

BEYOND THE SAFE HARBOURS: HARMONISING SUBSTANTIVE INTERMEDIARY LIABILITY FOR COPYRIGHT INFRINGEMENT IN EUROPE

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INTRODUCTION

The internet has proven a convenient vehicle for the commission of unprecedented levels of copyright infringement by leagues of anonymous – and impecunious – infringers. In their quest for deep pockets and easy targets, right-holders have, in reaction, turned against the internet middlemen, attempting to hold them accountable for the wrong-doings of the small-scale offenders using their networks. As a result, the tricky issue of indirect liability has been given new urgency. With perplexed domestic courts turning to the general rules on extra-contractual liability to parse the issue, during the 90s a number of EU Member States started introducing special liability laws in order to shield the budding internet industry from legal uncertainty.¹ In an effort to forestall the parallel development thus threatened of multiple disparate European national regimes for intermediary liability,² in 2000 the Commission adopted in the E-Commerce

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¹ Of the EU Member States relevant to this article, Germany was the first to introduce such legislation with the 1997 Multimedia Act (*Informations- und Kommunikationsdienstegesetz – IuKDG*); France followed in 2000 with its Freedom of Communications Act (*Loi n° 2000-719 du 1 août 2000 modifiant la loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication*). The UK never introduced specialised rules on the liability of intermediaries for copyright infringement, but the Defamation Act 1996 did codify the “innocent dissemination” defence for distributors of defamatory material.

² Recital 40, E-Commerce Directive. See also Commission Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market, 18 November 1998, COM (1998) 586 final.

Directive³ a set of safe harbour provisions granting immunity to intermediaries from liability incurred in the supply of three types of services: mere conduit, caching and hosting.⁴ But these immunities apply only in certain circumscribed conditions, barring which domestic courts perforce fall back onto national liability standards that remain greatly divided: the safe harbour, therefore, offer only a buffer zone against intra-EU secondary liability law inconsistencies. The harmonisation achieved applies in an evasive, negative fashion, dictating only when Member States *can't* impose liability for intermediary activities, not when they can. As a result, the national substantive rules on intermediary liability for copyright infringement continue to diverge from one another, a discrepancy which has consequences not only for businesses engaging in activities not currently covered by the safe harbours, e.g. the providers of hyperlinks and search engines, but also for intermediaries providing protected services that fail to abide by the required conditions and thereby forfeit immunity, such as hosting providers that refuse to expeditiously take down unlawful information upon obtaining knowledge of its existence or caching providers that do not appropriately update cached content. The veneer of approximation that the safe harbours supply masks the persisting fragmentation of substantive liability law along European borders.

The lack of a European cross-border consensus on the scope and normative basis of intermediary liability is probably unsurprising given the close connection of the issue with the hard to harmonise area of general tort law. But much more perplexingly, even on the national level the law of indirect liability is one of the most badly understood areas of intellectual property law – or indeed civil law. In fact, as this article will show, if there is one similarity that stands out between Member States, it is the persisting legal uncertainty they all share regarding the application of existing national norms: lacking set, well-reasoned standards for the attribution of intermediary liability, domestic courts are forced to rely on open-ended, haphazard, improvisational tests, while conflicting court rulings are rampant not only between Member States, but even within the same jurisdiction.⁵ It is therefore apparent that a cogent solution to the problem of intermediary liability will require significant doctrinal reform across the board of EU Member States. As a result, a gap has emerged that would be most efficiently covered with one single harmonised European solution for substantial intermediary copyright infringement than multiple national ones. Happily, such harmonisation is far from as hopeless as it is usually presented: indeed, as this article will show, although the underlying national traditions and bodies of law in tort are doubtlessly dissimilar, specifically in the area of intermediary copyright liability the rules are moving closer together and common principles are beginning to take shape beneath the national divergences.⁶

Below, in Sections 1-3, the substantive liability rules for third party copyright infringement in the UK,⁷ France and Germany shall be analysed. In view of the importance that tort rules play in this area, the selected countries have been chosen as representative of each of the three major tort law traditions of Europe.⁸ Given the complete lack of EU-level harmonisation in this area, a country-by-country analysis shall be taken. In this way, the article shall aim to provide a well-rounded perspective on the strengths and weaknesses of each national

³ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on Electronic Commerce), [2000] OJ L 178/1 (henceforth: E-Commerce Directive).

⁴ See Art. 12-15 of the E-Commerce Directive.

⁵ “EU Study on the Legal Analysis of A Single Market for the Information Society – New Rules for a New Age?” (November 2009), Chapter 6: “Liability of Internet Intermediaries”, available online.

⁶ Indeed, Martinet Farano suggests that similarities in the underlying substantive legal framework can be detected even between European states and the US and pushes for further harmonisation between EU and US. See B Martinet Farano, “Internet Intermediaries’ Liability for Copyright and Trademark Infringement: Reconciling the EU and US Approaches” (2012) TTLF Working Paper No 14.

⁷ It should be noted that, although the Copyright, Designs and Patents Act 1988 (henceforth: CDPA) applies across the United Kingdom, in view of the separate systems that govern extra-contractual liability in the various legal jurisdictions of the UK, for simplicity’s sake, this article shall limit itself exclusively to the law of England and Wales.

⁸ C van Dam, *European Tort Law* (OUP 2007) para 102-2.

scheme, while also picking out the common threads that run throughout all three. The intention shall be to reveal the shared confusion that prevails across European borders, as well as the dissimilarities between the three examined national approaches, thereby demonstrating the need for a new and uniform EU replacement scheme. Following this, Section 4 will step back to take a helicopter view of the issue in order to identify the main commonalities in the legal principles governing intermediary liability in the selected Member States that could support European harmonisation of the substantive issues. The analysis here shall move along the triple axes of the conditions for the imposition of monetary relief, the conditions for the imposition of injunctive relief and the scope of any injunctions thus imposed.

The article shall focus on the liability of internet service providers acting in their intermediary capacity for copyright infringement committed on their networks and web pages by their users. Direct liability incurred by a platform for its own harmful behaviour without third party involvement shall not be discussed, nor will the liability of users themselves for content they upload. It should be noted that, although this analysis is concerned exclusively with intermediary liability for copyright infringement, cases involving other forms of illegality will be discussed where they allow for conclusions to be drawn that can be equally applied to copyright.

1. United Kingdom

1.1. An Intra-Copyright Solution: Authorising Infringement

The legal tool primarily relied upon by the English courts for findings of liability by internet-related service providers is that of authorisation.⁹ Under s. 16 (1) of the UK's Copyright, Designs and Patents Act 1988 (CDPA) the owner of a copyrighted work is granted exclusive rights over certain restricted activities,¹⁰ as well as, under s. 16 (2), the right to authorise others to engage in these activities; accordingly, copyright in a work may be infringed by any person who either does any of the listed restricted acts without licence from the copyright owner himself or authorises another person to commit them. In order that unlawful authorisation be found, it is generally agreed that primary infringement by the person to whom "authorisation" was illegitimately given must have taken place.¹¹ Unlawful authorisation, although strictly speaking categorised in the UK as an act of direct infringement, thus straddles the fence between primary and secondary liability.¹²

According to Bently and Sherman, when the right was first introduced to the Copyright Act of 1911, it was dismissed as superfluous and tautologous,¹³ however, over time the concept of authorisation has evolved to exact liability beyond the directly and vicariously liable, from persons associated or affiliated in a variety of ways with the primary infringer. In *Falcon v Famous Players Film Company Ltd*¹⁴, Bankes LJ accepted that to "authorise" means to "sanction, approve and countenance", while a concurring Atkin LJ defined the notion as to "grant or purport to

⁹ It should be noted that sections 22 *et seq* of the UK's CDPA regulate questions of protection against those who aid and abet the primary infringer under the heading of "Secondary infringement of copyright". The scope of the concept of secondary infringement is however limited in this context to five acts relating to people who, broadly speaking, either distribute or deal with infringing copies once they have been made or facilitate copyright infringement by providing the equipment or means that enable the copying to take place. It is therefore not particularly interesting for the establishment of third party liability in the online context. See: L Bently and B Sherman, *Intellectual Property Law* (3rd ed, OUP, Oxford 2009) 195.

¹⁰ Namely, to (a) copy the work; (b) issue copies of the work to the public; (c) rent or lend the work to the public; (d) perform, show or play the work in public; (e) communicate the work to the public and (f) make an adaptation of the work or do any of the proceedings acts in relation to the adaptation.

¹¹ H MacQueen, C Waelde & G Laurie, *Contemporary Intellectual Property – Law and Policy* (2nd ed, OUP, Oxford 2011) 159.

¹² ED Ventose & JJ Forrester, "Authorisation and Infringement of Copyright on the Internet" (2010) 14(6) *Journal of Internet Law*, 3 and Y Gendreau, "Authorisation Revisited" (2001) 48 *Journal of the Copyright Society of the USA*, 341.

¹³ This will have been particularly so given the recognition of authorisation by the common law as a "participation link" leading to joint tortfeasance: see, LJ Scrutton in *Performing Right Soc'y, Ltd. v Ciryil Theatrical Syndicate, Ltd.* [1924] 1 K.B.

¹⁴ *Falcon v Famous Players* [1926] 2 KB 474.

grant to a third person the right to do the act complained of, whether the intention is that the grantee shall do the act on his own account, or only on account of the grantor.” The seminal authority in the area is *CBS v Amstrad*,¹⁵ in which Lord Templeman, speaking for a unanimous House of Lords, considered both *Falcon* authorisation formulations and came down in favour of the narrower Atkin LJ approach. Although it was acknowledged that authorisation may be express or simply implied, where the infringement is a necessary consequence of the act explicitly allowed, Lord Templeman observed that a distinction must be made between conferring the *power* to copy upon the purchaser and purporting to grant the *right* to copy. Significantly for the regulation of modern online technologies, the court noted that although a variety of materials are “by their nature almost inevitably to be used for the purpose of an infringement”, their invention, manufacture, sale and advertisement is nonetheless not inhibited by the law and cannot be convincingly interpreted as authorisation of infringement. Significantly, given that the commonly understood meaning of the term “authorisation” would require the assumption of some degree of authority, authorisation excludes the mere facilitation of copyright infringement.¹⁶

