EJLT European Journal of Law and Technology

Three songs and you are disconnected from cyberspace? Not in Germany where the industry may 'turn piracy into profit'

Sandra Schmitz [1], Thorsten Ries [2]

Cite as: Schmitz, S, Ries, T, 'Three songs and you are disconnected from cyberspace? Not in Germany where the industry may 'turn piracy into profit' European Journal for Law and Technology, Vol. 3, No. 1, 2012

Abstract

Musical and cinematographic works are shared on a large scale via the Internet, often disrespecting copyrights. State initiatives seek to curtail online copyright infringements in different ways; the latest being graduated response schemes, where the alleged infringer is initially warned twice before he is sanctioned. In this context questions arise inter alia as regards the identification of the actual infringer, information rights of the rights holder, reliability of tracking methods or judicial review of the allegations. In this context, it is of some interest to see how these questions are dealt with under similar regimes. This paper outlines how these questions and online copyright infringements in general are targeted under German civil law and how this has become a profitable tool of the music and film industry, in particular following the introduction of further information rights by the Enforcement Directive. It critically evaluates the recent developments in Germany and argues for a more restrictive interpretation of the relevant provision of the German Copyright Act.

Creative industries claim to have suffered a loss in income by the rise of so-called P2P file-sharing, i.e. the practice of distributing or providing access to digitally stored information using distributed peer-to-peer networking. While file-sharing as such is not illegal, many users ignore intellectual property rights and thereby breach existing laws. The problem for the content industry in enforcing their rights is the difficulty of identifying the copyright infringers without IP address subscription information. Governments feel that it is their responsibility to protect the rights of the entertainment industry viewed as key economic players. Therefore governments seek ways to disable unlicensed file-sharing and provide means to identify the person behind an IP address.

Germany has, so far, refrained from introducing a graduated response scheme and relies on the system of cease-and-desist letters where lawyers send out *Abmahnungen* on behalf of the copyright owners. With such a warning letter the sender informs the addressee that he considers an activity of the addressee to infringe rights of the copyright owner. The warning also contains a request to compensate the sender for the work involved to issue the warning (which according to the German law is beneficial to him) and regularly asserts a claim for damages. Furthermore, it is usually linked with a desist order which sets up a fixed amount of money each time a (further) infringing act can be proven. Thus, if the addressee signs the request he will have to pay the penalty for breaching the order or risks a suit filed by the right holder. A whole business has evolved with specialised law firms sending out dozens of cease and desist letters each day (an estimated 575.000 in the year 2010) [3] and advertising this business with the promise to 'turn piracy into profit'. Germany has thereby become an intense battleground for illegal file-sharers and content owners with specialised companies searching P2P networks for illegal activities.

This paper will examine how this system works, who profits from it, how effective it is and how the German legislature tries to prevent an abuse of the system by lawyers meshing their professional interest with their clients' economic interests while still enforcing copyright protection. The paper will also focus on recent decisions where *Abmahnungen* have been sent to internet access subscribers who have not infringed copyrights themselves but whose connection has been misused by family members or whose Wi-Fi access

was not sufficiently protected. This raises issues which are also of interest for those states operating a graduated response scheme, namely because while the internet connection where copyright material unlawfully passed through can be identified, it is another matter to tie a particular person to have definitely used that connection at that time.

1. Preliminary Remarks

1.1 General Principles of Copyright Enforcement in Germany

German copyright law protects right holders under both civil and criminal law. In copyright infringement matters, especially with regard to illegal file-sharing, a civil action is the far more common way to proceed as criminal charges are not pursued by the prosecutor. Under civil law, any infringements of an exclusive right of an author, an author's moral right, or a neighbouring right protected under the *Gesetz über Urheberrecht und verwandte Schutzrechte - UrhG* ('Act on Copyright and Neighbouring Rights') could lead to a claim for removal of derogation or for injunctive relief [4], damages [5], unjust enrichment [6] as well as destruction, recall or restitution of infringing goods [7].

German law distinguishes between direct infringements, and contributory and vicarious liability. Direct infringers are those, who violate rights of the right holder themselves, and will be directly liable to the right holder. Other persons contributing to the infringement (in a legally relevant way) will be liable under contributory liability [8]. In addition, persons involved in an infringement may be liable as a so called *Störer*, i.e. *disturber* [9]; Liability will be established if the provider knowingly contributes to the infringement of a protected right. [10] This liability concept originally applied to cases where a person had constructive control over dangerous property and was therefore held liable under public law - irrespective of intentional or negligent behaviour - for any foreseeable harm arising from such source of danger. Under private law, the notion of *Störer* characterizes a person who is liable under § 1004 *Bürgerliches Gesetzbuch - BGB* ('Civil Code') to cease any interference with the property of another that is not caused by removal or retention of the possession [11] The concept has been applied by analogy also to interferences with intellectual property rights for example to host providers of internet auction platforms for trademark infringements of sellers as they provided the means for committing the infringement.[12] In general, liability will be established if the *Störer* has breached a reasonable duty to examine when he had reason to believe that he or she is actually supporting an IP-infringing act. Of some relevance, especially with regard to the case of illegal file-sharing, is in this respect, that *Störer* are not liable for damages. Hence, *Störer* are only liable to cease and desist. Danger of first infringement suffices for injunctive relief. Copyright infringement also constitutes a criminal offence under § 106*UrhG*, punishable with up to three years of imprisonment or a fine. For infringements committed on a commercial scale the maximum sentence is five years imprisonment (§ 108a *UrhG*). Criminal investigations in copyright matters are only successful where the infringement is of some severity.

1.2 Remedies for Copyright Infringement

In case of a copyright infringement having taken place, the right holder may bring an action for an injunction. An interim injunction may be granted if interim legal protection is sought before an actual decision in the main proceedings, whereas injunctive relief may also be granted permanently in normal proceedings. The infringed party may assert a claim against any person who unlawfully violates a copyright or another right protected by the UrhG for removal of the derogation or, in case of risk of recurrence, for injunctive relief. A claim for injunctive relief also exists where an infringement impends for the first time. The right holder regularly seeks to have his actual damages compensated. If the infringer acted intentionally or negligently, he will be liable for actual damages suffered by the right holder (§ 97 II UrhG). In German law, there are three different ways of calculating damages in copyright infringement matters. The right holder may claim compensation for his profits lost due to the infringement, reasonable royalties in relation to the infringement (by the way of license analogy), or to have the actual profits generated by the infringer conveyed to him. [13] In copyright infringement matters via P2P networks, the license analogy is the most commonly used way to calculate damages. Although under German law only actual damages can be compensated, meaning that there are no punitive damages, in certain limited circumstances 'immaterial damages' may also be compensated. [14] The UrhG provides for a compensation of non-pecuniary losses by authors, editors of

scientific editions, photographers and performing artists if and to the extent that this is equitable (§ 97 II). The intention behind this provision is to compensate particularly for the infringement of moral rights. [15] If damages claims cannot be brought, [16] the right holder may base his claims on the unjust enrichment provisions in §§ 812 et seqq. BGB. Under unjust enrichment, the infringer will be liable for restitution of the value of what he gained due to the infringement.

