing

\textsuperscript{524} Id. at 933-936
\textsuperscript{525} Playboy Enterprises Inc. v. Hardenburgh, 982 F.Supp. 503 (N.D. Ohio 1997)
\textsuperscript{526} Id. at 514
\textsuperscript{527} Mark D. Robins, Digital Millennium Copyright Act defenses for Providers of online storage services and information location tools, 16 NO. 6/7 Computer Law. 11, 13-14 (1999); Paul D. Amrozowicz, When Law, Science and Technology Worlds collide: Copyright issues on the Internet, 81 J. Pat. & Trademark Off. Society 81, 109 (1999); David N. Weiskopf, The risks of copyright infringement on the Internet: A practitioner’s guide, 33 U.S.F.L. Rev. 1, 29 & n. 132 (1998)
\textsuperscript{528} See Mark D. Robins, Digital Millennium Copyright Act defenses for Providers of online storage services and information location tools, 16 NO. 6/7 Computer Law. 11, 13-14 (1999)
uses".\textsuperscript{530} An OSP provides a service that is certainly capable of many uses that do not infringe copyright.\textsuperscript{531} A general duty to monitor Internet "traffic" would not only be impractical, but expensive and could ultimately be paid for at a higher price than money: the functionality of the Internet itself. This result seems inconsistent with the decision in Sony, even though there are significant factual differences.\textsuperscript{532} Whether the Sony decision is in point in the context notwithstanding, it could be argued that contributory infringement is a form of enterprise tort and can therefore only be imposed on a party that "knowingly participates".\textsuperscript{533} OSPs do know that infringements happen, yet they generally have no knowledge of individual specific infringements.

Finally, the 1\textsuperscript{st} Amendment comes into play as well. In Cubby, the court specifically relied on the 1\textsuperscript{st} Amendment's protection of free speech to hold that due to the large amount of information, the provider could not be considered to know of the infringement until receiving notice of it.\textsuperscript{534} A similar analysis seems appropriate in this context since it is almost impossible for an OSP to monitor the tremendous amounts of data flowing through its system and the danger of unintentional free speech impediments would arise.\textsuperscript{535}

\textsuperscript{530} Id. at 456 (1984); There were other important issue sin the case, such as fair use, but the "substantial non-infringing use" test is the central point here.

\textsuperscript{531} It seems fair to say that the majority of uses are non-infringing.

\textsuperscript{532} For example, while a VCR is generally not used to make multiple copies because of quality losses and cost, whereas copies on the Internet cost close to nothing and there is almost no loss of quality. Accordingly multiple copies are the norm on the Internet. Furthermore, the transfer of these copies over the web gives each recipient a copy of the material while the original owner keeps his/her copy, which distinguishes the situation from lending of copied material in the "real world". Finally, material is made accessible and available for copying to an anonymous mass of persons on the web whereas videotapes are rarely given away to strangers.


\textsuperscript{534} See id. at 14, citing Cubby, Inc. v. CompuServe, Inc., 776 F.Supp. 135, 139-142 (S.D.N.Y. 1991)

\textsuperscript{535} Cf. Alfred C. Yen, Internet Service Provider Liability For Subscriber Copyright Infringement, Enterprise Liability, And the First Amendment, 88 Geo. L. J. 1833, 1881 et seq. (2000)
Obviously, before the DMCA, the issue of liability for contributory infringement was far from resolved; differing standards were applied and there was no secure way to determine whether liability existed or not.

d. OSP liability under the DMCA – vicarious and contributory infringements

(1) The DMCA provisions

Concerning these forms of liability for “indirect” infringement of copyright, the DMCA is more complicated than it is concerning direct infringement liability: Safe harbors are provided for situations that involve the temporary storage of infringing material on an OSP’s computers induced by a subscriber and for “system chaching”. Such situations, which may include browsing the web or email, are resolved in the same manner as direct infringement. This can be deduced from the mention of temporary storage in 17 U.S.C. § 512 (a) and the language of 17 U.S.C. § 512 (b).

In addition, the DMCA contains a safe harbor provision regarding situations that involve subscriber-induced long-term storage of infringing material on the OSP’s computers. This may occur in the course of hosting web pages, for example. In these situations the OSP can avoid liability if she complies with a set of detailed requirements:

"(A) (i) [d]oes not have no actual knowledge of the infringing material or activities;

(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which the infringing activity is apparent; or

537 Alfred C. Yen, Internet Service Provider Liability For Subscriber Copyright Infringement, Enterprise Liability, And the First Amendment, 88 Geo. L. J. 1833, 1881 (2000)
(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(B) does not receive a financial benefit directly attributable to the infringing activity,... [where] the service provider has the right and ability to control such activity; and

(C) upon notification of claimed infringement... responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of the infringing activity."

The rather complicated language of these paragraphs needs to be analyzed more closely. As can be seen from the use of the conjunction “and”, all three requirements must be met to avoid liability. Furthermore, the OSP needs to designate an agent for the receipt of notice of copyright infringement and follow a previously established method for handling the complaints received through this agent. It is clear that the OSP must not know of the infringing activity or the underlying facts in order to come within the scope of the safe harbor – (A) (i) and (ii). The defendant in Sega for example, could not claim this, since his activities were geared towards infringement all along and he clearly had knowledge of the infringing activities that were induced and encouraged by him. On the other hand, Netcom could have clearly claimed not to know of the infringements.

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538 Id. at 1881-1882 (2000); Other grounds for nonliability are explicitly not excluded by the DMCA. (17 U.S.C.A. § 512 (g) (4) (West Supp. 2000))
539 17 U.S.C.A. § 512 (c) (West Supp. 2000) (information residing on systems at direction of users)
541 Supra, pp. 110-111, 124
542 Supra, pp. 107, 118
Yet even knowledge does not preclude a provider from the benefits of the provisions, if it acts to remove the infringing material from its computers or at least makes it impossible to access - (A) (iii) and (C). Frena, for example, removed the infringing material as soon as he became aware of it and consequently would have come within the scope of the safe harbor.

Furthermore, the OSP must not directly benefit financially from the infringement where she is able to control the infringing activity – (B). This will generally not be the case, since most providers charge flat rates for their services and there cannot be any direct financial profit from infringements.

But when is an OSP required to remove material or disable access to it? The statute requires this in two situations: First, if an OSP becomes aware of infringement, it must remove the material to come within the scope of the safe harbor. Second, to avoid liability, material must also be removed when an OSP receives formal statutory notice of the infringement through its designated agent. In this case, there need not be proof of the infringement as shown by the statutory language. It is clarified in the statute that notices of alleged infringement that do not satisfy the statutory requirements do not create “knowledge or awareness” of the infringement in the statutory sense. This clarification serves to ensure that notice is given in the required form. The OSP however, must in turn

543 See Alfred C. Yen, Internet Service Provider Liability For Subscriber Copyright Infringement, Enterprise Liability, And the First Amendment, 88 Geo. L. J. 1833, 1882-1884 (2000) (finding this reminiscent of the concept of contributory liability for copyright infringement)
544 Supra, p. 104
545 See Alfred C. Yen, Internet Service Provider Liability For Subscriber Copyright Infringement, Enterprise Liability, And the First Amendment, 88 Geo. L. J. 1833, 1882 (2000) (finding this reminiscent of vicarious liability – no direct financial benefit)
546 Supra, p. 122
548 17 U.S.C.A. § 512 (c) (3) (B) (i) (West Supp. 2000)
notify the complaining party that its notice was insufficient. It must also notify the subscriber whose (allegedly) infringing material was removed.

The alleged infringer in turn may respond to the OSP’s designated agent in a manner prescribed by the statute and thereby oppose the OSP’s removal of the material. Upon receipt of such response, the OSP must forward the response and a notice that the allegedly infringing material will be restored in ten to fourteen business days, to the original complaining party. The complaining party may then file “an action seeking a court order to restrain the subscriber” from infringing If she does so, the OSP is required to keep the material off the web. If however, the complaining party does not respond, the OSP is required to restore the removed material in “not less than ten, nor more than fourteen business days”.

Concerning the problems that were present before the DMCA, the Act offers some solutions. It rejects any duty to police or monitor as the standard to determine whether there is “reason to know”. This is clearly shown by the provision that the provider is within the scope of the safe harbor unless it is “aware of facts or circumstances from which the infringing activity is apparent”.