But the argument of facilitation as a form of authorisation has been gaining more traction in recent years.¹⁷ Faced with rampart online infringement, right-holders have been putting forth claims that making available facilities in the knowledge that they will probably be used to infringe should qualify as “authorising” them.¹⁸ In response, UK judges have attempted to introduce a bit more flexibility to the traditionally restrictive interpretation of authorisation by backpedalling to the broader Bankes LJ definition. In *Newzbin I*¹⁹, a case involving the liability of a Usenet indexer for locating, categorising and reassembling for download binary files containing copies of protected films, the court, although accepting that first copyright infringement by Newzbin’s premium members must be found Newzbin’s accessory liability can be considered, breezily substantiated the finding of such liability only on the mere *overwhelming likelihood* that infringement had occurred, while noting that the reason why greater accuracy was not possible in the identification of particular infringed films by premium members was the decision on Newzbin’s part to avoid recording the details of the files downloaded via its system. More importantly, although initially endorsing Lord Templeman’s understanding of authorisation as “the granting or purporting to grant of a right” and accepting that authorisation “does not extend to mere enablement, assistance or even encouragement”, it then unaccountably reverted to the “sanction, approve and countenance” test, ignoring its dismissal by the House of Lords. Indeed, although the judge introduces a list of circumstances substantiating “authorisation by supply”, ostensibly derived by an extensive excerpt quoted from *Amstrad*, this does not seem to offer a strong foothold for their selection, with two of the five criteria (whether the equipment constituted the means used to infringe and whether it was inevitable that it would be used to infringe) being circumstances that Lord Templeman explicitly rejected and a further two (the degree of control retained by the supplier and whether they had taken any steps to prevent infringement) circumstances about which he was at best ambivalent. Instead, the list appears to be inspired by Australian “sanction, approve and countenance” based law, to which the decision then turns, with 3 out of the 5 listed factors reminiscent of s.101(1) of the Australian Copyright Act and the rest taken from Australian case law unambiguously denounced by Lord Templeman. The judge concludes that “[i]n my judgment [the Australian] decisions are entirely consistent with the principles which I have summarised and which I believe I must apply” – given that they are the only real basis offered in the ruling for their introduction this is perhaps unsurprising. The

¹⁵ *CBS Songs v Amstrad* [1988] 2 All ER 484.

¹⁶ See *CBS Inc v Ames Records and Tapes* [1981] 2 All ER 812. It should be noted that this restriction was slightly tempered by *Ames*’s willingness to treat, depending on the circumstances, mere indifference as capable of signalling authorisation.

¹⁷ For an exploration of the arguments in favour of introducing secondary liability for mere facilitation, see PS Davies, “Accessory Liability for Assisting Torts” (2011) 70(2) Cambridge Law Journal, 353.

¹⁸ L Bently and B Sherman, *Intellectual Property Law* (3rd ed, OUP, Oxford 2009) 154.

¹⁹ *Twentieth Century Fox Film Corporation & Anor v Newzbin Ltd* [2010] EWHC 608 (Ch).

Newzbin case law was replicated two years later in *Dramatico Entertainment*,²⁰ a case examining whether the operators of the well-known peer-to-peer file-sharing website the Pirate Bay have infringed the claimant's copyrights which the judge described as "stronger [...] than *Newzbin I*."

The British courts' preference for foreign and outdated domestic case law over that of their own jurisdiction's highest court can be explained by the realisation that a faithful application of Lord Templeman's reasoning would most likely have led to a finding of no liability.²¹ Arguably neither *Newzbin* nor the Pirate Bay "purport to authorise" copyright infringement by their users; rather their users download copyright-protected material from their sites in full knowledge of the illegality of their actions and with the intent to engage in them as such. The founders of the Pirate Bay in particular, vocal anti-copyright advocates who openly support users' right to copy without having to request right-holder authorisation, cannot be said to assume any ostensible authority to grant a right, as it is clear from their public statements that they reject the very notion of copyright. Thus, although the High Court pronounced that the fact that the Pirate Bay openly defy the rights of the copyright owners is no defence for its actions, a consequent application of authorisation doctrine would suggest the opposite. As Laddie, Prescott and Vitoria have observed, "the reference to granting or purporting to grant the right to do something cannot properly be construed as a reference to the purported grant to the 'right' to sue the copyright work, for this does not occur where both parties know perfectly well that a piratical use is intended".²² If both parties know that the intended copying is illegal, it is misleading to talk about the purported grant of a right; quite to the contrary, what the sites in question encourage is precisely unauthorised copying. The distinction is significant as it highlights the limits of the authorisation doctrine and the extent to which the term is being distorted beyond its natural meaning in an effort to adapt outdated liability rules to a changing landscape.²³

The two High Court decisions cannot be said to mark a departure from the precedent laid down in *Amstrad* – such a development would be a task for the Supreme Court of the United Kingdom.²⁴ What they do reveal is bewildered lower courts struggling to identify a sound jurisprudential basis on which to ground the liability of third parties whose wrongfulness the judges instinctively accept. The result is legal gymnastics that fail to convince. As an alternate route, given that infringement of copyright is a tort,²⁵ a more sensible and straightforward approach to the issue of intermediary liability can be identified in the general theory of tort law and more specifically in the tort-based doctrine of joint tortfeasance.²⁶ After all, the codified notion of authorisation finds its roots in joint tortfeasance, which has been described as the English equivalent of the American notion of "contributory liability".²⁷

1.2. Return to Tort Law Basics: Joint Tortfeasance

The common law doctrine of joint tortfeasance holds multiple persons liable where they are connected with or somehow associated with the same infringement.²⁸ Joint tortfeasors must

²⁰ *Dramatico Entertainment Ltd & Ors v British Sky Broadcasting Ltd & Ors* [2012] EWHC 268 (Ch).

²¹ L Bently and B Sherman, *Intellectual Property Law* (3rd ed, OUP, Oxford 2009) 156.

²² H Laddie *et al.*, *The Modern Law of Copyright and Designs* (3rd ed, Butterworths, London, 2000) 1776.

²³ ED Ventose & JJ Forrester, "Authorisation and Infringement of Copyright on the Internet" (2010) 14(6) *Journal of Internet Law*, 3.

²⁴ M Shillito & D Meale, "Twentieth Century Fox Film Corp v Newzbin Ltd – copyright – online service provider held liable for copyright infringements of its users" [2010] 32(8) *EIPR* 67.

²⁵ In *Credit Lyonnais Bank Nederland*, Hobhouse LJ commented: "These are cases which arise out of the law of intellectual property but the principles applied are drawn from the general law of tort. Infringement of a patent or copyright is a tort." *Credit Lyonnais Bank Nederland NV (now Generale Bank Nederland NV) v Export Credits Guarantee Department* [1999] C.L.C. 823.

²⁶ ED Ventose & JJ Forrester, "Authorisation and Infringement of Copyright on the Internet" (2010) 14(6) *Journal of Internet Law*, 3; L Bently and B Sherman, *Intellectual Property Law* (3rd ed, OUP, Oxford 2009) 157; H Laddie *et al.*, *The Modern Law of Copyright and Designs* (3rd ed, Butterworths, London 2000) 1777.

²⁷ PS Davies, "Accessory Liability Protecting Intellectual Property Rights" (2011) 4 *IPQ* 390.

²⁸ H Carty, "Joint Tortfeasance and Assistance Liability" (1999) 10 *L.S.* 489 and L Bently and B Sherman, *Intellectual Property Law* (3rd ed, OUP, Oxford 2009) 1075.

be distinguished from several concurrent tortfeasors, i.e. independent wrongdoers whose acts combine to produce a single damage to the plaintiff.²⁹ A good if somewhat abstract test for joint tortfeasance was given in *SABAF SpA v MFI Furniture*, where it was stated that each joint tortfeasor must be “so involved in the commission of the tort as to make the infringing act their own.”³⁰ This can occur through the establishment (to use the terminology of Carty’s leading exposition of the topic³¹) of a “participation link” connecting the primary and “secondary” wrongdoers. Three such links are generally acknowledged: authorisation, procurement and combination.³² As with authorisation, it has also been definitely established that mere or even knowing facilitation of a wrongdoing is insufficient to substantiate joint tortfeasance.³³

There is no reason why the concept of authorisation in the context of the common law should have a different meaning than in the CDPA.³⁴ As concerns inducement, three points must be made: a) an inducer can only be held liable for another’s tortious actions if his inducement, incitement or persuasion played some part in the other’s decision to infringe (although it is not necessary to show that the principal tortfeasor would not have acted without the second party’s involvement); b) the inducer can only be held to be a joint tortfeasor if he or she intended to encourage the other to infringe;³⁵ c) finally, the inducement must be by a defendant to an individual infringer and must identifiably procure a particular infringement.³⁶ Finally, for combination to be found, a common design towards an infringing end is necessary: if one party commits an act which in itself might not be tortious, but in the doing of which she was carrying out a plan of action agreed upon with another to achieve the tortious act, the two will be acting in common design. Tacit agreement will suffice, while there need not be explicit common design to infringe if the parties combine to secure the doing of acts which in the event prove to be infringements.³⁷ It also does not matter whether or not all parties knew they were infringing or believed e.g. that permission to copy the infringed goods had been given.³⁸ Control is the dividing factor: if a defendant had no control over whether or not an infringing act would take place, no common design can be found. It is currently uncertain whether procurement and combination form two distinct ways of infringing or are different aspects of a single link. In *Unilever v Gillette*, Mustill LJ leaned in favour of the former view, although noting that procurement may lead to combination, with the act in such cases qualifying under both heads.³⁹

For the assessment of the liability of internet-based intermediaries for copyright infringements committed by others, joint tortfeasance has a pronounced advantage over the overworked and outdated concept of authorisation. Not least among its advantages is the fact that it provides solid legal grounds for the introduction of a component of blameworthiness to the liability standard, i.e. of precisely that mental element of malevolence as to the commission of the tortious act that the courts seem to be so intent on injecting into the discussion. Under such an approach, while Lord Templeman’s assessment that no common design to infringe can be deduced in cases such as *Amstrad* remains entirely valid, cases involving file-sharing providers could, without any incongruity, lead to the opposite result, at least where the operators of the site

²⁹ “The *damnum* is single, but each commits a separate *injuria*” notes Williams; see: G Williams, *Joints Torts and Contributory Negligence* (London, Stevens & Sons Ltd 1951), 16.

³⁰ *SABAF SpA v MFI Furniture* [2003] RPC (14), para. 59.

³¹ H Carty, “Joint Tortfeasance and Assistance Liability” (1999) 10 L.S. 489.

³² McBride and Bagshaw suggest the existence of a fourth possible avenue to joint liability in the form of ratification: N McBride and R Bagshaw *Tort Law* (3rd ed, Pearson 2012) 645.

³³ This has been categorically established in *Credit Lyonnais Bank Nederland NV v Export Credits Guarantee Dept* [1999] UKHL 9 and *Belegging-en Exploitatiemaatschappij Lavender B.V. v Witten Industrial Diamonds Ltd* [1979] FSR 59. For a brief analysis of the reasons justifying this choice see: N McBride and R Bagshaw *Tort Law* (4th ed, Pearson 2012) 702.

³⁴ PS Davies, “Accessory Liability for Assisting Torts” (2011) 70(2) Cambridge Law Journal, 353.