In order to be able to calculate damages, right holders are also attributed claims for information regarding the origin and distribution channels of the infringing products and rendering of accounts. [17] The implementation of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights (the 'Enforcement Directive', OJ L 157 of 30 April 2004) [18] introduced further information rights into the UrhG: Information on the origin and distribution of the infringing copies can now also be claimed from a third party which - on a commercial scale - was found (1) in possession of infringing goods, (2) to be using infringing services, (3) to be providing services used in infringing activities, or (4) was indicated by the person referred to in point 1, 2 or 3 as being involved in the production, manufacture, or distribution of the copies, other goods or services (§ 101 II). [19] There is no statutory definition of the notion of 'commercial scale' beside Recital 14 of the Enforcement Directive referring to acts on a commercial scale as those that are carried out for direct or indirect economic or commercial advantage, which would normally exclude acts carried out by end-consumers acting in good faith. Pursuant to § 98 UrhG, the right holder may also demand destruction, recall or restitution of infringing copies and equipment.

1.3 Proceedings in Copyright Enforcement Cases

The author of a work, the right holder of neighbouring rights, and the owner of exclusive rights of use with respect to an infringed work are all entitled to bring an action for copyright infringement. The owners of non-exclusive rights of use, however, do not have standing to sue for copyright infringement unless the right holder agreed (either separately for purposes of the infringement action or in the license agreement) that the licensee should be entitled to sue on behalf of the right holder. Before filing a copyright infringement action, it is advisable to send a so called Abmahnung, a warning letter, to the infringer asking him to cease and desist from the infringement and to issue a written declaration that he will subject himself to a cease and desist obligation with an appropriate penalty clause. § 97a UrhG specifically provides that the infringed party should send a cease and desist letter to the infringing party prior to the instigation of court proceedings to give him an opportunity to settle the dispute without court action. The penalty clause serves as a means to express the seriousness of the cease and desist promise. [20]

Abmahnungen are usually sent by an attorney on behalf of the infringed party. The lawyer's fees can be claimed from the infringer if the claim is justified. In general, the main purpose of a cease and desist letter is to avoid time consuming litigation and the cost risk associated with court proceedings: According to § 93 *ZPO* ('Civil Procedure Code'), the claimant has to pay the defendant's costs if the defendant acknowledges the claim straight away in litigation and the claimant had not sent a cease and desist letter prior to filing the action. Thus, it is advisable to send an Abmahnung; the initiation of court action right away should only be pursued where the matter is extremely urgent and a preliminary injunction is needed immediately or where the claimant is certain that the defendant will defend himself against the claims and would not sign a cease and desist declaration out of court.

2. How the Industry has turned the Instrument of Abmahnung into a Profitable Tool

No legal instrument in Germany has in the rise of the World Wide Web encountered as many criticisms as the *Abmahnung*. But what is the reason? The *Abmahnung* is nothing new, but a legal instrument that has existed in German law long before. However, only recently has the usage of this instrument increased significantly and while up to the mid-90s such letters were primarily targeted at business entities, it is now the private computer user who is the focus of cease and desist requests. The reason for this shift of focus is that modern technologies allow users to engage in potential illicit behaviour on a scale never encountered before. Just take the example of someone selling goods on eBay; he may easily become a nationwide seller on a commercial scale. Similarly someone who allows the download of a copyright-protected file from his computer regularly attracts a worldwide community in contrast to someone who hands over a copy of a recorded tape on the schoolyard.

First of all, the key idea of the *Abmahnung* is simple and reasonable: the sender makes the recipient aware of an illegal behaviour. The aim is to settle a potential lawsuit out of court and not to burden courts with unnecessary work. Likewise, the potential infringer shall be able to avoid the high legal costs of court proceedings. The time and effort for the right holder to issue a warning letter is minimal. However, the more the procedure is optimised and if many warning letters are sent out, they might become a separate profitable business model. Although it was not the intention of the legislator to turn the *Abmahnung* into a source of income, he has cleared the way for it. Each warning letter requires that the infringement and the infringer are identified. With the *Gesetz zur Verbesserung der Durchsetzung von Rechten des geistigen Eigentums* ('Act to Improve Enforcement of Intellectual Property Rights') which came into force on 1 September 2008, right holders and their attorneys may now request a judicial order against an ISP to disclose information on communications traffic data to identify the infringer. In order to obtain such an order pursuant to § 101 *UrhG* it is required that an obvious infringement has been committed on a commercial scale.

2.1 The Interpretation of 'Commercial Scale'

The 'commercial scale' requirement stems from the Art.8 of the *Enforcement Directive*. With its introduction, the European legislator intended to regulate the proceedings for disclosure of information in the sense that information rights are restricted to infringements carried out for direct or indirect economic or commercial advantage. [21] In Germany, a regulation in this sense has not been achieved as courts interpreted 'commercial scale' very broadly; hence, the upload of one music album [22] or one film[23] was sufficient to satisfy the criterion of commercial scale. [24] Clearly this interpretation led to an enormous number of information requests. Legal practitioners report that for example the local court in Cologne now operates so called 'Copyright weeks' where they exclusively try information requests pursuant to § 101 *UrhG*. [25] From 01/2009 to 09/2009 2824 information requests were handled in Cologne, the place of establishment of major ISPs. [26] Some applications related to up to 3500 IP addresses.[27] The number of applications for the disclosure of information as to who was behind a certain IP address at a specific time leads to thousands of identities disclosed; obviously not much time is spent on examining the facts of these cases. [28] Thus, not surprisingly, a subscriber was granted a right to appeal by the Higher Regional Court of Cologne with regard to the decision ordering an ISP to disclose his identity. [29] The Court paid tribute to the interest of the user and subscriber to remain anonymous and to have his anonymity lifted in only such cases where all the legal requirements to grant an information request are met. [30]

It has to be noted that pursuant to § 101 IX *UrhG* information which can be provided only through the use of communications traffic data (§ 3 No.3 *TKG* ('Telecommunications Act')), requires a judicial order on the permissibility of the use of communications traffic data. This traffic data is restricted to the data enumerated in § 96 I *TKG*:

'(1) the number or other identification of the lines in question or of the terminal, personal authorisation codes, additionally the card number when customer cards are used, additionally the location data when mobile handsets are used; (2) the beginning and end of the connection, indicated by date and time and, where relevant to the charges, the volume of data transmitted; (3) the telecommunications service used by the user; (4) the termination points of fixed connections, the beginning and end of their use, indicated by date and time and, where relevant to the charges, the volume of data transmitted; (5) any other traffic data required for setup and maintenance of the telecommunications connection and for billing purposes'.[31]

Accordingly, information can be acquired with regard to the name and address of the subscriber.