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549 17 U.S.C.A. § 512 (c) (3) (B) (ii) (West Supp. 2000)
550 17 U.S.C.A. § 512 (c) (2) and § 512 (g) (3) (West Supp. 2000) (this includes the requirement of submission under U.S. jurisdiction)
551 17 U.S.C.A. § 512 (g) (2) (C) (West Supp. 2000)
552 17 U.S.C.A. § 512 (g) (2) (C) (West Supp. 2000)
553 17 U.S.C.A. § 512 (g) (2) (C) (West Supp. 2000)
554 See Mark D. Robins, Digital Millenium Copyright Act defenses for Providers of online storage services and information location tools, 16 NO. 6/7 Computer Law. 11, 15 (1999)
On February 6, 2001, the Fourth Circuit decided *ALS Scan, Inc. v. RemarQ Communities, Inc.*, a case that revolved around the DMCA safe harbor provisions.\(^{556}\) ALS Scan, Inc. (hereinafter ALS) is a corporation creating and marketing “adult” photographs and videos, which it displays on the Internet to paying subscribers to their site. It also sells the images on CD-ROMs and videotapes. RemarQ Communities, Inc. (hereinafter RemarQ) is an OSP and provides access to various newsgroups, including two newsgroups that not only contain ALS’ name in their titles but also contain “hundreds of postings that infringe ALS’... copyrights”.\(^{557}\) The postings in these newsgroups, “alt.als” and “alt.binaries.pictures.erotica.als” were posted by subscribers to RemarQ’s service. ALS sent RemarQ a letter stating:

“[B]oth of these newsgroups... were created for the sole purpose of violating our... copyrights and tradename. These newsgroups contain virtually all...copyrighted images... Your servers provide access to these illegally posted images and enable the illegal transmission of these... This is a cease and desist letter. You are hereby ordered to cease carrying these newsgroups within twenty four (24) hours upon receipt of this correspondence...”\(^{558}\)

RemarQ refused to comply, but indicated that it was willing to remove single infringing images, if these were specifically identified by ALS. No compromise was reached and ALS filed suit alleging copyright infringement, unfair competition claims and violation of the DMCA, Title II, claiming that RemarQ had actual knowledge of the infringements and “steadfastly refused to remove or block access to the material”. ALS

\(^{556}\) *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F. 3d 619 C.A. 4 (Md.) 2001

\(^{557}\) *Id.*, 620
further claimed that it had put RemarQ on notice. RemarQ responded by filing a motion to dismiss, contending that ALS failed to comply with the DMCA notice requirements, RemarQ was an OSP and willing to remove specifically identified infringing material and because of this had a defense to ALS' claim. The district court ruled in RemarQ's favor, holding that there was no liability for direct copyright infringement "merely because it provided access to a newsgroup containing infringing material" and that ALS had indeed failed to give notice in accordance with 17 U.S.C. § 512 (c) (3) (A), wherefore RemarQ was within the safe harbor regarding any liability for infringement.

The Fourth Circuit reversed and remanded. It first clarified that Frena was "overruled" by the DMCA and that the Act codified the Netcom decision. Accordingly, the court only addressed ALS' claims brought under the DMCA. In doing so, the court focuses on whether ALS' notice was sufficient to deprive RemarQ of its safe harbor. The district court had found the notice to be insufficient because it did not comply with two of the six requirements; it did not contain a "list of [infringing] works" and that it "did not identify the infringing works in sufficient detail to enable RemarQ to locate and disable them." The Fourth Circuit found ALS' notice to be sufficient in all respects. It argued that § 512 (c) (3) (A) only requires "substantial" compliance with the requirements and that it specifically allows for "representative" lists of works in cases

558 Id., 620-621
559 Id. 621
560 Id.
561 ALS Scan, Inc. v. RemarQ Communities, Inc., 57 USPQ 2d 1996 (4th Cir. Md. 2001)
562 ALS Scan, Inc. v. RemarQ Communities, Inc., 239 F. 3d 619, 622 C.A. 4 (Md.) 2001
563 17 U.S.C.A. §512 (c) (3) (A) (ii), (iii) (West Supp. 2000)
564 ALS Scan, Inc. v. RemarQ Communities, Inc., 239 F. 3d 619, 625-626 C.A. 4 (Md.) 2001
where multiple copyrights are involved. The court found it to overly burden the copyright holder to identify every individual work in such cases and consequently held that ALS “substantially” complied with the notice requirement by providing information that

“(1) [I]dentified two sites created for the sole purpose of publishing ALS Scan’s copyrighted works, (2) asserted that virtually all the images at the two sites were its copyrighted material and (3) referred RemarQ to two web addresses where RemarQ could find pictures of ALS Scan’s models and obtain ALS Scan’s copyright information.”

The Fourth Circuit’s decision needs to be examined closely, as it could set the standard for interpreting the requirements in § 512 (c) (3) (A). The court is certainly correct in quoting the House Report and agreeing that the

“[D]MCA was enacted both to preserve copyright enforcement on the Internet and to provide immunity to service providers from copyright infringement liability for ‘passive’, ‘automatic’ actions in which a service provider’s system engages through a technological process initiated by another without the knowledge of the service provider.”

The Fourth Circuit goes on to declare that the safe harbor immunity is only to be given to “innocent” service providers, i.e. such providers that have no actual or constructive knowledge of the infringements, and that “innocence” is lost when the provider is notified by the copyright holder. In all this, the court is correct. The

565 Id. 625
566 Id.
568 ALS Scan, Inc. v. RemarQ Communities, Inc., 239 F. 3d 619, 625 C.A. 4 (Md.) 2001
question of the case circles around the requirements for the notice however, and here the
decision can be questioned. It is certainly true, that substantial compliance with the
requirements is sufficient; this is clear from the words of the statute and serves to
preserve a balance between the interests involved. If the requirements were too strict,
copyright holders would have to go to undue lengths to protect their rights, while too
little formal requirements would make it too simple for copyright holders to have
noninfringing material removed. Yet, it is questionable whether a copyright holder can be
said to have fulfilled the requirements substantially where it only supplies web addresses
to its own directories. A representative list is to be contained in the notice. Arguably, a
web address that contains such a list, does not amount to the actual inclusion of a
representative list. On the other hand it seems narrow-minded to make the distinction
between the list itself and a web address where it can be found. In ALS, the sites
containing the infringing material contained ALS' name and were obviously primarily
dedicated to posting images to which ALS held the copyright. Considering this, the court
was correct in letting ALS’ notice be sufficient without the specific identification of
images or even a representative list, especially since the images to which ALS held the
copyright were discernible as such due to the copyright notice. However, where there is
no copyright notice, where the infringing sites are not dedicated to infringing activity, not
as easily identifiable or only contain small quantities of infringing material, the situation
should be evaluated on its own merits. Hence, although the decision in ALS finds a
reasonable interpretation of the notice requirements for the case at hand, it should not
necessarily be considered as a general standard.
4. Peer-to-peer networks and indirect liability

The question whether or not there is room for indirect liability in the context of P2P networks has so far only been addressed in the already famous case against the centralized P2P network Napster. However, the more problematic decentralized P2P systems, like Gnutella or Freenet, are already widely available. There are important differences between centralized and decentralized systems, as mentioned earlier. The problems arising due to decentralized systems will be addressed after an analysis of the Napster case.


Napster, Inc. (hereinafter: Napster) operates a website from which subscribers can download a piece of file-sharing software at no cost to them, that allows them to log on to the Napster network and share music files in the MP3 format directly with other users logged onto the system (peer to peer). Napster requires users to register under a “screen name” but does not require the inclusion of any biographical data. If biographical information is included in the registration, this information is no longer available to the Napster servers after registration. The software includes a browser, a search engine that lets users search other users’ hard drives for the music they wish to download, a chat room and a so-called “hotlist” function with which users can use to compile a list of other

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570 See Damien A. Riehl, Peer-To-Peer Distribution Systems: Will Napster, Gnutella and Freenet Create a Copyright Nirvana or Gehenna?, 27 WMLR 1761 (2001) (describing the architecture of these systems) 571 Supra, p. 53
572 Damien A. Riehl, Peer-To-Peer Distribution Systems: Will Napster, Gnutella and Freenet Create a Copyright Nirvana or Gehenna?, 27 WMLR 1761, 1766-1769 (2001)
users. The software may also be used to create directories that allow users to share files in a “user library”. There is no requirement to share files, however. No files from users are ever saved to or pass through the actual Napster servers. Rather, once a user is logged on to Napster, the browser part of the free software interacts with Napster’s software. If a user sets the browser to allow downloads, all MP3 file names are automatically listed in the respective user library and become available for download by other Napster users logged on to the network after the Napster software has verified that the files are in the proper MP3 format. The user libraries are deleted every time a user logs off and created anew every time a user logs on. Via the search engine or the “hotlist” function of the Napster software, users can access the content of other users’ MP3 libraries and download the desired title directly from those users’ hard drives.\(^\text{574}\) The content of the MP3 files requested by a user does not pass through Napster’s network, but is transferred over the Internet from the host user (the user making the files available for download) to the requesting user. Napster’s function in this process is providing the software that enables users to engage in such peer-to-peer transfers of data and thereby obtaining the IP address of the host user. The Napster software is necessary to access the uploaded file names in the user libraries and to obtain the routing data that is required to transfer the files.\(^\text{575}\) The userbase of Napster is extensive; approximately 1 million users are logged

\(^{574}\) Napster users are assigned to certain clusters of servers, so that they can only access the hard drives of users in the same server cluster. See A&M Records, Inc. v. Napster, Inc., 114 F.Supp.2d 896 (N.D. Cal. 2000), aff’d in part, rev’d in part, and rem’d, 239 F.3d 1004 (9th Cir. 2001); see also Frederike Hänel, Napster und Gnutella - Probleme bei der Übertragung von MP3-Dateien nach deutschem Urheberrecht, JurPC Web-Dok. 245/2000, Abs. 34-35 (2000), <http://www.jurpc.de/aufsatz/20000245.htm> (last visited 6/5/2001)

\(^{575}\) See id.; see also Damien A. Riehl, Peer-To-Peer Distribution Systems: Will Napster, Gnutella and Freenet Create a Copyright Nirvana or Gehenna?, 27 WMLR 1761, 1768
onto the network at any given time and so far close to 1.4 billion music files have been exchanged between its users.\textsuperscript{576}

The Recording Industry sued Napster for contributory and vicarious copyright infringement in December 1999.\textsuperscript{577}