³⁵ N McBride and R Bagshaw *Tort Law* (4th ed, Pearson 2012) 700.

³⁶ *CBS Songs v Amstrad* [1988] 2 All ER 484.

³⁷ *Unilever plc v Gillette (UK) Ltd* [1989] RPC 583.

³⁸ L Bently and B Sherman, *Intellectual Property Law* (3rd ed, OUP, Oxford 2009) 1076.

³⁹ *Twentieth Century Fox Film Corporation & Anor v Newzbin Ltd* [2010] EWHC 608 (Ch).

make their anti-copyright sentiments public, thereby allowing the courts sturdy footing for condemning excessive involvement in the infringements of others.⁴⁰

Indeed, the principles of joint tortfeasance have already been applied in both *Newzbin I* and *Dramatico*. Admittedly, there still seems to be some confusion on the part of the courts, as demonstrated by the reference in the former to assistance and the provision of means as evidence in favour of the establishment of joint tortfeasance. The *Newzbin I* judge also breezes over Lord Templeman's instructions as to the significance of identifying an individual primary offender and specific infringement by interpreting this simply as "one of the matters to be taken into account". It is likewise unclear why Newzbin's profit from its operations would be a relevant factor in accessory, rather than vicarious, liability, as implied in the judgment. But these discrepancies are likely to be ironed out over time. It is indicative that, three years earlier, in *L'Oreal v eBay*,⁴¹ Arnold J, while acknowledging that eBay (a much more sympathetic defendant) facilitate the infringement of third parties' trademarks by sellers, know in a general sense that such infringements have occurred and are likely to continue to occur and make profit from such infringements, stated that this is not enough to confirm eBay's liability. The judge pointed out that eBay could not be held liable as, under the provisions of the CDPA, although it owed a duty to not infringe copyright and not to authorise an infringement of copyright, it was under no duty or obligation to prevent infringement of third parties' registered trademarks.

This introduced a new element into the discussion on the liability of internet intermediaries, that of duties of care, although the court did seem unsure from where such duties might be derive. On a related note, *L'Oreal v eBay* also reveals another discontinuity in UK law in the form of the judge's puzzlement as to the basis in law for a possible injunction ordering the prevention of the same or similar infringements in the future in compliance with Article 11 of the Enforcement Directive.⁴² This would not be a problem in a copyright, as opposed to a trademark case, as s. 97A and 191JA of the CDPA explicitly allow the issue of injunctive relief, but it does reveal the disjointed legal patchwork that the partial harmonisation of intermediary liability on the European level has led to in Member State law. As we shall see below, continental courts seem much more confident, if not entirely problem-free, regarding the answer to both of these conundrums.⁴³

2. France

2.1. The Misleading Construct of the *Éditeur*

In contrast to the UK, where they have been largely ignored, in France the introduction of the safe harbours has generated avid debate and a prolific and controversial jurisprudence, particularly concerning the immunity for host service providers. Indeed, the thorny question of what which type of intermediary should benefit from the hosting safe harbour or, as the French courts approach the matter, what distinguishes a host (*hébergeur*) from a content provider (*éditeur*), has been described by commentators as "the principle preoccupation of French jurisprudence in recent years".⁴⁴

Absent a concrete definition by the legislator, the notion of the *éditeur* has been progressively refined through case law. The French courts initially identified expansive criteria for the qualification of a service as an *éditeur*. So, for example, in *Olivier D. c/ Éric D.*, the *Tribunal de*

⁴⁰ ED Ventose & JJ Forrester, "Authorisation and Infringement of Copyright on the Internet" (2010) 14(6) Journal of Internet Law, 3.

⁴¹ *L'Oreal S.A v eBay International AG* [2009] EWHC 1094 (Ch).

⁴² Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L 195/16.

⁴³ B Kleinschmidt, "An International Comparison of ISP's Liabilities for Unlawful Third Party Content" (2010) 18(4) International Journal of Law and Information Technology 332.

⁴⁴ L Thoumyre, "Étude 464 – La responsabilité pénale et extra-contractuelle des acteurs de l'Internet" (Novembre 2009) Lamy droit des médias et de la communication.

Grande Instance de Nanterre (Nanterre High Court of First Instance – *TGI Nanterre*) listed five indications of the editorial character of content aggregators: alongside the sorting of information through the use of an RSS feed and the formation of a comprehensive overview of a given topic through the automatic compilation of information from a variety of sites, the commercial exploitation of the content through the placement of advertisements, the use of a structured display framework and the use of search engine functionalities to assist the user in the collection of material relevant to a certain topic were also cited as proof of editorial capabilities.⁴⁵ This line of thinking has likely been influenced by the more stringent requirements surrounding the French pre-E-Commerce Directive immunity of Art. 43-8 of the Freedom of Communication Act of 2000,⁴⁶ which only covered “hosting providers 1.0”, i.e. those that provide space on servers and deal with professional users.⁴⁷ Characteristically, in its contentious 2010 *Tiscali* decision⁴⁸, the *Cour de cassation*, applying the old provisions, held that a website offering third parties the possibility of creating personal pages and advertising space exceeded the simple technical functions covered by the immunity defence. The French courts continuing attraction to this kind of reasoning has been explained by their suspicion of the new favourable safe harbour regime and resulting tendency to seek out ways to bypass it and apply the general rules into the adjudication of intermediary liability.⁴⁹

The CJEU rejected this line of reasoning in the *Google Adwords* case in 2010⁵⁰ and in 2011 in *Nord-Ouest*, the *Cour de cassation* acknowledged the irrelevance of the commercial exploitation of a site for its eligibility for the new Directive-based set of safe harbours.⁵¹ In the meantime, the French courts have come round to a more generous definition of the *éditeur*: by opposition to host providers, which are considered to *passively* provide the means allowing for the communication of content to the public by others, editors are understood as performing an *active* role in the collection, evaluation and modification of material prior to knowingly and willingly proceeding to its publication.⁵² The TGI de Paris in the *Lafesse* case⁵³ described the editor as “the person who determines the content which will be communicated to the public on the service that he has created or of which he is in charge”, identifying “choice over the content of uploaded files” as an obligatory component of editorial control. In the *Google Video*⁵⁴ case, the TGI de Paris refused to categorise Google as an editor, as it was not “personally at the origin of the distribution”, that activity being performed by the users.⁵⁵ For the avoidance of confusion, commentators have suggested modifying this “origin of content” definition to that of “the person at the initiative of whom the content was placed online”.⁵⁶ indeed, although the content need not be produced directly by the *éditeur*, she must at a minimum be the one to select the

⁴⁵ *Olivier D. c/ Éric D.* TGI Nanterre, ord. réf., 23 February 2008.

⁴⁶ *Loi n° 2000-719 du 1 août 2000 modifiant la loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication.*

⁴⁷ R Matulionyte & S Nerisson, “The French Route to an ISP Safe Harbour, Compared to the German and US Ways” (2011) 42(1) IIC 55.

⁴⁸ *Télécom Italia (Tiscali) c/ Dargaud Lombard, Lucky Comics*, Cour de cassation 1ère chambre civile, Arrêt du 14 janvier 2010.

⁴⁹ M Dhenne, “Hébergeurs et contrefaçons : de l’usage de la loyauté dans un régime de responsabilité limitée” (2009) 51 RLDI 58.

⁵⁰ Case C-236/08, *Google v Louis Vuitton* [2010] ECR I-02417.

⁵¹ *Sté Nord-Ouest c/ Dailymotion*, Cour de cassation 1ère chambre civile, Arrêt du 17 février 2011.

⁵² L Thoumyre, “Étude 464 – La responsabilité pénale et extra-contractuelle des acteurs de l’Internet” (Novembre 2009) Lamy droit des médias et de la communication.

⁵³ *Jean Yves L. dit Lafesse c/ Myspace*, Tribunal de Grande Instance de Paris, Ordonnance de référé, 22 juin 2007.

⁵⁴ *SARL Zadig Productions, Jean-Robert Viallet et Mathieu Verboud c/ Sté Google Inc. et AFA*, Tribunal de Grande Instance de Paris (3ème chambre, 2ème section), Jugement du 19 octobre 2007.

⁵⁵ It has been suggested that the courts have derived this definition of the concept of editor from Art. 6-II LCEN, which refers to “the person who contributed to the content of an online service of communication to the public”, see: P Mimja, “La Définition de l’Éditeur Était dans la Loi...” (March 2009), available at: Juriscom.com.

⁵⁶ L Thoumyre, “Étude 464 – La responsabilité pénale et extra-contractuelle des acteurs de l’Internet” (Novembre 2009) Lamy droit des médias et de la communication.

material to be published and its mode of presentation in a manner that indicates an intellectual intervention.⁵⁷

In certain areas of the law classification as an *éditeur* is relevant with regard to liability as it can mean the application of a separate set of liability rules for the actor in question: this will be the case for example for certain crimes of the press, exhaustively enumerated in the law, for which the cascading liability scheme (*responsabilité en cascade*) of France's 1881 law on the freedom of the press applies.⁵⁸ This system institutes a liability hierarchy under which liability is in the first instance placed on the director or editor of a publication. The relevant crimes include defamation, the denial of crimes against humanity, incitement of discrimination and racial hatred, incitement to commit a felony or misdemeanour, racist speech and the distribution of violent or pornographic images where a minor is likely to encounter them, but, significantly in the context of this article, exclude the infringement of intellectual property. In copyright therefore no special liability regime is attached to the concept of content editors.⁵⁹ Instead, the notion should be understood as the default term that French courts fall back on to describe the actor to whom the *plein droit* rules apply, in absence of safe harbour protection. For copyright, absent any other special liability regime,⁶⁰ this will mean the *droit commun*, i.e. the general tort law principles as enshrined in the French Civil Code. In the final analysis therefore, at least in the area of copyright, an *éditeur* can be described as the person who, in accordance with general tort norms and unqualified for an immunity, attracts liability for infringing content. The concept appears accordingly to be a somewhat of a red herring, or at least a tautology, in as much as its meaning can, for all intents and purposes, be boiled down to “the person who is liable for the content”.