2.2 Professional IP Logging

The IP addresses, for which disclosure of information has been applied, are often collected by companies like DigiProtect or Media Protector. These companies have specialised in the detection of file-sharing of copyrighted works and monitor P2P networks for incidents of illegal file-sharing by using software such as, for example, *Filewatch* which is currently used by Media Protector. [32] *Filewatch* connects to a P2P server and requests a copyrighted file. It then records all the IP addresses that offer the file and starts a download. Alternatively, they track so-called 'eD2K-links' which lead to a file that can be downloaded from the eD2K network. [33] As every downloaded file has a unique hash value and can be identified on this basis, a search will be conducted for identical files with the same hash value. For every hit, *Filewatch* inter alia, logs the actual time, the hash value of the file, the user's pseudonym within the sharing software, a hash value that

identifies the software client within the eD2K network, the name and version of the software, the number of packets which the client has already downloaded and most importantly the IP address of the client's internet connection as well as the name of the corresponding ISP at the time of the incident.

2.3 The Legal Costs involved

What is it that makes the *Abmahnung* so attractive? As has been mentioned in the introduction it is not merely the aim to protect one's rights but in a number of cases the aim is primarily to generate revenues and thereby 'turning piracy into profit'. [34]

Abmahnungen can be profitable because the infringing party is obliged to pay the fees for the cease and desist letter. The legal basis for this reimbursement of the infringed party on whose behalf the lawyer acts is the so called *Geschäftsführung ohne Auftrag*('Agency without specific authorisation', §§ 677 et seqq. *BGB*), which is a form of agency in which an agent acts on behalf and for the benefit of a principal, but without being instructed by him, or otherwise entitled towards the principal. If the assumption of agency corresponds to the interest and the real or presumed will of the principal, then the voluntary agent may demand reimbursement of his necessary expenses like a duly authorised agent (§ 683 *BGB*). Necessary are those expenses that the agent - according to the circumstances of the case - could consider as necessary. [35] As a cease and desist letter, if justified, avoids a costly court litigation, it is always assumed to be necessary and in the interest of the infringing party. Accordingly, the infringer is entitled to have the expenses for the cease and desist letter covered. The costs of such a letter depend on the value of the claim. [36] The chamber of the Regional Court of Cologne for example, which deals with copyright claims, regularly sets the value of an illegal file-sharing claim at EUR 10.000 per music title. [37] This Court also held a claim-value of EUR 50.000 for 964 shared music files as adequate. [38] Unlike in competition law claims, the economic situation of the defendant is not taken into account. It is solely up to the court to determine the appropriate value of a claim. [39] Thus, for example the Higher Regional Court of Frankfurt set the value of the claim in the 'Sommer unseres Lebens' case at EUR 2.500. [40]

The incentive to pay the fees for the warning and even the damages claimed is high, as potential infringers fear to be sued. Pressure is put upon them by the fact that courts tend to issue interim injunctive relief in favour of right holders. In proceedings for interim injunctions courts often do not hear the defendant. [41] Given the workload German courts are faced with, they are often appealed to issue an interim injunction as this is a fast and simple proceeding. The right holder only has to furnish prima facie evidence for the alleged infringement, which means that he has to show that it is more likely that an infringement was committed by the defendant than it was not. Accordingly, he does not have to prove the infringement. Furthermore the right holder does not have to make an advance payment of court fees, which makes it easy for him to request numerous interim injunctions at a time. The alleged infringer has to bear the costs if the injunctive relief is granted. Although he can file an objection pursuant to §§ 936, 924 *ZPO*, it can take several months until his objection is tried and until then he bears the costs. [42] The interim injunction constitutes a leverage for those issuing warning letters which adds to the success of warning letters.

2.4 Additional Aspects

Recently, there have been reports that users who shared a copyrighted film have received two *Abmahnungen*: one from an attorney on behalf of the film distribution company and one from a law firm acting on behalf of a rap artist for copyright infringement of the music contained in the film. [43] Also, users who shared the song 'Schöne Welt' of German band Culcha Candela have received two *Abmahnungen* for one act of file-sharing: one from a law firm on behalf of the composer/texter and one from a law firm on behalf of the Music label. [44] It has also been reported that a company, that specialised in the detection of copyright infringement in file-sharing networks, advertises its business model as generating more income for right holders than online music stores: whereas a legal download generates an income of EUR 0.60, illegal downloads may generate EUR 90. [45] Accordingly, the enforcement of copyrights via warning letters has a distinctive economic value in itself which is even higher than the legal download market.

3. Measures to hinder the Abuse of Warning Letters

Although the measure was intended as an easy, fast and claimant- and defendant-friendly tool for the out-of-court settlement, it turned out to be open for abuse.

3.1 'Necessary Expenses'

Pursuant to §§ 683, 670 *BGB* the expenses for which the claimant has to be reimbursed is limited to the 'necessary expenses'. These expenses are those expenses that the agent could consider as necessary and which were in the interest of the claimant. It is common practice in P2P file-sharing cases where attorneys send out hundreds of warning letters for copyright infringements, that these attorneys ask for payment of their fees when the infringer has paid. This is unobjectionable as long as the infringed party is also bound to pay the attorney's fees. The claim for release can only exist where the infringed party is obliged to pay the fees in any case. Accordingly, the law firms which send out hundreds of warning letters are only entitled to claim their fees from the infringer if the infringed party itself would be obliged to compensate the attorney.