(1) Napster filed a motion for summary judgment claiming to be a "service provider" in the sense of being a mere "passive conduit" for user transactions under §512(k)(1)(A) of the copyright statute and that its liability should therefore be limited by the safe harbor of § 512.\textsuperscript{578} The provision defines "service provider" as "an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received."\textsuperscript{579}

The plaintiffs argued that § 512(a) should not apply because the material exchanged by Napsters users did not go "through" the Napster servers, but was rather


\textsuperscript{579} 17 U.S.C.A. § 512 (k)(1)(A) (West Supp. 2000)
transmitted directly between the individual users' computers.\(^{580}\) It was also argued that §516(d), which covers search engines, more appropriately fits Napster's activities.\(^{581}\)

The court rejected Napster's "safe harbor" argument. It ruled that Napster neglected to prevent infringements in accordance with § 512(i) and had had actual or at least constructive knowledge of infringing activities of its users wherefore it is excluded from the safe harbor.\(^{582}\)

(2) The plaintiffs filed a motion for a preliminary injunction. Napster contended that there could be no liability for indirect infringement because this would require that Napster users directly infringe the copyright, which, according to Napster, they did not because of the fair use doctrine.\(^ {583}\) Napster further brought forward that the software and services it provides were staple articles of commerce and as such capable of substantial non-infringing uses, wherefore it could not be held liable under the rule in Sony.\(^ {584}\)

The District Court Judge Marylin Patel found that the plaintiffs were likely to succeed on the merits and granted the plaintiffs' motion for a preliminary injunction against Napster.\(^{585}\) The court addressed the issue of contributory and vicarious liability in the context of 'probable success on the merits'. Judge Patel recognizes that contributory or vicarious infringement by Napster require direct infringement by a third party (the


\(^{583}\) Id. at 900-901

\(^{584}\) Id. at 912

\(^{585}\) Id.
Napster users). The court states that prima facie evidence establishes that the activities of Napster users amount to direct infringement because virtually all of them engage in up- and downloading music files and because evidence showed that more than 80% of the music contained in these files was copyrighted. As to the fair use defense Napster alleged for its users, the court examines the case under the four non-exhaustive factors of section 107 of the copyright act after finding that the use was not transformative because the “repackaging” of copyrighted music in MP3 format “adds no new aesthetics, insights and understandings.” The four factors of fair use analyzed by the court are:

“(1) [t]he purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.”

The court finds that all four factors cut in favor of the plaintiffs. It argued that the use was commercial, even though Napster has not made a profit to date and Napster users do not usually directly reap profits from the files they download. The court based its finding of commercial use on the “vast scale of Napster use among anonymous individuals” because of which the downloading was not a “personal use in the traditional

sense. Judge Patel goes on to state that Napster users "get for free something they would ordinarily have to buy" and therefore "[r]eap economic advantages from Napster use." Private use is dismissed based on the scale of the use and because users "cannot be said to engage in a personal use when distributing that file to an anonymous requester."

The court further finds the second and third factors to cut against a finding of fair use because the musical works and sound recordings at issue are creative in nature and because the downloading of files "undisputed[ly]... involves copying the entirety of the copyrighted work."

The fourth factor is found to weigh against fair use as well because Napster use allegedly "reduces CD sales among college students... [and] raises barriers to plaintiffs' entry into the market for the digital downloading of music."

Napster argued the fair uses of "sampling, space shifting and the authorized distribution of an artist's work," basing the argument on the Sony decision. Sampling in this sense was understood as the users' downloading music from Napster to determine whether they would like to purchase it or not. "Space shifting" means the transfer of a

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590 Id., citing Sega Enterprises Ltd. v. MAPHIA, 857 F. Supp. 679, 678 (N.D.Cal. 1994) and American Geophysical Union v. Texaco, Inc., 60 F. 3d 913, 922 (2nd Cir. 1994)
591 A&M Records, Inc. v. Napster, 114 F.Supp 2d, 896, 913 (N.D. Cal. 2000), aff'd in part, rev'd in part, and rem'd, 239 F.3d 1004 (9th Cir. 2001), citing Sega, Ltd. V. MAPHIA, 857 F. Supp. 679, 687 (N.D. Cal. 1994) (holding that copying to save expenses of purchasing the copied item is commercial and weighs against a finding of fair use); American Geophysical Union v. Texaco, Inc., 60 F. 3d 913, 922 (2nd Cir. 1994) (holding that for-profit enterprise that made copies of scholarly articles for research reaped indirect economic advantage from this and was hence engaging in commercial use.
595 Id. at 913-914
legally obtained work from one storage medium to another, specifically from one of a user's computers to another. The authorized distribution of artists' works, which took place through Napster's so-called "New Artists Program", a program designed to give musicians without a label the opportunity to expand their fan-base and level of recognition by allowing the download of their work on the Napster network.

The court did not find any of these uses satisfying for a finding of fair use. As to "sampling" it held that this was not a personal use because the user obtains for free a permanent copy of the file, which she can distribute to many others, instead of ordinarily buying the music; even obliterating the need to pay for material the user wishes to own. Sony was not applied in Napster's favor due to the differences in the facts: While VCR users recorded "a work which he has been invited to witness in its entirety free of charge," wherefore "time shifting" in the Sony scenario can easily be regarded as fair use. The record companies do charge for music, whether in CD format or in downloadable formats. Furthermore, VCR users are unlikely to distribute recorded material to millions of other persons free of charge. The court goes on to state that sampling adversely affects the potential market for the works. This finding was based on the "Jay Survey", prepared by the plaintiffs, according to which "the more songs Napster users download, the more likely they are to reveal that such use reduces their

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596 Id. at 913, citing Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 434 (1984)


598 Id. at 913-914


music buying."\(^{603}\) Napster, on the other hand, contended that sampling even increased music sales.\(^{604}\) The court, however, dismissed the report this contention was based on as unreliable and went on to state that "potential enhancement of... sales due to sampling would not tip the fair use analysis... in favor of defendant," because "[p]ositive impact on sales" does not negate the copyright holder's "[e]ntitlement to licensing fees or access to derivative markets."\(^{605}\) Napster further argued that "space-shifting" was analogous to "time shifting", as discussed in Sony, and that therefore the "staple article of commerce doctrine" precluded a finding of liability, especially considering the AHRA and the decision in RIAA v. Diamond Multimedia Systems, Inc., 180 F. 3d 1072, 1079 (9th Cir. 1999).\(^{606}\) The court stated that the AHRA is inapplicable and therefore gave it no further consideration.\(^{607}\) It further dismissed the analogy between "space shifting" and "time shifting" by finding that "space-shifting" was not the primary (and not even a significant)\(^{608}\) use of Napster and that consequently the doctrine did not preclude liability, even if "space shifting were a fair use."\(^{609}\) The court did not find Napster "capable of substantial non-infringing uses" as required by Sony to come within the scope of the "staple article of commerce doctrine."\(^{610}\) Another argument the court brings up to deny application of the article of commerce doctrine is that Napster "exercises ongoing control

\(^{603}\) \textit{Id.}, citing Jay report, Tbl 4


\(^{606}\) A&M Records, Inc. v. Napster, 114 F.Supp 2d, 896, 915 (N.D. Cal. 2000), \textit{aff'd in part, rev'd in part, and rem'd,} 239 F.3d 1004 (9th Cir. 2001)

\(^{607}\) \textit{Id.}

\(^{608}\) \textit{Id.} at 916

\(^{609}\) \textit{Id.}

\(^{610}\) \textit{Id.}, citing Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 442 (1984)
over its service” while Sony had not done more than sell the VCRs. The court also finds that the authorized promotion of artists not represented by the record companies (the “new artist program”) does not weigh in Napster’s favor. It states that the program is not a substantial part of Napster’s services in the first place and that secondly it seems to have been developed only after suit had been brought. In total, the court finds that there is direct infringement by the users because the engage in unauthorized copying of protected material and cannot claim the benefit of the fair use doctrine.

The court goes on to find that Napster had knowledge, or at the very least reason to know, of the infringements and willingly facilitated these, thereby making itself liable for contributory infringement. It bases the finding of knowledge on the fact that internal Napster documents “mention[s] the need to remain ignorant of users’ real names and IP addresses since they are exchanging pirated music” and state that “[w]e [Napster] are not just making pirated music available, but also pushing demand.” Furthermore, Napster executives with experience in the record industry themselves had downloaded music from the network and had enough knowledge of intellectual property laws to sue the band “The Offspring” for trademark infringement. All This, the court finds, shows that Napster was not only aware of the infringing activities but that these

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612 A&M Records, Inc. v. Napster, 114 F.Supp 2d, 896, 917 (N.D. Cal. 2000), aff’d in part, rev’d in part, and rem’d. 239 F.3d 1004 (9th Cir. 2001)
613 Id.
614 Id. at 918 et. seq.
615 Id. at 918
616 Id. at 918-919
were also a central point in Napster’s business plan.\textsuperscript{617} Since knowledge of specific infringements is not necessary for a finding of contributory liability, the court finds this to be sufficient to establish knowledge or at least reason to know of the infringing activities on Napster’s part.\textsuperscript{618} It dismissed Napster’s reliance on Netcom based on the argument that Napster is not an Internet Service Provider.\textsuperscript{619}

Citing Fonovisa, Sega and even Netcom decisions, the court also finds that Napster materially contributed to the infringements because it provided the means necessary to exchange files with ease and thereby facilitated the infringements.\textsuperscript{620}