2.2. No Special Liability Regime: Applying the *Droit Commun*

Art. 122-3 of the French *Code de la propriété intellectuelle* provides that “[a]ny complete or partial communication to the public or reproduction made without the consent of the author or of his successors in title or assigns shall be unlawful.” Reproduction includes digitisation, meaning that any digitisation and distribution of a protected work on a network requires the express permission by the right holder. In principle under French copyright law only the person who commits the material act of infringement will be held liable.⁶¹ However, as in the UK, the general tort law principles may be relied upon to expand liability to additional actors: although the legislator, in contrast to what is the case in patent law, has not expressly stated that the rules of civil liability apply to copyright, as Lucas and Lucas note, it is reasonable to assume that that is the case.⁶²

Yet, in French civil law no notion of accessory liability in the English sense is encountered. Prior to the introduction of safe harbours in favour of intermediaries into French law, French courts instead relied primarily on expansive interpretations of the *direct* breach of the general tort principles to determine the liability framework applicable to online service providers. Art. 1382 of the *Code civil* (French Civil Code) obliges any person who, when acting with fault, caused prejudice to another to the payment of damages (*responsabilité délictuelle*). Art. 1383 expands the obligation of reparation to damage caused by negligence or imprudence (*responsabilité quasi-délictuelle*). To be successful, the claimant must therefore prove three elements: the existence of fault or negligence; a resultant damage and a causal connection between the two first elements.⁶³

⁵⁷ B Beignier, B de Lamy & E Dreyer, *Traité de droit de la presse et les médias* (Litec, 2009) 1176, 1217.

⁵⁸ Article 42 of the *Loi du 29 juillet 1881 sur la liberté de la presse* (Act on Freedom of the Press of 29 July 1881).

⁵⁹ L Thoumyre, “Etude 464 – La responsabilité pénale et extra-contractuelle des acteurs de l’Internet” (Novembre 2009) Lamy droit des médias et de la communication.

⁶⁰ *Ibid.*

⁶¹ See Art. L. 122-4 CPI.

⁶² Art. L615-1 CPI; See also, A Lucas, H-J Lucas & A Lucas-Schloetter, *Traité de la Propriété Littéraire et Artistique* (4th ed, LexisNexis 2012) 901.

⁶³ Y Benhamou, “Compensation of Damages for Infringements of Intellectual Property Rights in France, Under Directive 2004/48/EC and its Transposition Law – New Notions?” (2009) 40 IIC 125.

In copyright, these three are further whittled down to only the latter two: The *Cour de cassation*, in a much criticised decision, has declared that, due to the *erga omnes* opposability that results from copyright's nature as an absolute right, i.e. a right which are enforceable against everyone, no fault is required for the imposition of, not only reparative measures, that is to say court orders, injunctions and fines intended to prevent the continuation of the infringement and to confirm the exclusivity of the holder's rights, but also claims for the compensatory payment of damages. Indeed, French judges are traditionally afforded the discretion to pick and choose from among available remedies, resulting in a hybrid *action en contrefaçon* that encompasses both reparative court orders and the compensatory payment of damages, thus obscuring through unitary terminology the two separate systems of conditions.⁶⁴

While for the primary offender a rule of strict liability appears quite reasonable, it becomes less easy to accept in the case of other parties involved in the distribution of a work,⁶⁵ particularly the multiple actors involved in the digital dissemination of works who do not directly contribute to an infringement and whose fault is harder to take as given.⁶⁶ Lucas and Lucas observe, "the autonomy of copyright is not such as to justify a self-standing notion of infringement and a fault-independent tort which evades (both dangerously and pointlessly) the general rules of civil liability".⁶⁷ As we shall see below, the German courts have developed a much more coherent framework for recognizing the distinction between the imposition of reparative measures against persons acting without fault and the compensation of damages in cases of fault, although here too criticism has been levied against the idea that any kind of sanction should be imposed on innocent intermediaries. In any case, the lower French courts have taken a much more moderate approach: although falling short of expressly accepting a presumption of fault, they generally impose the burden of proving the absence of fault on the defendant, but will absolve from liability defendants who demonstrate that they could not have foreseen the damage.⁶⁸

The pre-E Commerce Directive case law provides insights into the regime still applicable outside the reach of the immunities. The jurisprudence of the day presents a relatively harsh liability scheme which placed intermediaries under a general obligation of prudence and vigilance for damage occasioned to third parties. Failure to abide by this obligation would constitute a fault and thus give rise to liability under the general principles of extra-contractual liability. So, in the famous 1998 *Estelle Halbyday* case,⁶⁹ the judge imposed 300.000 francs in damages on website hosting provider Altern, on whose networks nude photos of the celebrity had appeared, reasoning that they had exceeded the technical role of a mere transmitter of information and thus opened themselves up to liability for the infringement of third party rights impinged upon as a consequence of an activity into which they deliberately entered and from which they gained profit.⁷⁰ Intermediaries were thus placed under a duty to take all necessary precautions to prevent any breach of the rights of third parties if they were to avoid liability. In the reverse, French courts refused to hold liable ISPs who blocked access to or promptly took down unlawful content, thus excluding own fault.⁷¹ This system is strikingly different from the UK approach: not only is facilitation explicitly recognised as an association with the primary tort capable of

⁶⁴ A Lucas, H-J Lucas & A Lucas-Schloetter, *Traité de la Propriété Littéraire et Artistique* (4th ed, LexisNexis 2012) 893.

⁶⁵ A Lucas, H-J Lucas & A Lucas-Schloetter, *Traité de la Propriété Littéraire et Artistique* (4th ed, LexisNexis 2012) 903.

⁶⁶ A Lucas & H-J Lucas, *Traité de la Propriété Littéraire et Artistique*, (2nd ed, Litec 2001) 606 *et seq.*

⁶⁷ Lucas, H-J Lucas & A Lucas-Schloetter, *Traité de la Propriété Littéraire et Artistique* (4th ed, LexisNexis 2012) 901 (translation by the author).

⁶⁸ See Y Benhamou, "Compensation of Damages for Infringements of Intellectual Property Rights in France, Under Directive 2004/48/EC and its Transposition Law – New Notions?" (2009) 40 IIC 125.

⁶⁹ *Estelle H. c/ Valentin L. et Daniel*, Tribunal de grande instance de Paris, Ordonnance de référé, 9 June 1998.

⁷⁰ *Estelle H.c / Valentin L. et Daniel*, Cour d'appel de Paris, 14^e ch., Arrêt du 10 février 1999.

⁷¹ X Amadei, "Standards of Liability for Internet for Internet Service Providers: A Comparative Study of France and the United States with a Specific Focus on Copyright, Defamation, and Illicit Content" (2002) 35 Cornell Int'l L.J. 189; B Beignier, B de Lamy & E Dreyer, *Traité de droit de la presse et les médias* (Litec, 2009) 1161; L Thoumyre, "Etude 464 – La responsabilité pénale et extra-contractuelle des acteurs de l'Internet" (Novembre 2009) Lamy droit des médias et de la communication.

substantiating liability, but the method with which this is achieved is the imposition of duties of care of a kind explicitly rejected in the UK.

In the subsequent *Lacoste* case, the TGI de Nanterre, referring back to Art. 1382 and 1383 of the *Code civil*, went one step further and identified the three main obligations on service providers contained in this general duty of care: to bring the need to respect the rights of others to the attention of users, to remain vigilant against infringement along a standard of professional care and to act against verified infractions by removing the unlawful material and impeding its future re-posting.⁷² The *Cour d'appel de Versailles* later mitigated the obligation of vigilance by specifying that it should not be understood as requiring a systematic and general examination of all content on hosted websites, but only due diligence checks (*diligences appropriées*), which must be proactively executed by the intermediary once it acquires knowledge of the unlawful nature of the content of a site or once it has reason to suspect unlawfulness.⁷³

The case law imposing *diligences appropriées* after receiving notification of illegal or damaging content was inserted into the primitive safe harbour provisions of the first draft of the law of 1 August 2000 on the freedom of communication,⁷⁴ but was subsequently struck down by the *Conseil Constitutionnel*.⁷⁵ The subsequent adoption of Art. 15 of the E-Commerce Directive should have put a final end to attempts to impose surveillance obligations on intermediaries, at least when providing caching, hosting and mere conduit services.

Yet French courts have been reluctant to let go of the notion of due diligence as a precondition for delivery from liability. Beginning in 2007, lower courts have imposed obligations on host service providers requiring the monitoring of new publications, indexing or uploads or material previously notified as unlawful. So, in *Tranquility Bay* the TGI de Paris held that, once a host provider had been informed of the existence of infringing copies of the film, it was under an obligation to implement any means necessary to avoid future dissemination; speedy blocking of access to unlawful content upon first notification may exonerate defendants on that single count, but failure to block subsequent uploading would disqualify hosts from safe harbour protection.⁷⁶ In January 2011, the Paris Court of Appeal confirmed this line of thinking in four judgements handed down on the same day, in which Google Video was held liable for copyright infringement committed by users with regard to the films “*Le génocide arménien*”⁷⁷, “*L’affaire Clearstream*”⁷⁸, “*Les dissimulateurs*”⁷⁹ and “*Mondovino*”.⁸⁰ Interestingly, Google had been absolved from liability at first instance before the *Tribunal de Commerce*, which accepted its eligibility for safe harbour protection. The court did however issue an injunction ordering Google to refrain from future reproduction or communication to the public of all or part of the films in question, as well as from referencing any link allowing them to be viewed or downloaded on pain of a fine of EUR 1500 per infraction. Google contested the order before the Court of Appeal, which reverted back to the lower courts’ earlier liability-inducing heightened duty of surveillance regime: although accepting the neutral and passive character of Google’s activities, the court found that, in order to benefit from safe harbour protection, the host service provider should not have limited itself to the mere withdrawal of the notified content, but also implemented every possible technical measure to render future access to the disputed content through its search engine impossible. The Art. 15 E-Commerce Directive prohibition on general monitoring obligations was deemed inoperable in this case, as the obligation was seen as specific to the documentary in question and notice as to its copyright status had already been given. In echo of the British rulings mentioned above,

⁷² *Madame L. c/ les sociétés Multimania*, Tribunal de Grande Instance de Nanterre, 8 December 1999.

⁷³ *S.A Multimania Production c/ Madame Lynda L.*, Cour d’Appel de Versailles, Arrêt du 8 juin 2000.

⁷⁴ *Loi n° 2000-719 du 1 août 2000 modifiant la loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication.*

⁷⁵ *Conseil Constitutionnel, Décision n° 2000-433 DC du 27 juillet 2000.*

⁷⁶ C Angelopoulos, “Filtering the Internet for Copyright Content in Europe” *IRIS plus* 2009-4.

⁷⁷ *Google Inc. c/ Compagnie des phares et balises*, Cour d’appel de Paris (Pôle 5, chambre 2), Arrêt du 14 janvier 2011.

⁷⁸ *Google Inc. c/ Bac Films, The Factory*, Cour d’appel de Paris (Pôle 5, chambre 2), Arrêt du 14 janvier 2011.

⁷⁹ *Google Inc. c/ Bac Films, The Factory, Canal+*, Cour d’appel de Paris (Pôle 5, chambre 2) Arrêt du 14 janvier 2011.