Right holders, in particular big music companies, which demand reimbursement of expenses often ranging up to EUR 5000, reportedly have not paid fees or are unwilling to pay them. [46] As they have mandated the attorney they would be obliged to pay the set fees, and are entitled only to claim reimbursement by the alleged infringer for the set fees they would be obliged themselves to pay. If they were not willing to pay the set amount themselves and thus, for example, carry the risk that the infringer is insolvent, they would not be able to claim reimbursement. However, if a case is litigated in court, the right holders will always rely on the fact that there has been an agreement between them and the attorney and that the calculation of the fees is based on the *Gesetz über die Vergütung der Rechtsanwältinnen und Rechtsanwälte - RVG* ('Attorneys Remuneration Act'). [47] It has been leaked that although in a case tried before the Local Court of Frankfurt the claimant was able to prove that the attorney's fees were agreed upon in this specific case, in reality the law firm and the right holder had created a 'joint venture' with no risks for the right holder. [48] This follows the Anglo-American model of 'no win, no fee' which in this sense does not exist in Germany. [49] The fee agreement was as follows: the law firm kept 37.5% of the amount paid by infringers and the remaining 62.5% belonged to the right holder. [50] This would not be an issue if the right holder did not claim reimbursement of attorney's fees based on the *RVG*, which in fact never accrued.

3.2 The limitation of 'necessary expenses' to EUR 100

Pursuant to § 97a II *UrhG* compensation for 'necessary expenses' for the use of the services of an attorney for the initial warning letter shall be limited to EUR 100 in 'non-complex cases with only an immaterial infringement of rights outside of commercial transactions'. This limitation was introduced in 2008 in order to protect individuals who commit minor infringements in a private setting against regular reimbursement claims for cease and desist letters, which often range from EUR 800 to EUR 2500. [51]However, the impact of this provision is limited. [52] An analysis of the case-law so far shows that courts interpret the limitation clause very restrictively. [53] Warning letters for online behaviour are regularly considered to be within commercial transactions. [54]Furthermore the notion of 'non-complex cases' is very vague and it seems that courts are reluctant to consider a case as being simple. [55] In addition the requirement of 'immaterial infringement' is interpreted restrictive, for example the sale of two unauthorised bootlegs of a concert live recording were considered immaterial [56], whereas it is presumed that P2P file-sharing never constitute an immaterial infringement. [57]

4. Possible Objections of the defendant in Filesharing Cases

If a defendant considers a warning letter unjustified, his main argument usually is: 'it wasn't me'. The right holder carries the burden of proof that the internet access subscriber was the actual infringer. [58] This proof is regularly difficult to produce unless the subscriber does not admit to be the actual infringer and only the actual infringer is liable for damages. The subscriber may always rely on his right to refuse to give evidence (§ 383 *ZPO*) as far as family members are concerned. He may argue that he was not the infringer, but does

not have to name the family member who committed the infringement. Accordingly, where the subscriber can prove that not only he but also third parties used a connection, he may only be liable as a *Störer*. The burden of proof is alleviated for the *Störerhaftung* relating solely to an obligation to cease and desist. Liability as a *Störer* is - as mentioned before - only established where the internet access subscriber has breached a duty to monitor the use of his connection or search for infringements. It is up to the defendant to prove that he has not breached a duty.

4.1 'It was not me, it probably was my child/spouse/someone else whom I allowed to use my computer'

A number of court cases dealt with the question of liability of internet access subscribers for their children or other family members. [59] The existence and scope of potential monitoring duties of internet access subscribers (*Störerhaftung*) have been heatedly disputed where the subscriber allowed family members or children to use the connection. [60] Some courts have established liability of the subscriber based on the fact that he did not use available technical measures as for example a firewall or tools restricting the installation or use of P2P software in order to prevent the infringement of copyrights. [61]

Also, it was held that parents have to monitor the surfing habits of their adult daughter sharing their connection on a random basis. [62] In general, children should be instructed by their parents before they would be allowed to use the internet. [63] Only recently, the Higher Regional Court of Cologne expressed doubts whether a subscriber has instruction or monitoring duties with regard to his/her spouse. [64] The majority of courts held that protective measures only have to be introduced where there are indications that an infringement has happened: an on-going supervision without cause for action has been considered as unreasonable. [65] Also, courts assumed that children may well be more advanced in the use of information technologies and therefore specifically adult children do not have to be instructed or monitored by their parents when surfing the internet. [66]

It has been presumed that the access subscriber will not be liable where he can prove that at the time of infringement he was not using his personal computer and due to password protection or the computer being locked in a room no one else could have used it.[67] Whether this argument will be accepted before a court to escape liability as a *Störer* remains to be seen. So far, there is no consensus in how far an internet access subscriber will be liable as a *Störer* for the activities of family members. The outcome clearly depends on the specific facts of the case but also on the court that has to decide the case.

4.2 Misconfiguration by ISPs

Unfortunately, to date, courts have relied on the accuracy of logged traffic data and considered such data as admissible evidence. In February 2011, the Higher Regional Court of Cologne however raised doubts on the reliability of the traffic data stored by a major ISP. [68] This ISP forces a re-connect of the internet connection every 24 hours. Additionally, when users disconnect and re-connect, they are most likely allocated a new IP address. In the application for disclosure of information, the ISP confirmed that the complainant was given a new IP several times during the period in question (three consecutive days). [69] Concluding from the way IP addresses were assigned, it was considered to be very unlikely that one person will be allocated the same IP address several times in a row. The Court had doubts whether the complainant could be identified behind one single IP address for a period of three days or whether this fact was based on a faulty transmission, collection or transfer of IP addresses. Thus, the court revoked the previous order of the Regional Court of Cologne for disclosure of information.This decision constitutes a first step into questioning the reliability of the data transmission, collection and transfer of ISPs.

4.3 'Sommer unseres Lebens' Case [70]: Liability for WLan

In this case the Federal Court of Justice had to decide whether someone who was evidently not at home when he allegedly shared a copyrighted file was liable for the copyright infringement committed via his WLan internet connection. The Court held that private persons that operate a WLan have to have a sufficiently secure password defined as one that is individual and sufficiently long, and have to obey the security standards at the time of purchase. Accordingly, WPA2 [71] is likely to be considered as the current standard for private users. This finding takes into account that people who have WLan at home are not necessarily IT-

literate and can therefore not be required to update the security settings from time to time. However, this conclusion leads to unfair results, namely that those who have an old router with out-dated security mechanisms are less likely to be liable for infringements committed via their internet connection. Whether such a result was intended by the Court is questionable.