As to vicarious infringement, the court also found in favor of the plaintiffs because Napster allegedly had the “right and ability to supervise the infringing activity and has a direct financial interest in such activities.”\textsuperscript{621} Even though the court recognized that it may be “infeasible” to supervise all Napster use, it found that the mere theoretical capability of doing so was sufficient with regard to the first requirement of a finding of vicarious infringement and further found Napster’s statements about “blocking users about whom rightsholders complain” as an admission of such capability.\textsuperscript{622} The court also finds that Napster directly profits from the infringing activities of its users, even though Napster, Inc. has not generated any revenues to date. However, because the size of

\begin{thebibliography}{9}
\bibitem{} Id.
\bibitem{} Id., citing Gershwin, 443 F. 2d at 1162
\bibitem{} A&M Records, Inc. v. Napster, 114 F.Supp 2d, 896, 919 (N.D. Cal. 2000), \textit{aff’d in part, rev’d in part, and rem’d}, 239 F.3d 1004 (9\textsuperscript{th} Cir. 2001)
\bibitem{} A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 918 et. seq. (N.D. Cal. 2000), \textit{aff’d in part, rev’d in part, and rem’d}, 239 F.3d 1004 (9\textsuperscript{th} Cir. 2001)
\bibitem{} Id. at 920-921, citing Fonovisa, Inc. v. Cherry Auction, Inc., 76 F. 3d 259, 262 (9\textsuperscript{th} Cir. 1996) (quoting Gershwin, 443 F. 2d at 1162)
\bibitem{} A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 921 (N.D. Cal. 2000), \textit{aff’d in part, rev’d in part, and rem’d}, 239 F.3d 1004 (9\textsuperscript{th} Cir. 2001)
\end{thebibliography}
the user base is Napster’s capital and increases its market value to be liquidated in one way or another specified in Napster’s business plans at some point in time.\textsuperscript{623}

In defense Napster claimed that its users’ and its own right to free speech would be abridged by an injunction because it merely offers a directory and not copyrighted material.\textsuperscript{624} Directories have indeed enjoyed the protection of free speech, as the District Court recognizes.\textsuperscript{625} Yet, the court explains, “free speech concerns ‘are protected by and coextensive with the fair use doctrine’” and therefore free speech does not give Napster a valid defense, since the court had already determined that fair use did not apply.\textsuperscript{626}

Napster also raised the copyright misuse defense, arguing that the record industry sought to expand their monopoly over the distribution of music onto the electronic market on the Internet, thereby violating antitrust laws. The court dismisses this defense, stating that antitrust violations “do not afford a valid defense against an infringement action.”\textsuperscript{627}

Napster further contended that the record companies had waived their entitlement to protection because they “hastened the proliferation of MP3 files on the Internet and…

\textsuperscript{624} A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 923 (N.D. Cal. 2000), aff’d in part, rev’d in part, and rem’d, 239 F.3d 1004 (9th Cir. 2001)
plan to enter the market for digital downloading themselves.” The court did not find this persuading but held that the plaintiffs had not waived their right by proliferating the spread of MP3, because they “did [no] more than seek partners for their commercial downloading ventures.”

(3) Napster appealed to the 9th Circuit Court of Appeals, which granted the motion just hours before the original injunction was to be enforced. During the oral argument the 9th Circuit focused on whether Napster has the ability to identify copyrighted files on its network and whether Napster has the obligation to somehow block those files from being accessed by users. The court asked, among other things: "[H]ow are they expected to have knowledge of what comes out of some kid’s computer in Hackensack, N.J., and is transmitted to Guam?" The Ninth Circuit only required small changes to the District Court’s injunction, however. It agreed with the court’s findings except concerning the application of the DMCA, which the Ninth Circuit held would be addressed at trial. The injunction was found to be necessary but overbroad and the Circuit Court required it to be changed to require the plaintiffs to identify the infringing works.

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628 A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 923-924 (N.D. Cal. 2000), aff’d in part, rev’d in part, and rem’d, 239 F.3d 1004 (9th Cir. 2001)
629 Id. at 924
630 Id., 2001 WL 115033 (9th Cir. 2001)
632 P.J. Huffstutter, Napster Buys Some Time as Judges Consider Appeal Copyright, L.A. Times, Oct. 3, 2000, at C1
633 A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1025 (9th Cir. 2001)
634 Id. at 1025, 1026
The decision must be criticized in several points. The court discussed whether or not individual users can claim fair use at length but relies on some flawed argumentation. While there can be little doubt as to the second and third factors of the fair use analysis weighing against a finding of fair use, the commercial nature of such use must be questioned. The court recognizes that users do not reap profits from their copying of files. This alone should speak against finding the use to be commercial. The argument, that because users save the cost of purchasing the music in conventional formats the use becomes commercial, is questionable. The court relies heavily on the decision in *American Geophysical Union v. Texaco*, decision that must be criticized itself for flawed argumentation. Research scientists working for Texaco, Inc. had copied and archived articles from scientific journals. On appeal, the Second Circuit found the use to be "archival", not necessarily "commercial" and held that therefore the first factor of the fair use analysis weighed in favor of the publishers. However, the court found that the use would have an adverse effect on the potential market for the articles and weighed the fourth factor against Texaco as well. This finding was based on the arguments that Texaco would have bought additional journal subscriptions if it was not allowed to copy and that the publishers were entitled to licensing fees, which were lost due to Texaco's copying. Texaco contended that "whether the publishers can demand a fee for permission to make photocopies is the very question that the fair use trial is supposed to answer." The court held that "it is undisputable that... a copyright holder is entitled to demand a

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636 Id. at 913, citing American Geophysical Union v. Texaco, Inc., 60 F. 3d 913, 922 (2nd Cir. 1994)
637 American Geophysical Union v. Texaco, Inc., 60 F. 3d 913, 919 (2nd Cir. 1994)
royalty for licensing."\(^{640}\) Consequently, the court weighed the fourth factor against Texaco, mainly "because of lost licensing revenue, and to a minor extent because of lost subscription revenue."\(^{641}\) The decision must be subjected to criticism, especially regarding the fourth factor analysis. First of all, there is no guarantee that Texaco would actually order more subscriptions if it were not permitted to copy, and secondly, the publishers "must... assume that... the scientists will extract what they need and arrange to copy it" because institutional subscribers like Texaco are charged double the usual subscription fee.\(^{642}\) As to licensing revenues, it must be said that the copyright holder cannot be entitled to licensing fees when the use is fair, the argument brought forward by Texaco is correct. Whether a copyright holder has "lost" licensing revenue depends on whether the use is fair. The Texaco decision is not convincing. Furthermore, the Napster court relies on the decision, not only regarding the effect on the market, but also regarding the commercial nature of the use. The Second Circuit determined that there was "archival" use but that this was only indirectly commercial.\(^{643}\) The decision does not provide convincing reasons as to why the use in Napster should be considered commercial or adversely affecting the market.

Furthermore, it could be argued that the individual user is making a personal use of the work rather than an unauthorized commercial use of the copyright. It is curious, to say the least, that the court relies on the sum of all Napster users to find the scale of such

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638 Id. at 929
639 Id. at 926, 929
640 Id.
641 Id. at 931
642 Id. at 936 (Jacobs, C.J., dissenting)
643 Id. at 923
use to be the reason for its commercial nature.\textsuperscript{644} Yet, with regard to direct infringement by a third party, the individual users are to be regarded as individuals rather than an anonymous mass.\textsuperscript{645} The District Court broadened the scope of the analysis beyond what was warranted by the fair use defense. There is also no foundation in precedent for the court’s focus on the anonymity of the use.\textsuperscript{646} On a common sense level, the anonymity of the uses speaks against personal use nevertheless, but the court should not have based its argumentation on the “vast scale of Napster users” and the anonymity. In the end, the first factor would probably still weigh against a finding of fair use because the individual users indeed exchange copyrighted music without authorization and a use need not be commercial in nature to be unfair.\textsuperscript{647} The large number of Napster users and the anonymity argument ultimately do weigh against a finding of fair use but they do not necessarily indicate that the use is commercial.

While some of the court’s arguments are less than convincing, the result is very likely correct: Individual Napster users directly infringe the copyright holders distribution right by making files available for download to a mass of people and the reproduction right by downloading works that they do not already own in conventional formats.