⁸⁰ *Google Inc. c/ Les Films de la Croisade, Goatworks Films*, Cour d’appel de Paris (Pôle 5, chambre 2), Arrêt du 14 janvier 2011.

according to the court, as soon as the protected status of the video had been indicated, insisting that each upload by the same or different users constitutes a novel circumstance necessitating separate notification is meaningless. Its lapse disqualified Google from immunity and incurred its liability under the general scheme of civil law.

Under this line of thinking the liability position of a host service provider rests in rightholder hands, changing drastically once a notification of an infringement has been received, suspending the applicability of the immunities. Subsequent inaction on the part of intermediary will not only disqualify it from safe harbour protection, but is further interpreted as a dereliction of a duty of care, which serves to substantiate its fault and thus its liability. When a hosting provider is informed of unlawful content, in order to avoid liability, it will either have to implement all necessary means to prevent the future upload of illegitimate copies of the same content or be able to prove that effective means of disablement were employed. The “notice and take down” scheme crudely hinted at by Art. 14 of the E-Commerce Directive was thus transformed by the French courts into a judge-made “notice and stay down” regime, with an obligation to monitor derived directly from the Article 14’s requirement of expeditious removal or disabling of access to allegedly infringing information upon obtaining knowledge or awareness. This is arguably a considerable misinterpretation of a provision intended to protect against liability, not add grounds for its establishment.⁸¹

The *Cour de cassation* finally put an end to this extended liability regime with two rulings on “*L’affaire Clearstream*” and “*Les dissimulateurs*” on 12 July 2012.⁸² According to the court, the judge-made “stay-down” obligation cannot be observed by online providers without conducting prohibited general monitoring. Copyright holders must therefore monitor the content of websites themselves and notify intermediaries for each new infringement of protected content. Indeed, a duty to avoid future infringement is difficult to navigate around a ban on general monitoring by the intermediary. Although the multiple postings of identical content by the same or different users arguably renders the monitoring obligation specific, if host service providers wish to avoid liability they are obliged, after receiving notification, to hunt down each and every remaining or reposted unauthorised copy. This however, can only be achieved by screening all (even non-infringing) content passing through its servers for infringing copies, *i.e.* practicing general monitoring. In fact, as notifications are likely to accumulate at a fast rate, the only practical way to achieve this would necessitate the use of fingerprinting or similar automatic filtering technology. The *prima facie* specificity of the obligation is therefore negated by the broad reach of the practical implications, which would affect the liability of all hosting services for all works for which a notification has been sent as to a single infringing copy. As we shall see below, the German approach of *Störerhaftung*, although crafted in much more careful terms, being limited only to the issue of injunctive orders by courts and not the imposition of *ex ante* liability for damages, encounters the same fundamental obstacle.

3. Germany

3.1. *Täterhaftung*: the Basic Tort Principles

As in France, in Germany too basic tort law principles can be relied upon to investigate the liability of persons participating in the commission of an infringement. According to § 823(1) of the *Bürgerliches Gesetzbuch* (German Civil Code – BGB) any person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or any other legal right of another person or commits a breach of a statute that is intended to protect another person is

⁸¹ C Jasserand, “France: The Court of Cassation puts an end to the Notice and Stay Down Rule”, Kluwer Copyright Blog, 14 August 2012.

⁸² *La société Google France c/ La société Bach films*, Cour de cassation (Première chambre civile), Arrêt n° 831 du 12 juillet 2012; *La société Google France c/ La société Bac films*, Cour de cassation (Première chambre civile), Arrêt n° 828 du 12 juillet 2012.

liable to compensate the other party for the damage thus incurred. As in France therefore, aside from the other constituent elements of the infringement (the violation of a right, unlawful behaviour and causal connection), culpability is also a necessary prerequisite for the establishment of extra-contractual liability. Where a statutory breach, according to the contents of the specific provision, may also be committed without fault, then liability for compensation only exists in the case of fault.⁸³

The element of *unlawfulness* (*Rechtswidrigkeit*) is automatically satisfied whenever a legal right is violated intentionally. If the protected right is violated unintentionally, unlawfulness will only accrue if the defendant has failed to satisfy the standard of care demanded by society. In other words, an act or omission is only unlawful in the event that an actor violates a duty of care (*Sorgfaltspflicht*, *Verkehrspflicht*). A duty of care will arise to anybody who through his/her activity or property creates a source of potential danger which is likely to affect the interests and rights of others. This will include a duty to prevent the misuse of one's property by third persons in violation of another's rights. The rule of reason (*Zumutbarkeit*) prevails: accordingly, the measures a person can be expected to take to prevent a violation of the legal rights of others must be technically and economically feasible. They must also be permitted by law, while the usual balancing act will require that the advantages of maintaining a source of danger be weighed against potential damages to the rights of others.⁸⁴ Breaches of a duty of care lead to liability as a *Täter*, i.e. main perpetrator, whether for monetary or injunctive relief.

A statutory tort as required by Art. 823(2) is provided by the Article 97(2) of the German copyright act (*Gesetz über Urheberrecht und verwandte Schutzrechte – UrhG*). This provision obliges whoever infringes a copyright or related right intentionally or as the result of negligence to pay compensation for damages suffered in cases of unlawful infringements committed intentionally or as a result of negligence. Although with regard to all of the above German tort law strongly resembles its French equivalent, German law is much more consistent than French law in distinguishing between the conditions for reparative and compensatory action: so, where a defendant was not at fault but there is a danger of infringement or of repetition of an infringement, Art. 97(1) also explicitly permits injunctive relief requiring the direct wrongdoer to cease and desist.

The BGH has recently made a timid attempt to find a basis for intermediary liability in the general principles of tort law. In *marions-kochbuch.de*⁸⁵ the Court found that the operator of a website on which third party users could make content (in the particular case, recipes) publicly available was liable under the general provisions as a content provider because it examined the posted content for completeness and accuracy had thus adopted it as its own. The determining factors substantiating the content “adoption” included the fact that, (a) the contents were editorially checked and approved by the website; (b) the photos were tagged with the platform's logo; (c) the contributing users were required to grant extensive use rights to the site, which the court interpreted as an economic appropriation of the contents; and (d) the contents in question constituted the core value of the website.⁸⁶ Remarkably, whether or not internet users could perceive that the content originated with third parties was deemed irrelevant. It has been suggested that *marions-kochbuch.de* could be interpreted as instituting a general principle along the lines that where the structure and contents of a given website create in the mind of a reasonably informed internet user the impression that the platform operator intends to adopt the UGC as its own, the operator should be directly liable as *Täter* for any infringement concerning the content.⁸⁷ If this interpretation were to be accepted, it would lead German jurisprudence on intermediary liability to converge with French solution of editorial liability: where the intermediary can

⁸³ Article 823(2) BGB.

⁸⁴ Imprimatur/IViR study, “Liability for On-Line Intermediaries”, August 1997.

⁸⁵ BGH, *marions-kochbuch.de*, 12 November 2009, I ZR 166/07.

⁸⁶ J Becher, “Copyright and User-Generated Content: Legal Challenges for Community-Based Businesses in Germany and the USA” (2010) master thesis, Bucerius Law School/WHU Otto Beisheim School of Management.

⁸⁷ *Ibid.*

reasonably be considered to be at the origin of the infringing material, it may be held liable as a direct infringer either under the copyright provisions or, in the default, under the basic tort principles for a dereliction of a duty of care.

Another basis for intermediary liability can be found in Art. 830§1 BGB. This establishes that joint tortfeasors (in German, *Mittäter*), whether or not the actions of exactly whom among them caused the damage in question can be established, are all to be held responsible. Under Art. 830§2, participants to an infringement (*Beteiligte* or *Teilnehmer*), instigators (*Anstifter*) and accessories (*Gehilfen*), also face the same liability as direct offenders. Instigators are understood as being persons who incite the decision to infringe, while deliberate assistance to the direct infringement will brand one an accessory.⁸⁸ At least contingent intent is necessary for a finding of liability under this heading, i.e. the participant must have seriously considered the risk of infringement and approvingly accepted it.⁸⁹ Knowledge of the objective circumstances that form the main offence and awareness of their unlawfulness are accordingly required.⁹⁰ This condition is not usually met by online intermediaries. However, the defendant may also be held liable if she consistently violated duties of care over a longer period of time.⁹¹ Such gross and insistent breaches of the obligation to examine have been accepted, for example, where service providers ignored specific notices of unlawful activities and failed to prevent further infringements.⁹² This kind of conduct is considered to constitute infringement by forbearance.⁹³ Similarly, courts have found online intermediaries liable where, regardless of the operator's knowledge, an infringement was to be expected⁹⁴ or where the operator had knowledge of repeated infringements in the past or persistently violated the inspection duties that this knowledge imposed.⁹⁵

3.2. *Störerhaftung* or Disturber Liability

Notwithstanding the above possibilities, in Germany intermediary contribution to copyright infringements committed by others is mainly dealt with through the specially-developed theory of *Störerhaftung*.⁹⁶ This permits cease and desist claims to be imposed not only on the immediate wrongdoer (*Täter*) and any participants in the wrongdoing (*Mittäter*), but also on “disturbers” (*Störer*) who knowingly and causally contribute to an infringement by another. *Störerhaftung* is a form of strict liability and thus not dependent on the establishment of fault; dogmatically, the only relevant factor is the unlawfulness of the conduct as such.⁹⁷ According to the case law, the existence of a wilful behaviour which endangers the rights of another or significant cause for concern over the emergence of such a danger is sufficient.⁹⁸ Its purely causal nature has also led courts to limit its application to cases involving a breach of a reasonable duty

⁸⁸ H Köhler & J Bornkamm, *Gesetz gegen den Unlauteren Wettbewerb* (C.H. Beck, Munich 2012) Rn. 2.15.

⁸⁹ J Becher, “Copyright and User-Generated Content: Legal Challenges for Community-Based Businesses in Germany and the USA” (2010) master thesis, Bucerius Law School/WHU Otto Beisheim School of Management.

⁹⁰ H Schack, “Täter und Störer: Zur Erweiterung und Begrenzung der Verantwortlichkeit durch Verkehrspflichten im Wettbewerbs- und Immaterialgüterrecht” in *Festschrift für Dieter Reuter zum 70. Geburtstag am 16. Oktober 2010* (De Gruyter 2010), 1167.

⁹¹ BGH, *Internet-Versteigerung I*, 11 March 2004, I ZR 304/01; JB Nordemann, “Liability for Copyright Infringements on the Internet: Host Providers (Content Providers) – The German Approach” (2011) 2(1) JIPITEC 37.

⁹² OLG München, 2006 MMR 332.

⁹³ T Hoeren & S Yankova, “The Liability of Internet Intermediaries – The German Perspective” (2012) IIC 501.

⁹⁴ OLG Köln, 26 September 2008, 6 U 111/08, MMR 2009, 197.

⁹⁵ OLG Hamburg, 4 February 2008, 2-81/07, WRP 2008 1569.