5. Concerns about the Introduction of a Graduated Response Scheme in Germany

Following the criticism of the (ab)use of warning letters, one might ask whether graduated response schemes such as in the French *Loi n°2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur Internet* - generally known as *Loi Hadopi* - are a feasible solution for Germany. The German Federal Ministry of Economics is currently awarding a contract for a comparative research study on models to issue warning notices to users in the case of copyright infringements. [72] The Ministry wants to gain insight into the experiences with response schemes of other EU Member States such as, for example, France and the UK which only recently have introduced graduated response schemes. Conducting such a research study raises concerns that Germany is also toying with the idea of a Three Strikes Law. Whether the sanction of disconnecting an internet access subscriber from the internet is a feasible solution for Germany is questionable.

The legality of any such measure in view of fundamental rights depends on the concrete realisation of the graduated response scheme. Taking into account that a disconnection order constitutes a serious sanction not only against the subscriber but any other person sharing the connection, the question arises whether such an order violates basic rights. Regard has to be paid to the fact that it is not necessarily the subscriber that has committed a copyright infringement where more than one person has access to a specific internet connection. The problem with the use of the World Wide Web as such is, that one never knows who is using a specific device accessing the web. The current German regime for copyright enforcement requires that the actual infringer is identified in order to issue a sanction other than a cease and desist order. If the actual infringer cannot be identified the internet access subscriber is only liable as *Störer*, meaning that he can only be ordered to prevent future infringements of the same nature.

A disconnection order clearly intervenes with the basic right of communication and information freedom encompassed in Art.5 I 1 *Grundgesetz - GG* ('Basic Law'). [73] Information freedom encompasses the right to freely obtain publicly available information. It allows the individual access to all general sources of information and usually refers to means of mass communication. [74] It further includes the right to actively obtain information, which also refers to the use of technical means and infrastructure to receive information. [75] The rights encompassed in Art.5 I 1 *GG* find their limitations in the provisions of general laws and thus can be limited wherever a law protects other rights. However, any limitation has to be proportionate in the sense that it has to be suitable and necessary to achieve the legitimate aim of the limitation and outweigh the individual's interest. [76]

A *Three Strikes Law* may be a suitable solution to reduce the number of infringing downloads but already its necessity is disputable. When examining the necessity one has to answer the question whether there is a less restrictive measure that would have the same effect. It has been suggested that the reduction of transfer speed of data which still allows surfing the net, but makes downloading time-consuming and thereby less attractive, might be an alternative. [77] Balancing the interest of the user to have internet access and the copyright owner to prevent future infringements and sanction infringements that have been committed, would require that the latter outweighs the user's interest.

While this is already potentially difficult to assess, the issue becomes more difficult when a whole family is cut off from the internet as a result of the sanction. However, this would depend on the specific details of the Three-Strikes-Law, i.e. whether it is the household that is cut off or the subscriber. But if only the subscriber is cut off then the aim of the disconnection order might not be achieved in first place. In how far will parents be responsible for their children? Do they have to install software disabling the use of P2P networks? What if children that are far more IT-literate than their parents circumvent any protective measures? Considering that a personal computer may not be seized (levy of execution of judgements) if it is needed for professional or occupational reasons: What if the internet access subscriber needs the internet connection to pursue business? Questions also arise with regard to shared accommodation and shared internet connection,

Hotspots offering Free WLan, libraries, basically everywhere where more than one person shares a connection, the subscriber risks sanctions.

Although the question of feasibility of a Three-Strikes-Law in Germany is not the focus of this paper, the issue is addressed in order to show that the basic problems are the same as those that have been encountered with regard to liability questions under the current regime. Considering the distinction that is made between interferers and actual infringers, any disconnection order could only be directed at the actual infringer. Also, the introduction of such a scheme might not impact the use of *Abmahnungen* due to their above described effect for the affected party as well as the lawyer representing it.

6. Concluding Remarks

The German legal instrument of *Abmahnung* in the context described above clearly constitutes a legal policy tool that primarily serves the entertainment industry. Although the intention of such a warning letter is positive for both sides, the new provisions in the*UrhG* introduced by the 'Act to Improve the Enforcement of Intellectual Property Rights' changed this. Business models emerged where only one winner is known, namely the entertainment industry. While it is clearly understandable that right holders want to protect their rights, some 'black sheep' have perverted the copyright enforcement tool into a revenue generating tool. Although the introduction of § 97a II *UrhG* which limits the amount of 'necessary expenses' to EUR 100 was intended to prevent the turn-piracy-into-profit scheme, due to the restrictive interpretation of this provision, so far its impact is minimal. If this provision was interpreted less restrictively, warning letters would presumably still be an effective mechanism to enforce copyrights but the business that evolved around them would vanish. Nowadays, everyone seems to know someone who has received a warning letter with many of those addressees not knowing whether they have actually downloaded the specific file named in the warning. Many of these people pay or negotiate a settlement for a lesser sum; the reason for this is that many people use P2P networks, but actually are not able to keep track of what they have been downloading. They might accidentally have downloaded a copyrighted file. They might have tried to download a copyright-free file but another file was hidden under the file-name they searched for. Someone might have used their wireless internet connection. Warning letters are particular popular with regard to porn movies with salacious titles: the addressees pay because they are too embarrassed to consult a lawyer or verify with those whom they share an internet connection whether they have (accidently or intentionally or not at all) downloaded the file in question.. As long as the courts do not interpret the notion of 'commercial scale' within § 101 *UrhG* more restrictive and do not make it as easy as it is currently is to obtain a judicial order against ISPs to disclose information on communications traffic data, the 'joint venture' of right holders and copyright enforcement businesses is relatively safe. One very recent decision of the Higher Regional Court of Cologne might be a first step into restricting the notion of 'commercial scale': the Court held that the requirement of commercial scale is met if the shared film or song is not more than six months old, as the first six months on the market are considered as the main 'exploitation period' for musical and cinematic works. [78] If the presumed exploitation period of six months has expired, further factors have to indicate an on-going exploitation period of some relevance, for example, a listing in the TOP50 charts. It is a matter of time until the courts will have to deal with the accusation of critics of the current system, namely, that attorneys acting on behalf of the right holders operate a 'no win, no fee' system. In the end, this could shatter the business model of more than one person.