In the end, the court is right to find Napster liable for contributory infringement, since Napster did facilitate infringements committed by its users and certainly had

\textsuperscript{644} See A&M Records, Inc. v. Napster, 114 F.Supp 2d, 896, 912 (N.D. Cal. 2000), aff’d in part, rev’d in part, and rem’d, 239 F.3d 1004 (9th Cir. 2001)


\textsuperscript{646} The court refers to Sega Enterprises Ltd. v. MAPHIA, 857 F. Supp. 679 (N.D.Cal. 1994) at a later point. That case involves a situation somewhat similar to the Napster situation where users anonymously logged onto a bulletin board to exchange copyrighted videogames. However, the Napster court’s use of this case as precedent is limited to the proposition that a use is commercial if an individual gets something for free that she would usually have had to pay for. The MAPHIA case does not support the finding that a use is commercial because of the anonymity of the users involved.
knowledge of these infringements. The argument that Napster did not know of any individual infringement is intriguing but ultimately unconvincing due to several factors: First of all, the amount of infringing activity on Napster in relation to the non-infringing activity is so enormous that the individual infringement loses some importance; Napster had to be aware of this. Secondly, Napster had to have had knowledge of some individual infringements, since these were committed by its executives. Lasty, and maybe most importantly, Napster’s internal documents and business plans clearly showed that it had consciously avoided any knowledge of individual infringements and attempted to “remain ignorant of users’ real names and [Internet] addresses” because Napster’s directors realized that its users were trading in “pirated music” and that one of Napster’s goals was not only to make “pirated music available, but also push[ing] demand.” The hypocrisy of Napster suing “The Offspring” for trademark infringement is just an additional and amusing fact that tips the scales in that direction. If a contributory infringer attempts to avoid liability by consciously making an effort ‘not to know’, this bad faith conduct should indeed not weigh in her favor. The Sony defense indeed wears thin as well, mainly because of the vast factual differences between the cases. Sony concerns itself with an analog technology that hardly relates to the technology involved in the Napster litigation. Whereas VCRs allowed users to record television broadcasts, Napster enables them to exchange copyrighted music files. This factual difference should not be underestimated, since the users of the (analog) VCR technology did not exchange copyrighted material on a large scale, they essentially only recorded what they were

649 Id.
entitled to enjoy anyway, only at a different time. The Napster users on the other hand engage in a different kind of activity, enabling each other to copy without authorization. Where “time-shifting” was essentially limited to one and the same user, this is not the case with Napster. The only real criticism that must be brought forward against the court’s analysis of Sony is its limited view, trying to analogize the scenarios while ignoring the underlying rationale in Sony, that technology should not be impede because it can be used to infringe. A more comprehensive application of Sony should not have yielded a result in favor of Napster entirely for the reasons mentioned above, but it could have led to a more balanced decision.

Where the court is mistaken however, is its finding of vicarious infringement. While Napster certainly knew of the infringements, it is questionable whether it was ever in a position to supervise. It may have had the right to supervise the user libraries created with its software, but technically it hardly had the ability to actually supervise all those libraries, let alone all transactions between Napster users, which never actually touched the Napster servers. The court’s argument, that the “ability to supervise” does not require actual but only theoretical ability, must be questioned. The law should not require the impossible for one simple reason: If it does it will not be followed. A law that ignores reality is simply not a good law. This is equally true for societal reality as it is for technical reality. However, there remains a question mark as to whether Napster actually does have the ability to identify and block infringing material on its system. If it does not, the injunction would be overbroad, even after the appeal, for requiring Napster to perform actions that it is unable to perform. Napster claims that it does not have this

650 See Damien A. Riehl, Peer-To-Peer Distribution Systems: Will Napster, Gnutella and Freenet Create a Copyright Nirvana or Gehenna?, 27 WMLR 1761 (2001)
ability. Independent sources, however, have argued that Napster could indeed identify protected material using the so-called ‘hash marks’ found on any given MP3 file.\textsuperscript{651} Hash marks are like digital fingerprints that identify an MP3 file that has been produced under identical conditions and recording speed. \textsuperscript{652} One digital music retailer, Emusic, has now installed a system that can allegedly scan the Napster network using hash marks to identify songs that have been distributed on Emusic’s system.\textsuperscript{653} If Emusic’s system can indeed identify infringing material in this way, this would prove that Napster could do so as well.\textsuperscript{654} Whether the hash mark identification system works well enough to discredit Napster’s claim of inability to identify and block infringing files remains to be seen, but it is a strong indication that the injunction was not overbroad.

The courts conclusion as to Napster’s direct financial interest in the infringing activities must be questioned. Napster did not make a profit, neither from any individual transaction nor from paying users or anything else.\textsuperscript{655} Its services were free of charge. While it is true that the company’s value grew proportionally to the user base, this alone is insufficient to find direct financial interest. First of all, the financial interest in an extended userbase is indirect because the userbase only increases the company’s market value but does not generate direct benefits or profits for Napster.


\textsuperscript{652} Id.


\textsuperscript{654} A&M Records, Inc. v. Napster, 114 F.Supp 2d, 896, 921 (N.D.Cal. 2000), aff’d in part rev’d in part and rem’d, 239 F.3d 1004 (9\textsuperscript{th} Cir. 2001), citing Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F. 2d 1159, 1162-1163 (2\textsuperscript{nd} Cir. 1971) - Judge Patel opined that she was 'sure that anyone as clever as the people are who wrote the software in this case are clever enough, as there are plenty of those minds in silicon valley to do it, can come up with a program that will help to identify infringing items as well.'

\textsuperscript{655} A&M Records, Inc. v. Napster, 114 F.Supp 2d, 896, 921 (N.D.Cal. 2000), aff’d in part, rev’d in part and rem’d, 239 F. 3d 1004 (9\textsuperscript{th} Cir. 2001)
In total, the result in the Napster decision is correct, at least as far as contributory infringement is concerned. Napster did indeed facilitate copyright infringements by its users with full knowledge of these activities. Regarding vicarious infringement however, the decision must be questioned and criticized.

b. The Gnutella Problem

A similar but distinctly different problem arises regarding peer-to-peer filesharing that relies on a decentralized system, like Gnutella. In a decentralized filesharing community, there are no central servers administering user libraries or providing IP addresses. The transfer of data between the users also occurs peer to peer, directly from on user to the other, but the users must obtain the information necessary for the file transfer, like the other user’s IP address, themselves, rather than having a central system providing this information. With Gnutella, it is sufficient to know one other Gnutella user’s information to establish a connection with the whole network of Gnutella users. The search request for a certain title or artist is forwarded to these individual users and their computers check whether the wanted files are available on their hard drive, before returning an affirmative notice to the host, which sent the search request. This notice contains the other user’s IP address, her port and information regarding the number and size of the files. The information contained in a Gnutella network is limited to the information that Gnutella users allow others to view on their computers while they are online, just like in the Napster network. Unlike Napster, however, searches are not limited to MP3 or Windows Media files. A Gnutella user can search other users’
computers for any type of file.\textsuperscript{657} Furthermore, Gnutella is open source software, which basically means that there is no single entity at the center of the network that could be held liable for copyright infringements on the basis of the concepts of contributory or vicarious infringement.\textsuperscript{658} Although an AOL employee initially created Gnutella, the original source code has undergone many transformations since its creation and arguably is a program much different from the original.\textsuperscript{659} It would be difficult, if not impossible, to hold AOL liable for Gnutella’s existence, since AOL did not condone the project and even removed the original from its website once it was aware of it.\textsuperscript{660} Furthermore, there are many modified versions of the program available. Consequently, even if AOL could somehow be held liable for the original version of the software, it would be impossible to extend that liability to these modified versions.\textsuperscript{661} Since there is no single entity behind Gnutella copyright holders would have to overcome difficult “jurisdictional hurdles” to sue and would have difficulties finding out who to sue at all.\textsuperscript{662} The same problem arises with every decentralized filesharing network. In the end, copyright holders would be left


\textsuperscript{657} Damien A. Riehl, \textit{Peer-To-Peer Distribution Systems: Will Napster, Gnutella and Freenet Create a Copyright Nirvana or Gehenna?}, 27 WMLR 1761 (2001)


\textsuperscript{661} Damien A. Riehl, \textit{Peer-To-Peer Distribution Systems: Will Napster, Gnutella and Freenet Create a Copyright Nirvana or Gehenna?}, 27 WMLR 1761, 1778 (2001)

\textsuperscript{662} Id.
with only one possibility, to sue all the individual users. In light of the immense legal costs this would incur, it is hardly a viable (or likely) solution.663

5. The AHRA

One possible solution to the problem of copying of protected works over the Internet could have been the Audio Home Recording Act (AHRA) of 1992.664

a. The AHRA solution to digital audio home recording

The AHRA was the result of a compromise between the manufacturers of audio home recording equipment and the music industry brought about by the advent of the Digital Audio Tape (DAT).665

It prohibits copyright infringement actions to be brought based on the manufacture, importation and distribution of digital audio recording devices or the noncommercial use of digital or analog music recordings,666 thereby practically legalizing home digital recording and the devices used. On the other hand it requires the manufacturers of such devices to pay royalties to the copyright holders through a central agency and these royalties are levied on the sales of the recording equipment and media.667 It further requires all digital audio recording devices to have a so-called Serial Copyright Management System (SCMS) to be within the scope of the act.668 This system

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663 See id. at 1778-1779
668 See 17 U.S.C. § 1002 (a); for the exact technical requirements, see S. Rep. No. 102-294, at 17 (1992)
allows an unlimited amount of copies to be made from the original but prevents copies of copies from being made by the device. This result is achieved by a digital "flag" that is encoded at the beginning of an original recording, "telling" the recording device that it may be copied. The "flag" is not copied however. The device will not make a copy of a recording without the "flag" and consequently no copies of copies can be made with the device.\textsuperscript{669}

b. \textit{RIAA v. Diamond Multimedia}\textsuperscript{670}

This case addressed the question of whether the AHRA can be applied in the computer context, more accurately, whether it can be applied to MP3 recording and playback devices. The Recording Industry Association of America (hereinafter RIAA) sought an injunction against the manufacture and sale of the Rio PMP300 (hereinafter Rio), a device that allowed users to copy MP3 files from their computers onto a portable device.\textsuperscript{671} The RIAA argued that the Rio qualified as a digital audio recording device under the definition of the AHRA, but lacked the SCMS required by the Act and was therefore in violation of the AHRA.\textsuperscript{672} This district court agreed with the RIAA to the extent that it found the Rio to be a digital "audio recording device" under the AHRA definition, but it denied the injunction nevertheless, because the Rio’s lack of a digital output makes serial copies impossible and an injunction because of the lacking SCMS would be an "exercise in futility."\textsuperscript{673} The decision was appealed. The 9\textsuperscript{th} Circuit, other