⁹⁶ Many translations of the term “*Störerhaftung*” can be found in the literature, including “interferer”, “disturber”, “accessory”, “contributory” liability or sometimes breach of a duty of care. The final two can lead to confusion between the legal concepts of *Störer* and *Teilnehmer* and are not recommended, while “contributory” liability presents the risk of conflation with the US-specific doctrine. In this piece, the terms “*Störerhaftung*” or “disturber liability” shall be used.

⁹⁷ A Bayer, “Liability 2.0 – Does the Internet Environment Require New Standards for Secondary Liability? An Overview of the Current Legal Situation in Germany” in MJ Adelman *et al.*, *Patents and Technological Progress in a Globalized World* (Springer 2009) 365.

⁹⁸ G Spindler & M Leistner, “Secondary Copyright Infringement – New Perspectives from Germany and Europe”, (2006) 37(7) IIC 788.

to review (*Prüfpflicht*). *Störerhaftung* thus technically constitutes an extension of liability to third parties who have not in fact themselves committed an infringement, but who are in a prime position to provide relief. Although not technically subsidiary in the sense that it is not necessary to exhaust all routes of action against the direct tortfeasor or contributors to turn against a disturber, as a general rule, *Störerhaftung* is intended to be available only in cases where the direct infringer is not known or within legal reach or where, although the direct infringer might be known, the nature of the infringement requires action against the disturber in order to ensure immediate and effective relief.⁹⁹ This will be especially likely in cases of online infringement: in a networked environment, after an initial posting, copies of infringing content will likely surface at multiple different locations, giving any action taken against the direct infringer only limited effect.

Importantly, and in keeping with its strict liability nature, *Störerhaftung* can only ground claims for injunctive orders requiring the defendant to terminate and refrain from infringements. It is not possible to claim against a *Störer* for damages unless they were acting at fault and therefore fulfil the requirements for direct liability.¹⁰⁰ In accordance with the general nature of injunctive remedies, *Störerhaftung* does not resolve the dispute on the merits, but only provides interim relief.¹⁰¹ Culpable breach of an injunction constitutes contempt of court and is punishable with a disciplinary fine.¹⁰²

Although injunctive relief is not specifically provided for by the tort provisions of the BGB,¹⁰³ it has been made available by the German courts by analogy with the law of property. *Störerhaftung* thus finds its roots outside tort liability in the property defence claims laid out in §§ 862 and 1004 BGB of Book 3 of the BGB, according to which if ownership is disturbed by an unlawful interference, the possessor may mandate the removal of the disturbance. If further disturbances are to be feared, the possessor may seek a prohibitory injunction. Unusually for Germany's mainly civil law based system, the theory of *Störerhaftung* was therefore developed through extensive case law in the area of unfair competition and the protection of absolute rights, including copyright, trademark and patent law.¹⁰⁴ The *Zivilprozessordnung* (Code of Civil Procedure – ZPO) contains a number of provisions intended to facilitate the granting of this kind of injunctive remedy.¹⁰⁵

Although the first relevant decisions of the BGH date back to the mid-50s, the development of the doctrine has not been consistent and, as a result, its requirements and scope remain ambiguous.¹⁰⁶ What is clear is that for claims against a disturber to be acknowledged the following conditions must be met:

- (a) Adequately Causal Contribution to a Legal Violation: As is the case with similar constructions in the UK and France, *Störerhaftung* requires the commission of a direct infringement by a third party. The disturber must have, in any way, deliberately, adequately and causally contributed to the creation or maintenance of a legal wrong, including taking advantage of the infringements committed by others. In this context, “deliberately” refers not to the intention to contribute to an infringement, but rather the

⁹⁹ A Bayer, “Liability 2.0 – Does the Internet Environment Require New Standards for Secondary Liability? An Overview of the Current Legal Situation in Germany” in MJ Adelman *et al.*, *Patents and Technological Progress in a Globalized World* (Springer 2009) 365.

¹⁰⁰ A Wandtke (ed.), *Urheberrecht* (De Gruyter Recht, Berlin 2012) 286 et seq.

¹⁰¹ BS Marquesinis, *The German Law of Torts – A Comparative Introduction* (3rd ed, Clarendon 1994) 413.

¹⁰² G Spindler, “Country Report – Germany” for the EU’s “Study on the Liability of Internet Intermediaries” (2006), available online.

¹⁰³ See BGB, Book 2 on the Law of Obligations.

¹⁰⁴ BGH, *Internet-Versteigerung I*, 11 March 2004, I ZR 304/01; J Bornkamm, “E-Commerce Directive vs. IP Enforcement – Legal Balance Achieved?” (2007) GRUR Int 642; T Hoeren, “German Law on Internet Liability of Intermediaries”, LIDC Congress, Oxford 2011.

¹⁰⁵ BS Marquesinis, *The German Law of Torts – A Comparative Introduction* (3rd ed, Clarendon 1994) 413.

¹⁰⁶ A Bayer, “Liability 2.0 – Does the Internet Environment Require New Standards for Secondary Liability? An Overview of the Current Legal Situation in Germany” in MJ Adelman *et al.*, *Patents and Technological Progress in a Globalized World* (Springer 2009) 365.

intention to perform the action which creates or maintains the infringement.¹⁰⁷ The disturber must have either the legal or the factual possibility of exerting influence on the infringing conduct of the direct infringer.

(b) Breach of a Reasonable Duty to Review: Liability may not be extended unduly to innocent third parties. In *Architektenwettbewerb*,¹⁰⁸ the BGH held that for an alleged disturber to be held liable, the disturbing circumstances must be readily apparent. However, if this is not possible because the disturber ignored a duty to review, liability will be imposed regardless.

The duty to review must be reasonable. This requirement significantly restricts the reach of *Störerhaftung* and has been described as offering a type of “safe harbour” protection in itself.¹⁰⁹ In *Paperboy*¹¹⁰ the BGH held that if the risk of unlawful conduct is not qualitatively altered by the alleged disturber’s behaviour, no room for *Störerhaftung* exists – thus, the setting of hyperlinks to copyright-protected articles which have been placed online by the right-holder does not give rise to liability for injunctive relief, as the hyperlink merely increases the accessibility of the article, while the decision as to whether the work should remain available to the public or not remains with the initial publisher. In *Schöner Wetten*¹¹¹ it was established that the scope of the duty to review should be determined according to the overall context within which the alleged disturber was acting, the purpose of his/her behaviour, his/her knowledge of circumstances that suggest unlawful activity and the possibilities available to reasonably recognise the unlawfulness of the act.

A duty to review is considered to be unreasonable if it would unduly impair the business of the alleged disturber. For example, in *Internet-Versteigerung I*, it was established that an online auction platform does not have to examine each and every listing for trademark infringement prior to allowing its publication on its website, as such an obligation would jeopardise the site’s entire business model. Only after gaining knowledge through a specific notification does the operator have a duty to block infringing content. Upon receipt of such notification, the service provider must in addition take technically feasible and reasonable measures to prevent future infringement.¹¹² This may include making use of filter software or, if necessary, conducting manual follow-up checks. Significantly, the duty to review is not limited only to the conduct to which the right-holder has drawn the disturber’s attention, but includes preventive obligations to take measures to minimise or eliminate easily recognisable future unlawful acts of a similar nature.¹¹³

The comparative importance of the opposing protected interests is also relevant here: in *Schöner Wetten* the author of the editorial article containing the hyperlink was protected by the freedom of expression under Art. 5(1) of the *Grundgesetz* (GG), as obliging an ISP which lacks the necessary professional knowledge to evaluate content for legal violations risks forcing it into blocking content that might be fully legal, thus engendering *de facto* censorship and an impairment of the communication means it offers and opening itself up to legal action on the part of the alleged direct infringer.¹¹⁴

¹⁰⁷ J Becher, “Copyright and User-Generated Content: Legal Challenges for Community-Based Businesses in Germany and the USA” (2010) master thesis, Bucerius Law School/WHU Otto Beisheim School of Management.

¹⁰⁸ BGH, *Architektenwettbewerb*, 10 October 1997, I ZR 129/96.

¹⁰⁹ J Wimmers, “Who Interferes? Liability for Third Party Content on the Internet in Germany” (August 2007) *Intellectual Property Today*, 32.

¹¹⁰ BGH, *Paperboy*, 17 July 2003, I ZR 259/00.

¹¹¹ BGH, *Schöner Wetten*, 1 April 2004, I ZR 317/01.

¹¹² BGH, *Internet-Versteigerung I*, 11 March 2004, I ZR 304/01.

¹¹³ BGH, *Internet-Versteigerung III*, 30 April 2008, I ZR 73/05.

¹¹⁴ A Bayer, “Liability 2.0 – Does the Internet Environment Require New Standards for Secondary Liability? An Overview of the Current Legal Situation in Germany” in MJ Adelman *et al.*, *Patents and Technological Progress in a Globalized World* (Springer 2009) 365.

The duty to review therefore emerges from the above as an exceptionally flexible criterion: a host of factors influence the outcome, while the tasks that can be demanded of a disturber are likewise variable, ranging from attempts to detect unlawful conduct in advance to more passive behavioural standards.¹¹⁵ The unreasonableness threshold rises and falls with the behaviour of the operator: the more the operator provokes infringement by third parties, the more strident the requirements of the duty to review will be.¹¹⁶ As a result, the exact scope of *Störerhaftung* can only be decided on a case-by-case basis after comprehensive weighing of the relevant constellation of circumstances of the specific situation with a view to finding a fair balance between the interests of the parties involved.¹¹⁷ This flexibility also provides room for the courts to take into consideration the complicity of the disturber: as Bayer notes, a domain name registry will be subject to a less stringent duty to review than a provider of peer-to-peer software used exclusively for illegal exchanges of copyright-protected works. The public interest in the service it provides will earn the former protection from the judicial suspiciousness to which the latter leaves itself fully open. Yet this very flexibility carries with it considerable disadvantages: *Störerhaftung's* duty to review has been criticised as overly broad, while, despite the numerous instructions coming down from the BGH, the regional courts of Germany remain confused about the exact scope and requirements of the doctrine, especially in the area of internet service providers, resulting in conflicting rulings. A general, unambiguous standard for disturber liability is currently absent.¹¹⁸

The fondness of the German courts for the *Störerhaftung* doctrine can be explained by the BGH's findings that the E-Commerce safe harbour provisions are not applicable in respect of injunctive claims: like the French courts, they are disinclined to apply the favourable safe harbour regime and, like both the French and the British courts, they are eager allow the imposition of some liability, albeit for injunctions only, even on intermediaries engaging in mere facilitation, although they have found another (arguably, more legally convincing) way to achieve this. The German judges also seem intent on making a distinction between worthy and unworthy intermediaries – the insistence on injecting a moral, mental element into the question of third party liability thus seems to cross borders: in *Cybersky* case, for example, the BGH confirmed the Hamburg Court of Appeals' decision imposing *Störerhaftung* on the developers and distributors of a free P2P software application for sharing television signals. The decisive factor was the defendant's active role in inciting infringement by users through the advertisement of their product's ability to be used for copyright-infringing purposes. According to the Court, as long as the danger of illegal uses created by the defendant persists, the software cannot lawfully be brought to market.¹¹⁹ By contrast, the courts' approach towards more "neutral" providers, whose technology has a significant potential for legal use and is not exclusively designed for infringing activities, is much more generous: instead of a positive obligation to prevent illegal activity on their systems, they can rely much more confidently on the classic measures of warning notices and preventive action.¹²⁰

A possible conflict with the prohibition of general monitoring duties under Article 15 of the E-Commerce Directive by *Störerhaftung's* expansion to clear future repetitions of the notified infringement has been argued.¹²¹ Recital 47 does concede that monitoring obligations in specific

¹¹⁵ *Ibid.*

¹¹⁶ JB Nordemann, "Liability for Copyright Infringements on the Internet: Host Providers (Content Providers) – The German Approach" (2011) 2(1) JIPITEC 37.