References

Czychowski, C (2008), 'Das Gesetz zur Verbesserung der Durchsetzung von Rechten des Geistigen Eigentums - Teil II: änderungen im Urheberrecht', GRUR-RR 265 - 268

Dreier, T and Schulze, G (2008), Urheberrechtsgesetz: UrhG (München: C.H. Beck)

Fink, U (2009), 'Internetzugangssperren: Wäre 'Three-Strikes' in Deutschland verfassungsgemäss?', http://carta.info/13113/zugangssperren-three-strikes-verfassungsgemaess/

Foster, N and Sule, S (2010), German Legal System and Laws (Oxford University Press)

Heinze, C (2009), 'Die Durchsetzung geistigen Eigentums in Europa - Zur Umsetzung der Richtline 2004/48/EG in Deutschland, England und Frankreich', ZEuP 282 - 310

Heidrich, J, Forgó, N and Feldmann, T (2010), Heise Online-Recht: Der Leitfaden für Praktiker & Juristen (Hannover: Heise Zeitschriften Verlag)

Hoffmann, H (2009), 'Das Auskunftsverfahren nach § 101 Abs. 9 UrhG n.F. - überblick über die Rechtsprechung im ersten Jahr nach Inkrafttreten der gesetzlichen Neuregelung', MMR 655 - 661

Klett, A, Sonntag, M and Wilske, S (2008), Intellectual Property Law in Germany (München: C.H. Beck)

Köhler, M, Arndt, H-W and Fetzer, T (2008), Recht des Internet (Heidelberg: C.F. Müller)

Kraßer, R (1980), 'Schadensersatz für Verletzungen von gewerblichen Schutzrechten und Urheberrechten nach deutschem Recht', GRUR Int. 259 - 272

Malkus, M (2010), 'Harry Potter und die Abmahnung des Schreckens', MMR 382 - 388

Maaßen, S (2010), 'Anm. Zu OLG Köln: Anschlussinhaber hat eigenes Beschwerderecht gegen Gestattungsbeschluss nach § 101 Abs. 9 UrhG', GRUR-Prax 2010, 483

Meier-Beck, P (2005), 'Herausgabe des Verletzergewinns - Strafschadensersatz nach deutschem Recht', GRUR 617 - 623

Otten, W (2009), 'Die auskunftsrechtliche Anordnung nach § 101 IX UrhG in der gerichtlichen Praxis', GRUR-RR 369 - 372

Palandt, O (2010), Bürgerliches Gesetzbuch (München: C.H. Beck)

Solmecke, C (2008), 'LG Köln: Erstattung von Anwaltskosten einer (Massen-) Abmahnung wegen P2P-Urheberrechtsverletzung', MMR 129 - 130

Solmecke, C (2010), 'Wenn sich die Abmahnindustrie verzockt - Rechtsprobleme bei Massenabmahnungen im Internet', in: Taeger, J (ed.), Digitale Evolution - Herausforderungen für das Informations- und Medienrecht (Oldenburg: OlWIR) 625 - 633

Spindler, G and Schuster, F (2011), Recht der elektronischen Medien (München: C.H. Beck)

Spiegel (dpa) (2010), 'Plagiatsurteil: Gericht lässt Bushido Alben shreddern', Spiegel Online of 23.03.2010, http://www.spiegel.de/kultur/musik/0,1518,685251,00.html

Verein zur Hilfe und Unterstützung gegen den Abmahnwahn e.V. (2011), 'Die Große Jahresstatistik 2010', http://www.verein-gegen-den-abmahnwahn.de/zentrale/download/statistiken/2010/jahresbilanz_2010.html

Wandtke, A-A and Bullinger, W (2009), Praxiskommentar zum Urheberrecht (UrhR) (München: C.H. Beck)

---

[1] Ph.D. Student in Law at the Interdisciplinary Centre for Security, Reliability and Trust (SnT), University of Luxembourg. Sandra Schmitz is a fully qualified lawyer in Germany The work of both authors is funded by the **National Research Fund, Luxembourg** (fnr.lu).

[2] Ph.D. Student at the Interdisciplinary Centre for Security, Reliability and Trust (SnT), University of Luxembourg. Thorsten Ries graduated in computer science and writes a Ph.D. in network and communications security.

[3] See Annual statistic 2010 of *Verein zur Hilfe und Unterstützung gegen den Abmahnwahn e.V.,* available at http://www.verein-gegen-den-abmahnwahn.de/zentrale/download/statistiken/2010/jahresbilanz_2010.html (last accessed 16.06.2011).This estimate stems from an association that lobbies against the instrument 'Abmahnung'; therefore the number should be viewed critically. However, considering that according to the German association of the internet industry *eco* information on subscribers of 300.000 IP addresses are disclosed via court order per month, the estimated number of warning letters even seems to be too low. See eco press release '300.000 Adressen pro Monat: erfolgreicher Kampf gegen illegale Downloads' of 31.05.2011http://www.eco.de/verband/202_9137.htm (last accessed 16.06.2011).

[4] § 97 I *UrhG*: 'The infringed party may assert a claim against any person who unlawfully infringes a copyright or another right protected by this Act for removal of the derogation or, in case of risk of recurrence, for injunctive relief. A claim for injunctive relief shall also exist where an infringement impends for the first time.' (Translation by Klett, A, Sonntag, M and Wilske, S, 2008, p.340).

[5] § 97 II *UrhG*: 'Any party who undertakes such action intentionally or negligently shall be liable for compensation to the infringed party for the damage suffered. When assessing damages, the profit made by the infringing party as a result of the infringement may also be taken into account. The claim for damages may also be calculated on the basis of the amount payable by the infringing party as appropriate remuneration had it obtained permission to use the infringed right. Authors, authors of scientific editions (§ 70), photographers (§ 72) and performing artists (§ 73) may also demand compensation in money for non-pecuniary losses if and to the extent that this is equitable.' (Translation by Klett, A, Sonntag, M and Wilske, S, 2008, p.340).

[6] It is generally accepted in German law that the provisions in the German Civil Code on unjust enrichment also apply in the intellectual property area. Consequently, the infringer will have to surrender the value of what he gained due to the infringement according to the provisions on unjust enrichment. See also Klett, A, Sonntag, M and Wilske, S, 2008, p.71.

[7] § 98 *UrhG*: '(1) Any person who unlawfully infringes a copyright or another right protected by this Act may be required by the infringed party to destroy all unlawfully produced and distributed copies or copies intended for unlawful distribution held or owned by the infringing party. Sentence 1 shall apply *mutatis mutandis* to the devices owned by the infringing party that mainly served to produce such copies. (2) Any person who unlawfully infringes a copyright or another right protected by this Act, may be required by the infringed party to recall unlawfully produced and distributed copies or copies intended for unlawful distribution or to remove these permanently from the distribution channels. (3) Instead of the measures provided for in subsection 1, the infringed party may demand that the copies owned by the infringing party be handed over to it in return for payment of appropriate remuneration which may not exceed the costs of production. (4) The claims arising from sections 1 to 3 shall be excluded if the measure is disproportionate in the individual case. The legitimate interests of third parties shall also be taken into consideration when assessing proportionality. (5) Buildings and separable parts of copies and devices of which production and distribution is not unlawful shall not be subject to the measures provided for in sections 1 to 3.' (Translation by Klett, A, Sonntag, M and Wilske, S, 2008, p.341).