\textsuperscript{670} Recording Industry Association of America v. Diamond Multimedia Systems, Inc., 180 F. 3d 1073 (9\textsuperscript{th} Cir. 1999)
\textsuperscript{671} \textit{Id.} at 1074-1075
\textsuperscript{672} \textit{Id.} at 1075
\textsuperscript{673} Recording Industry Association of America v. Diamond Multimedia Systems, Inc., 29 F. Supp. 2d 624, 632 (C.D. Cal. 1998), aff'd, 180 F. 3d 1073 (9\textsuperscript{th} Cir. 1999)
than the district court, found that the Rio is not a “digital audio recording device” under the definition of the AHRA. The AHRA defines a “digital audio recording device” as a device that is capable of making a “digital audio copied recording.” The court found that because this definition excludes “any material object... in which one or more computer programs are fixed,” and the Rio relies on music copied from a computer hard drive, which is a material object containing computer programs, the Rio could not be considered a “digital audio recording device” within the meaning of the AHRA. The 9th Circuit further argues that the legislative history suggests an intentional “loophole” for computers. Indeed the legislative history suggests that the AHRA is presently not applicable to devices like the Rio, or to normal home computers. The Senate Report on the AHRA states that “the typical personal computer would not fall within the definition of ‘digital audio recording device.’”

Presently, the AHRA is not applicable to computers and consequently has no impact on the question of OSP or P2P liability. Whether the AHRA should be extended to cover computers and the problems discussed in this thesis will be addressed later.

B. Conclusion for the present state of U.S. law:

1. OSP liability and the DMCA

The courts in Netcom and Sega had resolved the problem of OSP liability for direct copyright infringement in a reasonable way well before the introduction of the

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674 Id. at 1075, 1081
675 17 U.S.C. § 1001 (3)
676 17 U.S.C. § 1001 (5) (B)
677 Recording Industry Association of America v. Diamond Multimedia Systems, Inc., 180 F. 3d 1073, 1075, 1076 (9th Cir. 1999)
678 Id. at 1078
DMCA.\textsuperscript{680} However, this solution was neither uniformly applicable nor binding.\textsuperscript{681} Frena was technically still good law, even though the court had reached a questionable decision that provided no solution to the problem but rather caused more problems by ignoring reality.\textsuperscript{682} The DMCA provides a clear, functional and uniform solution regarding direct infringement liability; and although the DMCA's definition of "service providers" is somewhat indefinite and arguably insufficient to adequately cover the entities involved at all levels, at least § 512 (a) should be welcomed as the overdue uniform codification of a viable solution regarding this type of liability, consistent with the results in the leading cases on the issue: Netcom and Sega. Eliminating monetary liability for the types of activities vital to the Internet's existence and functioning ensures continuing widespread access to the Internet at low cost by reducing the OSPs' financial risk and thereby avoiding these risks being handed down to the user through higher fees or restrictive subscription policies. This result promotes further growth of the Internet and the resources available through it, while preserving free speech and thereby contributes to the constitutional goal of "promotion of science" (i.e. learning).\textsuperscript{683}

Curiously though, when taking a closer look at the safe harbors, it becomes apparent that they cover situations in which OSPs should not face liability anyway: If an OSP has knowledge or receives notice of allegedly infringing material on its network and removes this material or disables access to it, there should not have been any liability even before the introduction of the DMCA with its safe harbors.\textsuperscript{684} This is coherent with

\textsuperscript{680} Supra, pp. 107, 118
\textsuperscript{681} Alfred C. Yen, Internet Service Provider Liability For Subscriber Copyright Infringement, Enterprise Liability, And the First Amendment, 88 Geo. L. J. 1833, 1880, 1883 (2000)
\textsuperscript{682} Supra, p. 113
\textsuperscript{683} U.S. Const. art. 1 § 8 cl. 8
\textsuperscript{684} Alfred C. Yen, Internet Service Provider Liability For Subscriber Copyright Infringement, Enterprise Liability, And the First Amendment, 88 Geo. L. J. 1833, 1880, 1883 (2000)
the decisions in Netcom and Marobie. Defendants in those cases were not liable because they had no knowledge (hence were not contributorily liable), no financial benefit or no actual ability to supervise (hence were not vicariously liable) – exactly the standards used in the DMCA safe harbors. At the same time, the DMCA’s standards are consistent with the findings in Sega, since the defendant in that case had knowledge of the infringements and the right and ability to supervise and control. It must be noted that the provisions closely mirror the standards for contributory and vicarious infringement respectively. Subsection (A) refers to “actual knowledge” or “awareness”, which equals the constructive knowledge required for contributory liability while subsection (B) requires that the OSP have no “direct financial benefit” from an infringement, which is consistent with the standards for vicarious liability. The only real difference occurs in subsection (C) that equates the formal notice with knowledge.

Why create safe harbors, if there was no liability before? Suffice to say that before the introduction of the DMCA there were not enough court decisions to this effect; the issue was not settled completely. The court in Sega had not set forth standards for finding contributory liability that could be counted on, Frena was theoretically still good law and Netcom and Marobie were hardly enough precedents to establish a sound basis for standards of service provider liability. Therefore the safe harbor provisions serve a purpose after all. A uniform codified solution is to be welcomed because it

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685 Supra, pp. 107, 118, 120
687 Id. at 1880, 1882-1883
688 Id. at, 1880, 1883; see also ALS Scan, Inc. v. RemarQ Communities, Inc., 239 F. 3d 619, 622 C.A. 4 (Md.) 2001 and supra, p. 122
689 Supra, pp. 124 et. seq.
690 Supra, p. 159
691 Supra, pp. 107, 118, 120
provides OSPs with boundaries within which they do not face liability and thereby contributes to the functionality and further expansion of the Internet and new technologies.\textsuperscript{692} This development is certainly positive, especially since it does not endorse the findings of the Frena court. In the online environment it is prudent to create uniformity and functionality by statute to ensure further growth of the beneficial aspects of the Web while limiting the harmful aspects. If a balance between the copyright owners rights and the public’s interest is to be achieved, limitations of liability are necessary. If providers were to face liability caused only by a third party taking advantage of their prime activity – providing services relating to the Internet – this would cause costs which would ultimately fall back on the consumer and may also lead to limitations of free speech.\textsuperscript{693} Therefore, and for the reasons stated in the above discussions of the cases, limiting OSP liability for online infringements is generally a good idea.

An entirely different question is whether the safe harbors in their present form are the best solution that could have been found. This is difficult to evaluate, since the DMCA has not been applied for a sufficiently long period of time to draw final conclusions about its functionality and effects. These will also largely depend on whether the providers actually make use of the safe harbor provisions, e.g. comply with the conditions set forth therein.\textsuperscript{694} A few educated guesses toward answering these questions can be made. While meeting some of the requirements may be inconvenient for OSPs, it seems fair to say that they will attempt to limit their potential liability to the greatest

\textsuperscript{692} Cf. Brief Amicus Curiae of Copyright Professors In Support of Reversal to Appeal Nos. 00-16401 and 00-16403, United States Court of Appeals, Ninth Circuit, 3-6 (2000)

\textsuperscript{693} Infra, pp. 164 et. seq.

\textsuperscript{694} Alfred C. Yen, Internet Service Provider Liability For Subscriber Copyright Infringement, Enterprise Liability, And the First Amendment, 88 Geo. L. J. 1833, 1880, 1885 (2000)
extent possible. To do so, they will comply with the DMCA's safe harbor requirements where they face a high risk of liability. ALS v. RemarQ points in different directions at once regarding this issue. On the one hand the OSP, RemarQ, argued based on the DMCA and claimed the safe harbor, on the other hand they refuse to block the sites concerned as required to remain within the safe harbor. This behavior could be interpreted to signify only partial acceptance of the safe harbor provisions on the part of OSPs. However, it seems too early come to final conclusions about OSP behavior or the impact of the safe harbors at this point. RemarQ's refusal to block access to the newsgroup was under the impression that ALS had not complied with the DMCA requirements and there was hardly any case law to give RemarQ an idea of how to react. The case only shows that OSPs may be more reluctant to block access to sites than expected; yet this too may change once the standards set forth in the DMCA are interpreted more thoroughly and standards have been developed by the courts and in practice.

As demonstrated above the risk to be held liable for direct infringement is fairly small since Frena has been widely discredited. Yet Frena could still be followed by other courts and therefore at least some OSPs will comply with the requirements relating to direct infringement.

Regarding vicarious liability, the liability risk for OSPs is low as well, especially after Netcom. However, the risk to be held liable for contributory infringement seems significantly higher, especially since the law is not clear about the issue at the present

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695 Id. at 1885-1886  
696 Id. at 1840-1842  
697 Id. at 1886  
698 Supra, p. 107
time. It is not settled, for example, what degree of knowledge could suffice to find liability for contributory infringement, even though Netcom contained some indications. Accordingly, it seems likely that OSPs would be willing to comply with the requirements for the safe harbor concerning at least contributory liability.\textsuperscript{699} It must also be considered that the DMCA provides OSPs with a higher degree of certainty as to whether they may face liability or not. Furthermore, compliance with the DMCA requirements offers protection from lawsuits filed by subscribers whose material was removed.\textsuperscript{700} In toto, it seems likely that OSPs will tend to meet the requirements set forth in the statute.