¹¹⁷ BGH, *Schöner Wetten*, 1 April 2004, I ZR 317/01; T Hoeren, "German Law on Internet Liability of Intermediaries", LIDC Congress, Oxford 2011.

¹¹⁸ J Wimmers, "Who Interferes? Liability for Third Party Content on the Internet in Germany", (August 2007) Intellectual Property Today, 32.

¹¹⁹ BGH, *Cybersky*, 15 January 2009, I ZR 57/07.

¹²⁰ G Spindler & M Leistner, "Secondary Copyright Infringement – New Perspectives from Germany and Europe", (2006) 37(7) IIC 788.

¹²¹ JB Nordemann, "Liability for Copyright Infringements on the Internet: Host Providers (Content Providers) – The German Approach" (2011) 2(1) JIPITEC 37.

cases and, in particular, orders by national authorities in accordance with national legislation are not disallowed. But *Störerhaftung*'s duty to review does not have a statutory basis, while all the objections regarding the surreptitiously general nature of such orders mentioned in the French context above apply here as well.¹²² The German courts have thus been accused of “misconceiving the main goals which national and European legislators have pursued when drafting the Telemedia Act and the E-Commerce Directive.”¹²³ Indeed, the obligation for injunctive relief, although subject to a very different legal classification, has no less severe consequences for the business of a provider, particularly when it requires the application of expensive filtering and manual controls. Moreover, a breach of a court order might easily result in a steeper financial burden than the imposition of compensatory claims. A referral on this matter to the Court of Justice might have been welcome.

In addition to these misgivings, the doctrine of *Störerhaftung* is currently being argued in Germany as dogmatically unnecessary and replaceable by tort law rules on participation.¹²⁴ The doctrine has come under particularly intense criticism in the area of unfair competition. The criticism seems to be provoked precisely by *Störerhaftung*'s intended purpose of extending liability to encompass persons not directly involved in the commission of the infringement. This is seen as particularly inappropriate for unfair competition law, in which unlawfulness is supposed to emanate from the unfair competition practice itself (*Verhaltensunrecht*). Overextending the reach of the law to persons whose conduct does not of itself constitute a breach of the standard business conduct is seen as inappropriate. By contrast, intellectual property rights are, as noted above, absolute rights, making their infringement by definition unlawful. In their case, the unlawfulness will reside not in the type of behaviour, but in the achievement of the illegal result (*Erfolgsunrecht*): any infringement of an absolute right constitutes in and of itself an illegal act, irrespective of the behaviour that led to it. It has been argued that this difference means that Art. 1004 BGB cannot support injunctive action only against disturbers for unfair business practices. Others suggest that this indicates a general inapplicability of disturbance liability in all areas of law.¹²⁵ Certainly, application of *Störerhaftung* in the case law of the BGH has been severely restricted in recent years in unfair competition law,¹²⁶ but the Court continues to employ the doctrine in intellectual property matters, albeit circumscribed by the principle of reasonable review duties.¹²⁷ In any case, we can observe that, in Germany too, latest developments in the case law reveal attempts at a doctrinal reintegration of secondary liability in intellectual property in the underlying rules on liability of general tort law.¹²⁸

4. Converging in Confusion: Towards a European Substantive Intermediary Liability Regime

The elaborate country-by-country analysis engaged in above highlights the deep-rooted structural differences between the three examined national systems for third party copyright

¹²² R Matulionytė & S Nérissou, “The French Route to an ISP Safe Harbour Compared to German and US Ways” (2011) 42(1) IIC, 55.

¹²³ T Hoeren, “German Law on Internet Liability of Intermediaries”, LIDC Congress, Oxford 2011; J Wimmers, “Who Interferes? Liability for Third Party Content on the Internet in Germany”, (August 2007) Intellectual Property Today, 32.

¹²⁴ T Hoeren, “German Law on Internet Liability of Intermediaries”, LIDC Congress, Oxford 2011.

¹²⁵ H Köhler, “Täter und Störer im Wettbewerbs- und Markenrecht Zur BGH-Entscheidung ‘Jugendgefährdende Medien bei eBay’ (2008) 1 GRUR 2; H Köhler & J Bornkamm, *Gesetz gegen den Unlauteren Wettbewerb* (C.H. Beck, Munich 2012) Rn. 2.2 *et seq.*

¹²⁶ The leading case in this regard is BGH, *Jugendgefährdende Medien bei eBay*, 12 July 2007, I ZR 18/04.

¹²⁷ T Hoeren, “German Law on Internet Liability of Intermediaries”, LIDC Congress, Oxford 2011; G Spindler & M Leistner, “Secondary Copyright Infringement – New Perspectives from Germany and Europe”, (2006) 37(7) IIC 788; H Schack, “Täter und Störer: Zur Erweiterung und Begrenzung der Verantwortlichkeit durch Verkehrspflichten im Wettbewerbs- und Immaterialgüterrecht” in “Festschrift für Dieter Reuter zum 70. Geburtstag am 16. Oktober 2010” (2010) De Gruyter, 1167.

¹²⁸ G Spindler & M Leistner, “Secondary Copyright Infringement – New Perspectives from Germany and Europe”, (2006) 37(7) IIC 788.

infringement. At the same time however, it also reveals a number of common trends that unite them.

The most striking of these is of course the parallel regression to national tort law basics. Copyright infringement is a tort and, in view of the lack of satisfactory *sui generis* intermediary liability theories internal to copyright, judges in all three selected countries have turned to basic tort law principles to craft appropriate legal reactions. So, while the UK has attempted, through the mechanism of authorisation, to base intermediary liability on the rules on direct copyright infringement, its courts are falling back onto the, doctrinally more convincing, accessory liability principles of joint tortfeasance; France rests intermediary liability on duties of care, carved out of general tort theory, which prohibit intermediaries from engaging in behaviour harmful to right-holders;¹²⁹ and, although Germany currently relies primarily on the property law-based doctrine of *Störerhaftung*, which limits liability to injunctive relief, this scheme is slowly losing favour, with direct breach of basic tort principles here too providing a supplementary, increasingly discussed, option. On this basis, it is easy to conclude that, to a large extent, differences between European liability regimes are attributable to the differences in their tort traditions: the E-Commerce safe harbours have yielded differing interpretations because of the divergent tort rules guiding their application.¹³⁰

But basic tort rules are vague by nature and their application to intermediary liability is by no means a straightforward business. The result has been much national legal uncertainty, as domestic courts fumble for ways to adjust the applicable general principles to the peculiarities of the specific situation. It is indicative that, even in the civil law jurisdictions of France and Germany, the rules have been developed primarily through judge-made case law. With doctrine in flux, the result has been an assortment of murky and ill-defined *ad hoc* solutions that fail to stand up to thorough examination: so, while UK courts are struggling to squeeze intermediary liability into the ill-fitting concept of authorisation and use joint tortfeasance to rekindle the long-rejected liability for the mere assistance of infringement, the ambivalent French courts have trodden back and forth in their case law, as higher courts invalidate the theories developed by *juges du fond* intent on avoiding the application of the safe harbours. Finally, while the German principle of *Störerhaftung* is also notoriously unpredictable and possibly incompatible with the E-Commerce Directive and its very applicability to intermediary liability is currently contested, the direct application of *Täterhaftung* is only just beginning to be explored and offers no safer or more consistent outcomes. A systematic approach to intermediary liability is accordingly lacking in all three selected Member States, something particularly unfortunate given the political sensitivity of the topic. Consequently, although undoubtedly the connection with the tenacious cross-border disparities of tort may make the task of harmonisation seem even more formidable, it also hides an opportunity: in the area of intermediary liability, the EU Member States appear, in a way, to be converging towards a mutual confusion. More significantly, that confusion would seem to be concentrated in similar areas.

So, for example, all three jurisdictions above reveal a preoccupation with the intermediary's state of mind: in secondary liability, where the material act of infringement is committed by a third party, while the intermediary's culpability is indicated by his mental connection to the infringement, the usual strict liability rule in copyright reaches its limits. In France, if it weren't for the inconvenient jurisprudence of the *Cour de cassation*, this would be easily dealt with, as the fundamental delictual principle of extra-contractual liability for civil offences directly applies, placing fault at centre stage. By contrast, UK courts have a harder time fitting mental elements into their adjudication: the mental participation link in both authorisation and joint tortfeasance is much more strictly delineated in English law, leading UK judges to an impasse as they struggle to reconcile their instinctive conviction of the blameworthiness of

¹²⁹ Compare: JH Spoor, DWF Verkade & DJG Visser, *Auteursrecht – Auteursrecht, Naburige Rechten en Databankenrecht* (3rd ed, Kluwer 2005) 391.