[8] Copy shop owners may for example be liable for illegal copying by their customer if they have not taken reasonable precautionary measures to prevent the illegal copying of protected works; A clearly visible sign indicating that copyrights have to be observed may constitute such a measure. BGH, Decision of 09.06.1983 - I ZR 70/81 (Kopierläden), GRUR 1984, 54.

[9] Translation provided by the Langenscheidt Translation Service in the context of § 1004 BGB on the homepage of the German Federal Ministry of Justice, www.gesetzeiminternet.de (last accessed: 16.06.2011).

[10] BGH, Decision of 11.03.2004 - I ZR 304/01 (Internetversteigerung I), MMR 2004, 668 et seqq. with a case comment by Hoeren, T ; concerning the specific requirements in detail: Köhler, M, Arndt, H-W and Fetzer, T, 2008, para.774 et seqq.; Spindler, G and Anton, K in: Spindler, G and Schuster, F, 2011, § 1004 BGB para. 8 et seqq. with further references.

[11] § 1004 BGB: '(1) If the ownership is interfered with by means other than removal or retention of possession, the owner may require the disturber to remove the interference. If further interferences are to be feared, the owner may seek a prohibitory injunction. (2) The claim is excluded if the owner is obliged to tolerate the interference'. Translation provided by the Langenscheidt Translation Service on the homepage of the Ministry of Justice, www.gesetzeiminternet.de (last accessed: 21 March 2011).

[12] BGH, Decision of 11.03.2004 - I ZR 304/01 (Internetversteigerung I), MMR 2004, 668.

[13] For the calculation of damages see: von Wolff, B in: Wandtke, A-A and Bullinger, W, 2009, § 97 UrhG paras. 58 - 83; Dreier, T in: Dreier, T and Schulze, G, 2008, § 97 paras. 58 - 70; Meier-Beck, P, 2005, pp. 617 - 623; Kraßer, R, 1980, pp. 259 - 272; all with further references.

[14] Cf. von Wolff, B in: Wandtke, A-A and Bullinger, W, 2009, § 97 UrhG paras. 58 - 83; Dreier, T in: Dreier, T and Schulze, G, 2008, § 97 paras. 84 - 90.

[15] Cf. von Wolff, B in: Wandtke, A-A and Bullinger, W, 2009, § 97 UrhG paras. 58 - 83; Dreier, T in: Dreier, T and Schulze, G, 2008, § 97 paras. 84 - 90.

[16] One reason may be for example that the infringer has not acted at least negligently. However, as in copyright matters regularly at least negligence on part of the infringer is established, claims for unjust

enrichment are primarily relevant with respect to compensation claims against owners of businesses in which an infringement occurred. See Klett, A, Sonntag, M and Wilske, S, 2008, p. 71.

[17] Dreier, T in: Dreier, T and Schulze, G, 2008, § 97 para. 78.

[18] For details on how the Directive has been implemented into German Law see: Heinze, C, 2009; Czychowski, C, 2008.

[19] § 101 *UrhG* transposes Art.8 of the *Enforcement Directive* into national law.

[20] Heidrich, J in: Heidrich, J, Forgó, N and Feldmann, T, 2010, C.V.9

[21] Recital 14 of the *Enforcement Directive*.

[22] For Example OLG Hamburg, Decision of 17.02.2010 - case no. 5 U 60/09, MMR 2010, 338.

[23] For Example OLG Zweibrücken, Decision of 21.09.2009 - case no. 4 W 45/09, MMR 2010, 214.

[24] For further examples see Otten, W, 2009; Hoffmann, H, 2009.

[25] Solmecke, C, 2010, p.626.

[26] Bleich, H, 2010, p.155.

[27] Bleich, H, 2010, p.155. In October 2009, the Regional Court of Cologne ordered the disclosure of the identity behind 11.000 IP-adresses from major provider Telekom. Thus, one application regarding the sharing of one music title led to potentially 11.000 warning letters sent out.

[28] Bleich, H, 2010, at p.627.

[29] OLG Köln, Decision of 05.10.2010 - case no. 6 W 82/10, MMR 2011, 108.

[30] See also Maaßen, S, 2010, p.483.

[31] Translation by Bundesbeauftragter für den Datenschutz und die Informationsfreiheit, available at http://www.bfdi.bund.de/cae/servlet/contentblob/411286/publicationFile/25386/TelecommunicationsAct-TKG.pdf (last accessed 16.06.2011).

[32] See http://stop-p2p-piracy.com/site/filewatch-merkmale for more information. The procedure described in the following is that of Media Protector GmbH, one of the key players when it comes to the detection of copyrighted works in P2P networks.

[33] These links are primarily shared in online forums or similar websites.

[34] The slogan 'turn piracy into profit' was formerly used by the company DigiProtect, Gesellschaft zum Schutze digitaler Medien mbH. The advertising brochure containing this slogan is not accessible on their website www.digiprotect.org anymore, but is available via the following link: http://pdfcast.org/pdf/digiprotect-turn-piracy-into-profit-praesentation (last accessed 16.06.2011).

[35] Sprau, H in: Palandt, O, 2010, § 683 para. 8.

[36] Attorneys' fees for litigation work in civil law are regulated in the *Attorneys Remuneration Act (Gesetz über die Vergütung von Rechtsanwältinnen und Rechtsanwälten - RVG)* which details schedules of the statutory fees payable on a claim-value basis and payable in stages for the proceedings and court hearings. See § 11of the Attorneys Remuneration Act and its Appendix giving a table of the fees that can be applied. Fees for out-of-court work are completely liberalised and are to be determined by agreement and contract between the client and attorney. Guidance is provided in the regulations attached to the Attorneys Remuneration Act. Court costs in civil matters rise on a scale depending on the value of the claim which is not uniformly proportional. They are determined by reference to the statutory scales, primarily the Court Fees Act.

[37] For examples see Solmecke, C, 2008.

[38] OLG Köln, Decision of 23.12. 2009 - case no. 6 U 101/09, MMR 2010, 281. In this case the four claimants argued that the value of the claim was EUR 400.000 (four claimants, each EUR 100.000) and demanded to be reimbursed for attorney's fees of EUR 5.832,40 altogether. The court however held - inter alia taking into account that the shared music files were not current releases and therefore it was unlikely that they were downloaded by many people - a claim-value of EUR 50.000 each adequate.