What effects will this have? Ideally, it would simply mean that infringing material is removed while the Internet’s operability is preserved by limiting undue liability. However, it is questionable whether this will actually happen, whether the procedure required by the statute is going to have this effect, or whether it will lead to the unjustified removal of noninfringing material on a large scale.\textsuperscript{701} This seems to be a substantial risk, since the copyright holders will generally have more resources and legal knowledge than the alleged infringers; they will know which designated agent to notify, how to phrase their complaint and they will generally have financial resources to file a lawsuit and pursue their interests to the fullest extent. On the other hand, the average alleged infringer will not have these advantages.\textsuperscript{702} It may well be argued that the content provider will know exactly which designated agent to respond to once the notice of removal has been received and that individual knowledge and wealth are not the issue in copyright protection. While all of this is true to some extent, it must be considered that

\textsuperscript{699} Alfred C. Yen, Internet Service Provider Liability For Subscriber Copyright Infringement, Enterprise Liability, And the First Amendment, 88 Geo. L. J. 1833, 1886 (2000)
\textsuperscript{700} Id., at 1886-1887
\textsuperscript{701} See id. at 1880, 1888 (2000)
Copyright in the U.S. serves to protect not only the copyright holder, but also the public. The goal of American copyright law is, or at least constitutionally prescribed should be, a balance between these interests. In light of this, fairness between the parties involved regarding legal measures may well be considered a viable issue.

Another serious issue is the protection of free speech. The existence of copyright implicates free speech, because copyright by nature limits speech regarding the copyrighted work for anyone but the copyright holder. This does not mean that copyright law is generally a violation of the first amendment, of course. Where material is copied, it is necessarily a repetition. Restrictions on repetition of existing speech are no as problematic with regard to the first Amendment, since they add relatively little to the "marketplace of ideas". However, where material that is actually not infringing is removed or made inaccessible because of a complaint, free speech is restrained. Of course the argument can be made that the restriction is limited in duration since the material will be restored eventually if it really does not infringe. While this argument is valid, it is not convincing in the context of the DMCA's safe harbors for three reasons: First, the imbalance between the parties mentioned above makes it easy for content providers to have allegedly infringing material removed while it makes it difficult for the alleged infringer to react on an even battlefield. Second and more importantly, OSPs run no risk of being sued by their subscribers for removing material if they comply with the

\footnotesize{\textsuperscript{702} Id. at 1887 \textsuperscript{703} Supra, pp. 89-93 \textsuperscript{704} Alfred C. Yen, Internet Service Provider Liability For Subscriber Copyright Infringement, Enterprise Liability, And the First Amendment, 88 Geo. L. J. 1833, 1880, 1866-1867 (2000); see also L.Ray Patterson, Free Speech, Copyright and Fair Use, 40 Vand. L. Rev. 1 (1987); Robert C. Denicola, Copyright and Free Speech: Constitutional Limitations on the Protection of Expression, 67 Cal. L. rev. 283 (1979); Melville B. Nimmer, Does Copyright Abridge the First Amendment Guarantee of Free Speech and Press, 17 UCLA L. Rev. 1180 (1970)}
safe harbor requirements. As long as the material is removed due to a formal statutory complaint, there is no risk whatsoever for the OSP. It seems odd, that any material, infringing or non-infringing can be removed without risk of a lawsuit. The alleged infringer has no remedy; she has no choice but to await being sued by the complainant. After all, the opportunity to respond to the removal only leads to restoration of the material if the complainant does not sue. Furthermore, the allegedly infringing material remains offline during trial which again benefits the complainant; it amounts to a temporary restraining order and preliminary injunction without going through the procedure for obtaining such; there are no hearings, no court proceedings, not even posting of a bond. The usual procedures that would protect a copyright defendant from unjustified restrictions of free speech rights are circumvented by the safe harbor design in the DMCA.  

Last, and most importantly, generally errors that limit speech are far more problematic than errors that expand free speech further than necessary. The removal of material although it is potentially non-infringing seems to be an error of the first category.

Taking all this into account, the safe harbor provisions of the DMCA seem to be a less than perfect solution to the problem of OSP liability and the certainly necessary limitation thereof. While it is difficult to envision a more functional set of requirements, it is certainly possible to achieve a more balanced result by providing defendants in these cases with appropriate means to protect their First Amendment rights. A hearing or a bond for example would be an improvement. It would also be reasonable to allocate more

705 See Alfred C. Yen, Internet Service Provider Liability For Subscriber Copyright Infringement, Enterprise Liability, And the First Amendment, 88 Geo. L. J. 1833, 1880, 1885-1889 (2000)
706 Id. at 1889
707 Id. at 1868-1869
burdens to the complainant since it is she who claims copyright infringement and should therefore bear the burden of proof to its fullest. While the notice and take-down procedure is a sensible solution, it is not so sensible, even unreasonable to keep the material removed or inaccessible after a substantial response unless there is reason to believe that irreparable harm would be done to the complainant.

2. P2P

Regarding P2P services and networks, there is no final solution yet and the Napster decisions, though reaching an arguably reasonable result under the current law in the end, have not shone enough light into the darkness of the issue to guide the way to a uniform standard of liability. The decentralized filesharing networks have clouded the issue further, due to their lack of a central entity that could be held responsible for the users’ actions. After Napster’s loss in the courts, the likelihood of new centralized filesharing systems being created (for the purpose of exchanging copyrighted music at least) have diminished to almost nothing. The trend goes toward decentralized networks as illustrated by the emergence of Gnutella, Freenet and the like. Consequently, the question is not whether a central entity’s liability for contributory or vicarious infringement should be limited, but rather how to maintain a balance between the copyright holders and the public, as manifested in the individual private users. It is obvious, that the present laws cannot answer this question adequately, since the it is practically impossible for copyright holders to “fight for their rights” in court against millions of individuals with hardly enough assets to cover even the legal costs this would incur. On the other hand, allowing anyone with Internet access to share copyrighted
material without restriction would pose a serious threat to the copyright industry, the artists behind it and would eventually lead to less original creative work of all levels of quality being produced, thereby damaging the public interest in a big and varied public domain. Especially in the music business, it could be argued that the industry has somehow abused their copyrights and the monopolistic position they have enjoyed for so long and should therefore not be pitied or protected. While this argument may contain more than a kernel of truth, it is no legal argument and should not encourage anyone to ignore that the industry has rights. More importantly, the artists have rights; and while it is true that the artists profit much less than the industry, this again should not be used as an argument against protecting copyrights. These two arguments could be used against the "work for hire" doctrine or as reasons to take a closer look at corporate pricing schemes and potential violations of antitrust law, but they have nothing to do with the issue of copyright infringement. One possible solution would be the extension of the AHRA to cover computers and certain computer hardware to legalize the individual users' actions by creating a reimbursement and compulsory licensing scheme.
A. Similarities

In both jurisdictions discussed here, the individual users infringe copyright by transferring protected music over the Internet, be it with or without using peer-to-peer filesharing networks. The problem and the controversy are the same: The individual users are too numerous to sue, the enforcement of copyright against them has become impossible in most cases and the issue of liability on the part of OSPs and central P2P entities is an unresolved problem, the newly implemented laws (the DMCA, the TDG and Directive 2000/31/EC) notwithstanding. While the United States enacted the DMCA to address the problem, it does not resolve it entirely, especially with regard to centralized P2P networks. Even though the safe harbor provisions have been applied in ALS v. RemarQ, it is still not clear how well they will work. The same is true for Directive 2000/31/EC, which has not even been incorporated or translated into national laws by all member states and has not been applied in practice. Furthermore, there may be additional regulations on the issue in the “Multimedia Directive” to be enacted. It is difficult if not impossible to say whether the DMCA or Directive 2000/31/EC adequately deal with the problems in the long run.

In both jurisdictions however, there are laws that would resolve at least some of the problems, if they were applicable: The TDG would resolve the issue of OSP liability in Germany\textsuperscript{708}, curiously enough in a way much similar to the DMCA and Directive 2000/31/EC, which in turn shows many similarities to the DMCA in its structure and
B. Differences

The most obvious difference between the jurisdictions on the other hand, is the scope of the new legislation. While the DMCA purports to be a copyright law and is indeed limited in scope to copyright-related issues, Directive 2000/31/EC addresses criminal law, intellectual property law in general and even contract law, to name but a few. This illustrates the general difference between U.S. law, which tends to regulate “from the particular to the general” and continental European law, which usually contains very general rules that are then interpreted to fit many individual situations. Neither system seems to have the perfect solution for the issue, but from a logical standpoint it seems that the more general approach is better suited to address a developing problem; to answer a question that is not entirely known because it can be written more abstractly and thereby remain more flexible in its application. On the other hand, addressing the problem on a case-by-case basis has the advantage of not being limited by a statute.

