

ROLE OF THE COURTS

Fair and Pragmatic Solutions Between Provider Business Models and
IP Owners' Interests

Case Study I: Enforcing Rights on Information

- New rules on Enforcement based on EU-Enforcement Directive 2004/48
- Sec. 101 German Copyright Act:

Obligation of the copyright infringing user, acting on a commercial scale, to immediately provide the rightholder with the **relevant information on the origin and distribution networks of the infringing goods or services.**

Extended – inter alia – to any person providing services on a commercial scale which itself have been used in infringing activities, however, provided that the infringement is obvious or, as the case may be, that the right holder has already initiated court proceedings

- Applies to file-sharing activities

Case Study I: Enforcing Rights on Information

- Problem: the relevant information (i.e. the IP-address) is part of a communication process protected by constitution and in particular by data-protection laws.
- Unique procedure, set out in Sec. 101 (9) CA: Before access-provider is allowed to pass the relevant information to the rightholder, rightholder must apply for and obtain a **court order** saying that the access-provider may legitimately deliver the information on the copyright infringing communication process to the rightholder.

Case Study I: Enforcing Rights on Information

- Is the work protected by copyright?
- Has the applicant a right to sue resp. sufficient legal standing?
- Is there an “obvious” infringement?
- Is there an infringement on a “commercial scale”?
- Is there an unreasonable burden on the part of the Access-provider, to be assessed on a case-by-case basis?

Case Study I: Enforcing Rights on Information

- Next Problem: some access-providers **ceased to store** relevant information after session is finished. Courts had to dismiss applications.
- **Obligation to store** the relevant data after the session has been finished?
- Hamburg Regional Court: as soon as the access-provider has knowledge of the ongoing infringement, duty of the Access provider not to engage in any conduct which results in a frustration of his own obligation under Sec. 101 CA to provide the relevant data.
- Affirmed by Higher Regional Court, no appeal to the Federal Supreme Court; other Courts have taken different views.

Case Study II: Access-Provider and DNS-barrier

- Alliance of major studios moved for a preliminary injunction asking the court to compel the access-provider to **block a specific website** that contained masses of unlicensed copies of Hollywood movies, most of them not released in Germany at the time the application was filed.
- Providers are under contributory liability in German law, business model is not exempted from obligation under **general civil law to delete third party content that infringes copyrights**.
- Access-providers are not liable for copyright infringement before they have received sufficient knowledge of the infringing content. Obligation to store the relevant data after the session has been finished?
- On a second level to be assessed to what extent providers have to control content, and if so, to what extent they have to take actions against copyright infringing content

Case Study II: Access-Provider and DNS-barrier

- Hamburg Regional Court held that, access-providers are not obliged to install a DNS-barrier, since the obligation to adopt technical measures appeared to unreasonably burden the provider.
- Access providers render a passive, technical and automated service, transmitting data regardless of and without any control over specific content. DNS-barrier is a highly inefficient mechanism and easy to circumvent
- Recent Case: Piratebay, Hamburg Regional Court has taken a different view