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Liability of Internet Intermediaries for IP Infringements under EU and German Law

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"Perhaps the most important question in ten years' time won't be if a society uses the Internet, but which version of it they use."

Eric Schmidt/Jared Cohen, The New Digital Age, 2012, p. 126

- Layers of Internet architecture and of regulation (Benkler)
  - Physical infrastructure layer
  - Logical infrastructure layer
  - **Content layer**
    - **EU and German law regarding the liability of internet intermediaries for IP infringements**

- Phase 1 (late 1990ies): Intermediaries privileged in order to foster the proliferation of the Internet
  - Directive on electronic commerce 2000/31
    - Horizontal exemptions from liability for "mere conduit" (access provider), "caching", and hosting, no general obligation to monitor (art. 12-15)
    - Does not apply to search engines

- Phase 2 (2000-2011): Courts implement a balanced intermediary liability
- Yes, there is a notice and takedown obligation for host providers (GerBGH eBay 2004)
- But no liability for damages if automatic takedown systems are in place (GerBGH eBay 2004-2013)
- And no obligation to systematically monitor and filter all traffic for access and host providers (CJEU Scarlet and Netlog 2011/2012)
- Linking to lawful content, e.g. by search engines, is legal on the basis of an implied license (BGH Paperboy 1995, Vorschaubilder 2010, also CJEU Svensson 2014)
- Duties of care do not require human intervention -> **Code is law!**

- Phase 3: Intensified duties of care (2011-2014)
  - CJEU L'Oréal v eBay 2011
    - EU law (Enforcement Dir 2004/48) includes a staydown obligation for host providers
    - Safe harbor provisions do not apply if intermediaries take an active role
      - Hosting services that foster infringements have to implement individual human control (BGH 2012 and 2013 regarding sharehosters -> defendant bankrupt)

- Phase 4: Intermediaries as gatekeepers (2014-
  - Blocking orders against access providers (CJEU UPC Telekabel 2014, more limited BGH 2015)
  - Injunctions against providers of Wireless Local Area Networks (CJEU McFadden 2016)

- Phase 4: Intermediaries as gatekeepers (2014-
- From indirect to direct liability
  - CJEU GS Media 2016: Posting hyperlinks for profit to illegal content is a “communication to the public” unless the presumption can be rebutted that the person posting the link had knowledge of the illegality of the content
    - Are search engines liable for © damages?
  - Proposal for a related right for press publishers, aiming at news aggregators, art. 11 Dir © Digital Single Market (2016/280/COD)
  - Leaked optional proposal for art. 13 © Digital Single Market: YouTube et al. are themselves communicating works to the public if they optimize the presentation and promotion of works

- Phase 4: Intermediaries as gatekeepers (2014-
- Prohibition of certain technologies
  - CJEU Stichting Brein/Ziggo 2017: Providing a BitTorrent sharing platform with a search engine is a “communication to the public”
  - CJEU Stichting Brein/Wullems 2017: The sale (!) of a media player (hardware) with pre-installed add-ons to access and watch pirated films is a “communication to the public”
  - Art. 13 Dir © Digital Single Market Proposal: large UGC platforms like YouTube have to implement filter technologies and share ad revenues

- Conclusion:
  - Content layer regulation in the EU takes the perspective of (traditional) IP content providers. Online services are generally legal, but they have to make sure that only lawful content is available.
  - Under German law, this is also true for personality rights infringements, “hate speech” and “fake news” (Network Enforcement Act 2017)