There are several more differences prior to the introduction of the new laws, like the general philosophical approach or the scope of the defenses/justifications an individual or corporate entity could assert. These are largely apparent from the above discussions and will not be repeated here. Suffice to say that the approaches are different

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708 See supra, p. 75
710 Compare supra, p. 155 and infra, p. 171
enough to be distinguished but similar enough to possibly reach almost identical solutions, as will be suggested in the following.
CHAPTER IV: CONCLUSIONS AND SUGGESTIONS

A. OSP liability

The approach taken regarding the liability of OSPs in European and U.S. legislation so far is a step in the right direction, if a nervous and incomplete one. If the DMCA can be amended to adequately preserve free speech and fairly distribute the burden of proof, it should resolve the issue in a sensible manner. The same goes for the European solution, although it remains to be seen how the member states will fill in the details left open by the Directive. While the present solutions should certainly be subject to further criticism and refinement, they are fairly functional, practical and compatible with reality as far as they go. The gaps can be filled and the flaws eliminated.

An alternative solution would be the general implementation of a compulsory licensing and royalty scheme, possibly akin to the AHRA. Legislation to this effect would have to eliminate any liability on the individual users’ part. In turn any form of indirect liability in the U.S. could not arise due to the lack of infringement by a third party. In Germany the same result could be achieved by legislation going further than Directive 2000/31/EC’s requirements and eliminating all liability for OSPs. This solution will be discussed further in the following, regarding P2P filesharing networks.

B. P2P

Neither of the legal systems examined here has found a sound solution to the problem of P2P filesharing networks, especially not decentralized systems like Gnutella
or Freenet. There are several possible ways to handle the problem, some of which will be analyzed in the following.

I. Centralized filesharing networks

In centralized filesharing networks, the individual users infringe copyright when making unauthorized copies of protected works, as discussed above.\textsuperscript{711} Currently, the entity maintaining the centralized network is at least liable for contributory infringement, as seen in the Napster case.\textsuperscript{712} This seems simple enough. However, this result leaves much to be wished for. The individual users, who commit the actual infringements are too many to be sued for their acts and furthermore technology could be seriously impeded in its progress by the contributory liability of the central entity because this entity is usually the one creating a new service or technology. The driving forces behind the developments in the field of Internet usability and versatility should not be hindered by law beyond what is necessary. There may be several solutions to the problem.

The sensible solution to the issue would have to start by eliminating the individual users' liability. There is no benefit in maintaining a law that holds millions of otherwise innocent persons liable for an everyday activity while at the same time lacking any practical way of enforcing it. The copyright holders have no benefit from the individual users liability, it is not an effective element to the protection of their rights and therefore unnecessary. Consequently, the individual users sharing copyrighted works should have the benefit of an exception like the fair use doctrine or a justification like § 53 UrhG or a similar compulsory licensing scheme. This would not only simplify and obliterate many

\textsuperscript{711} Supra, pp. 53, 135
\textsuperscript{712} Supra, p. 136
of the problems discussed above, it would also mean bringing a vast number of Internet users “back into legality.” As a side effect, there could not be any contributory liability on the part of the central entities anymore (or OSPs for that matter), because there would not be any infringements committed by the individual users and consequently, there would be nothing to “contribute” to. Since vicarious infringement liability, like liability for contributory infringement, requires an infringement by a third party (the users), this issue would be resolved as well. Even though individual infringement is not a strict prerequisite to third party liability in Germany, the concept would eliminate the problem of third party liability for online infringements as well, due to the licensing scheme proposed here.

Of course, the individual users’ liability cannot be abolished without some form of generalized benefit or reimbursement to the artists and other copyright holders. There may be many ways to do this, but it seems there are only two practical paths to take. One would be a tax on Internet access that could then be used to pay artists and copyright holders. This solution would be the easiest conceptually. However, it is certainly the least popular and least politically opportune and is not likely to be implemented. Another, likely unpopular but practically viable, solution would be a mandatory automatically added fee on the purchase of hardware (and possibly some software) that is necessary for the exchange of copyrighted material over the Internet. One problem would be to determine to which equipment this should apply. A modem? A CD-Writer? Even a whole computer system? While this may not make much of a difference, another serious problem would be that such fees would be highly arbitrary since not everyone using any of the hardware required to share copyrighted material over the Internet actually does so.

\[713\] Supra, 117
or even wishes to do so. This, however, should be regarded as the drawback that is acceptable in resolving the whole problem. Furthermore, once P2P filesharing of copyrighted material is “legalized”, more users will likely take advantage of the technology, more technology will be available and the fees would grow to be less arbitrary over time. Therefore, this concept should be recognized as presenting a simple, functional and acceptable solution. As to possible opposition from the record industry or the copyright industry in general, it should be noted that the solution may cause losses for them for a certain time, but it should also be recognized that their rights would be preserved and royalties would be paid. Furthermore, the added publicity and exposure of their products to a vast worldwide audience may eventually lead to increased sales of their products. The value of word-of-mouth public relations should not be underestimated in this context.

For the United States, this result could basically be achieved by extending the scope of the AHRA to cover all digital recording devices, including MP3 recording software, CD-writers and possibly even home computers. In Germany, the implementation of Directive 2000/31/EC could be the opportunity to reform the UrhG to some extent and implement a compulsory licensing scheme of this nature by extending or reworking §53 UrhG. Such an amendment or “renovatin” of § 53 UrhG would then have to include a provision similar to § 5 TDG or a new provision, eliminating liability for “mere conduit”, “caching”, “hosting” and the like.
II. Decentralized filesharing networks

Since only the individual users of decentralized filesharing networks infringe copyrights under current laws, only the individual users could be held liable and therefore only they can be at the center of the question of how to protect the copyright holders without limiting free speech and the public interest relating to copyright and without inhibiting the growth of new technologies.

Following the AHRA-like approach would resolve this problem as well. The individual users’ activities would be legalized and the industry and artists would benefit from a royalty scheme and a larger audience that may or may not purchase items from the industry, increasing their profits apart from the royalties.

In the end, it must be noted that the problems are still immense and largely unresolved. The solutions found and suggested by legislators, courts and scholars should all be regarded as useful pieces to be brought together to solve the great puzzle of liability for online infringements. The suggestions made above are believed by the author to pose an alternative to the present "bits and pieces" legislation and attempt to incorporate and restate the most useful ideas already proposed while hopefully adding a new element of uniformity and simplicity.

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http://Internet.fastaccess.com/consumer/blsc_howfast.jsp - Consumer Information Site

http://www.netlaw.de - Legal Information Site

http://www.jurpc.de - Legal Information Site


http://europa.eu.int - European Union Information Page (official)

http://www.bmj.bund.de - German Ministry Of Justice Page (official)
http://www.heise.de - Legal Information Site

http://www.weinknecht.de - Legal Information Site

http://www.hgb.leipzig.de - University of Leipzig Site

BT-Drucksache 4/270 - Statement of the Bundestag regarding §53 UrhG

http://normative.zusammenhaenge.at/faelle/urhg_aol.html - Court Report

http://www.sub.unigoettingen.de - University of Goettingen Site

http://Internet.spiegel.de - Magazine “Der Spiegel” Site


http://www.newsbytes.com - News Site

http://www.inside.com - News Site

http://www.wired.com - Magazine “Wired” Site

http://www.thestandard.com - “The Standard” Site

http://www.wirednews.com

http://music.zdnet.com

http://www.salon.com

http://www.washingtonpost.com - “Washington Post” Site


Abbreviations and foreign terms:

1. Courts

AG – Amtsgericht (lowest level civil and criminal [trial] court in Germany)

LG – Landgericht (second level civil and criminal [trial and appeals] court in Germany)
OLG – Oberlandesgericht (civil and criminal court of appeals in Germany)

KG – Kammergericht (=OLG in Berlin)

OGH – Oberster Gerichtshof (highest civil and criminal court in Austria)

BGH – Bundesgerichtshof (highest civil and criminal court [of appeals] in Germany)

BGHZ – Bundesgerichtshof in Zivilsachen (private law decisions of the BGH)

BverfG – Bundesverfassungsgericht (Constitutional Court of Germany)

RG – Reichsgericht (highest civil and criminal court [of appeals] before 1945)

RGZ – Reichsgericht in Zivilsachen (private law decisions of the RG)

2. Statutes

BGB – Bürgerliches Gesetzbuch (German Civil Code)

UrhG – Urheberrechtsgesetz (German Copyright Statute)

luKDG – Informations- und Kommunikationsdienstegesetz (Information- and Communications- services statute)

TDG – Teledienstgesetz (Art. X of the luKDG)

LUG – Gesetz betreffend das Urheberrecht an Werken der Literatur und der Tonkunst (Copyright Statute for Literature and Music of 1901)

KUG - Gesetz betreffend das Urheberrecht an Werken der bildenden Kuenste und der Fotografie (Copyright Statute for Arts and Photography of 1907)

GG – Grundgesetz (German Constitution)

3. German Publications:

NJW – Neue Juristische Wochenschrift
4. Translations of frequently used German terms

Abs. – Absatz (paragraph)

Urheber – author

Urheberrecht – copyright/right of the author

Urheberpersoenlichkeitsrecht – personal rights of the author/moral rights

Urheberrechtsgesetz – copyright statute

Urteil – court decision/verdict

Verfasser/Autor – author

Eigentum - property

Verwertungsrecht – right to economic exploitation

Gesetz(buch) – statute

Rechtsverletzung – violation of a right/infringement

Dienste der Informationsgesellschaft – information society services

Inverkehrbringen – to be entered into circulation
Anbieten – to offer

Geistige Auseinandersetzung – intellectual dispute

Anspruchsgrundlage – (statutory) basis for a claim

Rechtswidrig – illegal/against the law

Amtliche Begruendung – official statement of the legislature

Kenntnis – knowledge

Inhalt – content