¹³⁰ Conversely, it could of course also be argued that the initial reluctance to directly apply tort principles in the UK and Germany might be disguising tort principles which, when applied, could prove surprisingly similar.

certain service providers with the rigid standards of their national law. Germany seems to lie on the intersection between the two systems: although the fault-free theories of disturber liability have dominated the discussion in recent decades, the adoption of infringing content can establish direct intermediary liability for unlawful content, while, alternatively, dereliction of duties of care, whether in the context of *Störerhaftung* or *Täterhaftung*, can also substantiate liability. Accordingly, all three jurisdictions seem to be at the very least leaning towards including some kind of mental element as a requirement for liability for monetary compensation, although courts disagree about (or are completely unclear on) where the normative basis for such requirements might lie. It should be noted that the European efforts to inject an element of blameworthiness into the third party copyright liability standard could be said to parallel, or perhaps even be inspired by, the US introduction of an inducement rule with its 2005 Supreme Court *Grokster* case.¹³¹

The different national approaches to intermediary culpability can to a large extent be explained by the fundamental divide in the approaches of civil and common law to the concept of duties of care: while in civil law systems under the general tort rule any person whose activity is likely to cause prejudice to another holds a broad duty to ensure that their actions do not prejudice third parties, in the common law system no such duty is envisaged, unless explicitly foreseen by precedent or statute.¹³² Instead, there is a sharp division in common law tort rules between the requirements for direct and indirect liability, which does not exist in civil law systems.¹³³ Yet it is possible that the UK courts might be slowly coming round to a more continental way of thinking, if not generally then at least in the very circumscribed area of indirect copyright infringement. So, for example, in *Dramatico*, as well as in *Newzbin I*, the English courts interpreted failure to take any substantial steps against mass-scale infringement as circumstances giving rise to liability, thus introducing considerations of due care in the assessment intermediary liability. Similarly, calls in the literature to re-examine the historical complete rejection of facilitation as a way of incurring liability¹³⁴ (and the courts' rather disingenuous attempts to bypass the same) could be foreshadowing an EU-wide approximation in the conditioning of intermediary liability for third party copyright infringement on the violation of a duty of care. It is also possible that some harmonising influence of the E-Commerce Directive can be detected here: the conditions for safe harbour protection, such as the requirement that host service providers lack all actual knowledge, the CJEU's insistence that intermediaries must be "neutral" to enjoy protection, as well as the vague reference to the possibility of regulating intermediary behaviour through the imposition of duties of care in the recitals to the Directive provide some first inklings of European guidance in this area.¹³⁵

The requirements for injunctive relief have inspired comparable musings across national borders, although the EU safe harbours afford absolutely no guidance, excluding injunctive relief from their ambit. Through the doctrine of *Störerhaftung* the German courts have put this autonomy to great effect: liability for damages is rarely acknowledged by the German courts, while all parties involved in a wrong-doing can be subjected to an injunction, without any need to establish participation in the commission of the tort or fault. But this originally strict principle has been diluted in recent years with the introduction of the duty to review accompanied by a reasonableness defence, thus injecting elements of blameworthiness into the discussion in the area of reparative remedies as well. The French approach exemplifies a dichotomy between the jurisprudence of the lower courts, which favour a fault test for injunctive relief as well as monetary compensation, and the *Cour de cassation*, which would rather apply a strict liability

¹³¹ *MGM Studios, Inc. v Grokster, Ltd.*, 545 U.S. 913 (2005). For further analysis of the evolution of US law in this regard see AYen "Sony, Tort Doctrines, and the Puzzle of Peer-to-Peer" (2005) 55 Case Western Law Review, 815 and A Yen "Third Party Copyright After Grokster" (2006) 91 Minnesota Law Review, 180.

¹³² B Martinet Farano, "Internet Intermediaries' Liability for Copyright and Trademark Infringement: Reconciling the EU and US Approaches" (2012) TTLF Working Paper No 14.

¹³³ KJ Koelman, "Online Intermediary Liability", in PB Hugenholtz (ed.) *Copyright and Electronic Commerce - Legal Aspects of Electronic Copyright Management*, (Information Law Series (no. 8), Kluwer Law International 2000) 18.

¹³⁴ PS Davies, "Accessory Liability for Assisting Torts" (2011) 70(2) Cambridge Law Journal, 353.

¹³⁵ Recital 48, E-Commerce Directive.

approach to both. At the opposite extreme, the British courts are entirely suspicious of injunctions: in *Bunt v Tilley* in 2006, in the area of defamation, the High Court, dismissed a request for injunctive relief requiring the prevention of the supply of services to the defendants by their respective internet service providers, as “wholly disproportionate to any conceivable legitimate advantage”, as well as “Draconian and pointless”.¹³⁶ Yet under EU influence, the British courts have opened up to the possibility of injunctive relief in defence of IPRs: in implementation of Art. 8(3) of the Copyright Directive,¹³⁷ s. 97A CDPA grants courts the power to issue injunctive relief against service providers in cases of copyright infringement, although only where they have actual knowledge of another person using their services to infringe copyright; accordingly, injunctive relief was granted to the plaintiffs under this heading in both *Dramatico* and *Newzbin II*, the follow-up to *Newzbin I* that turned against British ISPs seeking the blocking of the Newzbin website.¹³⁸ Even in the trademark-focused *L’Oreal v eBay* the High Court, despite the lack of an explicit implementation of Article 11 of the Enforcement Directive into UK law, did not exclude adjusting the equitable protective jurisdiction of the traditional so-called *Norwich Pharmacal* orders for discovery to achieve the desired effect.

Finally, the scope of any injunctive intervention is another topic ruled by mutual cross-border uncertainty: unlike their US counterparts, the courts in all three examined European states have been toying with the idea of demanding not only the take-down by intermediaries of notified infringing material, but also of targeted monitoring intended to prevent future infringement. In France, due diligence considerations ballooned into a notice-and-stay-down regime that had to be curtailed by supreme court intervention. In Germany the notoriously vague *Störerhaftung* has led courts to stray in the same direction. The question has arisen even in the injunction-sceptic UK, where *L’Oreal v eBay*, after a lengthy description of the German approach, identified the scope of the injunctive relief demanded by Article 11 of the Enforcement Directive as a matter requiring CJEU guidance.¹³⁹ Although the perplexing intersection between the demands of the Copyright Directive and Enforcement Directive for injunctive relief and the prohibition on general monitoring obligations under Article 15 of the E-Commerce Directive has recently been the subject of a number of CJEU preliminary rulings, the matter still remains unclear, as the relevant cases to date have been exceedingly limited in their reach.¹⁴⁰

The re-occurrence of similar patterns across European borders is unsurprising in view of the negative, round-about nature of the E-Commerce special liability regime: the safe harbours and CJEU case law have set the tone for the discussion of intermediary liability in Europe, but have failed to provide real answers. Instead, national courts have been left attempting to structure the EU’s hints as to the correct solution (“control”, “knowledge”, “neutrality”, “duties of care”, “no general monitoring obligations”) into their heterogeneous – and still developing – national approaches. As a result, the first step towards the European harmonisation of intermediary liability has probably contributed towards the very confusion that now necessitates further intervention. A bit more constructively, it has also led to an emerging European discussion on not only the requirements for monetary compensation, but also the conditions and scope of injunctive relief. In this way the ground has been laid for the introduction of further European coordination mandating not only where Member States cannot impose liability for intermediary activities, but also where they should, that would not only allow the imposition of duties of care or of injunctive relief, but would also stipulate under which circumstances that must happen – in

¹³⁶ *Bunt v Tilley* [2006] EWHC 407 (QB).

¹³⁷ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10.

¹³⁸ *Twentieth Century Fox Film Corp & Ors v British Telecommunications Plc* [2011] EWHC 1981 (Ch).

¹³⁹ *L’Oreal S.A v eBay International AG* [2009] EWHC 1094 (Ch).

¹⁴⁰ See in particular Case C- 324/09, *L’Oréal v eBay*, 12 July 2011, Case C-70/10, *Scarlet v SABAM*, 24 November 2011 and Case C- 360/10, *SABAM v Netlog*, 16 February 2012.

other words for a European harmonisation of the substantive issues surrounding intermediary liability.¹⁴¹

CONCLUSION

The fragmented conglomeration of national systems described in Sections 1-3 above is ill-suited to the global nature of the internet and the liability attribution problems it presents: a borderless problem deserves a borderless solution. But the European harmonisation of intermediary liability beyond the superficial approximation provided by the safe harbours presents a difficult task: the issue is closely connected to general tort law, an area in which divergences between EU countries remain deeply entrenched.¹⁴² Yet interestingly, although the normative basis and systemic organisation of basic tort norms may vary considerably across Member States, in practice the principles and legal standards of protection specific to secondary copyright liability appear to be slowly –and spontaneously – converging. This is to a large extent due to the lateral harmonising influence of the E-Commerce safe harbours: under the gentle prodding they provide, the same or similar factors dominate the discussions on intermediary liability across European borders, while, more conspicuously, the same or similar question marks hang over them.

But these common elements have failed to be incorporated into a cogent legal framework: instead domestic courts have been left struggling to fit European elements into their pre-existing systems of substantive law. Not only does this approach not make for good harmonisation, but it also undermines coherence on the national level. The problem is exacerbated by the lack of well-founded, systematic national theories on the issue. In all three examined states, third party liability remains a troublesome, under-analysed area of private law and consistent, flexible solutions for intermediary copyright infringement are consequently lacking. In their default, judges and legal practitioners are left to rely without legislative guidance on their personal intuitive sense of justice in the application of general tort norms to the specificities of third party online copyright infringement. The result is doctrinal tension, legal uncertainty and conflicting, only sluggishly maturing, interpretations by courts even within individual Member States.

Paradoxically, this provides the best opportunity for the Commission to step in with a cross-border, unifying regime: since a well-founded solution to the challenge posed will anyway require significant doctrinal reform on a national level across the board of Member States, a window has opened for an EU-level debate on intermediary copyright liability. After all, harmonising new uncharted territories is easier than attempting to find common ground between time-hallowed divergent national traditions. Moreover, unlike other areas of tort law that have been left untouched by the EU, in recent decades EU Member States have undertaken to approximate their national copyright laws and practices to a considerable degree. Although basic tort norms may therefore vary considerably across Member States, intermediary liability for copyright infringement is specific enough that the harmonisation of this one area should be possible without also necessarily requiring the prior harmonisation of its national tortious underpinnings. In its 2012 Communication on e-commerce and other online services¹⁴³ the Commission concluded that a revision of the Directive is not necessary at this stage and instead signalled plans to improve the implementation of the Directive and provide clarification, in order “to achieve the Directive’s full potential”. This article would suggest that more drastic action is needed: the EU should take advantage of the international momentum gathered in this area to

¹⁴¹ J Bornkamm, “E-Commerce Directive vs. IP Rights Enforcement – Legal Balance Achieved?” (2007) GRUR Int 642.

¹⁴² A Ohly, “Economic Rights” in E Derclaye (ed.), “Research Handbook on the Future of EU Copyright” (Edward Elgar, 2009) 235.

¹⁴³ Commission Communication to the European Parliament, the Economic and Social Committee and the Committee of the Regions, “A Coherent Framework for Building Trust in the Digital Single Market for E-Commerce and Online Services”, 11 January 2012, COM(2011) 942 final.

craft a truly coherent, sensitive, comprehensive and harmonised European system for intermediary copyright liability that allows for fine distinctions and delivers clear definitions. The E-Commerce Directive's safe harbours and the corresponding CJEU case law present a hesitant first step in this direction. Instead of shying away from this new challenge the EU should tackle the unfinished business it began with their adoption to usher in the next era in European intermediary liability.