[39] Solmecke, C, 2010, p.627.

[40] OLG Frankfurt, Decision of 21.12.2010 - case no. 11 U 52/07, GRURPrax 2011, 133 (the case was referred back to the OLG Frankfurt by the BGH, Decision of 12.05.2010 - case.no. I ZR 121/08 , NJW 2010, 2061).

[41] Solmecke, C, 2010, at p.632.

[42] Solmecke, C, 2010, at p.632.

[43] This has been the case for the film 'Zeiten ändern dich' about German rap artist Bushido. See Verein zur Hilfe und Unterstützung gegen den Abmahnwahn e.V., Die Große Jahresstatistik 2010, available at http://www.verein-gegen-den-abmahnwahn.de/zentrale/download/statistiken/2010/jahresbilanz_2010.html (last accessed 16.06.2011).

[44] This has been the case for the film 'Zeiten ändern dich' about German rap artist Bushido. See Verein zur Hilfe und Unterstützung gegen den Abmahnwahn e.V., Die Große Jahresstatistik 2010, available at http://www.verein-gegen-den-abmahnwahn.de/zentrale/download/statistiken/2010/jahresbilanz_2010.html (last accessed 16.06.2011).

[45] Bleich, H, 2010, p.155; Solmecke, C, 2010, p. 629.

[46] Bleich, H, 2010, p.155; Solmecke, C, 2010, p. 629.

[47] See For Example: AG Frankfurt am Main, Decision of 29.01.2010 - case no. 31 C 1078/09-78, MMR 2010, 262.

[48] See Solmecke, C, 2010, p.629.

[49] Cf. § 49b II RVG which sets forth that a contingency fee is inadmissable unless prescribed explicitly by the RVG. See also BGH, Decision of 23.04.2009 - IX ZR 167/07, NJW 2009, 3297.

[50] See Solmecke, C, 2010, p.629.

[51] Klett, A, Sonntag, M and Wilske, S, 2008, pp. 74 et seq..

[52] Malkus, M, 2010, pp.382 et seqq..

[53] Solmecke, C, 2010, p.628.

[54] Solmecke, C, 2010, p.628.

[55] For an analysis of recent cases discussing the notion 'non-complex cases' see Malkus, M, 2010, pp.384 et seq..

[56] AG Hamburg, Decision of 14.07.2009 - case no. 36a C 149/09, MMR 2009, 872.

[57] Malkus, M, 2010, p. 386.

[58] Leicht, A, 2009, p. 347.

[59] LG Hamburg, Decision of 19.04. 2006 - case no. 308 O 92/06, ZUM 2006, 661; OLG Düsseldorf, Decision of 27.12.2007 - case no. I-20 W 157/07, ZUM-RD 2008, 170; LG Köln, Decision of 27.01.2010 - case no. 28 O 241/09, ZUM-RD 2010, 277.

[60] See Leicht, A, 200946 with further references.

[61] OLG Hamburg, Decision of 11.10.2006 - case no. 5 W 152/06, BeckRS 2008, 14864; LG Köln, Decision of 28.02.2007 - case no. 28 O 10/07, ZUM-RD 2008, 93, 95; LG Frankfurt a.?M., Decision of 12.04.2007 - case no. 2/03 O 824/06, MMR 2007, 804, 805.

[62] OLG Hamburg, Decision of 11.10.2006 - 5 W 152/06, BeckRS 2008, 14864; LG Düsseldorf, Decision of 27.05.2009 - 12 O 134/09, MMR 2009, 780.

[63] LG München I, Decision of 19 June 2008 - case no. 7 O 16402/07, MMR 2008, 619 at 621; LG Hamburg, Decision of 15 July 2008 - case no. 310 O 144/08, MMR 2008, 685 at 687.

[64] OLG Köln, Decision of 24.03.2011 - 6 W 42/11, MMR 2011, 396.

[65] AG Frankfurt am Main, Decision of 12.02.2010 - case no. 32 C 1634/09-72, ZUM-RD 2011, 116.

[66] LG Mannheim, Decision of 29.09.2006 - case no. 7 O 76/06, MMR 2007, 267. No need to instruct adult family member: see also AG Frankfurt am Main, Decision of 12.02.2010 - case no. 32 C 1634/09-72, ZUM-RD 2011, 116.

[67] Leicht, A, 2009, p.347.

[68] OLG Köln, Decision of 10.02.2011 - case no. 6 W 5/11, BeckRS 2011, 04582.

[69] In this case the same dynamic IP address was allocated to the complainant on 12 June 2010 at 9:30 pm, on 13 June 2010 at 11:01 pm and on 14 June 2010 at 8:37 pm.

[70] BGH, Decision of 12.05.2010 - case no. I ZR 121/08, NJW 2010, 2061.

[71] WPA2 (Wi-Fi Protected Access 2) is an implementation of an IEEE ('The Institute of Electrical and Electronics Engineers, Incorporated', a New York not-for-profit corporation) security standard for wi-fi networks and the most used wi-fi protection nowadays in both, home and professional networks. Based on the Advanced Encryption Standard (AES), the current standard specification for the encryption of data, WPA2 provides strong security and vulnerabilities are currently only known in regard to weak passphrases.

[72] The tender that has been issued can be accessed via : http://www.evergabe-online.de/download/bekanntmachung17435.pdf;jsessionid=73E8FE2DD448A3FE76DE3A2AC6B56D45.node20?verfahrenID=17435 (last accessed 16 June 2011).

[73] Art.5 I *GG* provides for rights of communication, namely freedom of expression, information, press, broadcasting, and film.

[74] BVerfG, Decision of 03.10.1969 - case no. 1 BvR 46/65 (Leipziger Volkszeitung), BVerfGE 27, 71 = NJW 1970, 235. Cf. also Fink, U in: Spindler, G and Schuster, F, 2011, C. Verfassungsrecht II. paras.12 et seqq..

[75] Fink, U in: Spindler, G and Schuster, F, 2011, C. Verfassungsrecht II. para.21.

[76] For an illustration in English of this Three-Step-Test see Foster, N and Sule, S, 2010, pp.184 - 186.

[77] Fink, U, 2009.

[78] OLG Köln, Decision of 27.12. 2010 - case no. 6 W 155/10, GRUR-RR 2011, 85. See also OLG Köln, Decision of 05.10.2010 - case no. 6 W 82/10, MMR 2011, 108.