

Bundesgerichtshof (German Federal Court of Justice)

IN THE NAME OF THE PEOPLE

JUDGEMENT

I ZR/79/12

Pronounced on:
August 15, 2013
Führinger
Court clerk
as the Registrar
of the Court

In the proceedings of

1. Rapidshare AG, represented by the member of the *Verwaltungsrat* (supervisory board), Mr. Christian Schmid, Gewerbestraße 6, Cham, Switzerland
2. Christian Schmid, Luzerner Straße 121, Küssnacht am Rigi, Switzerland
3. Bobby Chang, Baarerstraße 149, Zug, Switzerland

Defendants and Claimants in the present proceedings on
the appeal on points of law (*Revision*)

- Attorneys of record: Rechtsanwälte Dr. Osterloh und Osterloh -

versus

1. Walther de Gruyter GmbH & Co. KG, represented by de Gruyter
Verlagsbeteiligungsgesellschaft mbH, this company in turn represented by its
Geschäftsführer (managing director) Dr. Sven Fund and its *Beiratsvorsitzender*
(chairman of the board) Dr. Bernd Balzereit, Genthiner Straße 13, Berlin, Germany

2. Campus Verlag GmbH, represented by its managing director (*Geschäftsführer*)
Thomas Schwoerer, Kurfürstenstraße 49, Frankfurt, Germany

Claimants and Defendants in the present proceedings on
the appeal on points of law (*Revision*)

- Attorneys of record: Rechtsanwälte Jordan und Dr. Hall -

The 1st Civil Senate of the Bundesgerichtshof, based on the hearing on May 8, 2013,
through presiding judge Prof. Dr. Bornkamm and the judges Prof. Dr. Büscher, Prof.
Dr. Schaffert, Dr. Kirchhoff and Dr. Löffler

rules as follows:

The appeal on points of law filed by Defendant 1) against the judgment given by
the Hanseatische Oberlandesgericht (Higher Regional Court) of Hamburg, 5th
Civil Senate, on March 14, 2012 is hereby dismissed. Upon the appeal on
points of law filed by Defendants 2) and 3), the mentioned judgment is repealed
with regard to the decision on costs and also in as far as the judgment was
given to the detriment of Defendants 2) and 3).

To the extent of the repeal, the matter is hereby referred back to the Court of
Appeal, for new proceedings and a new decision, also with regard to the costs
of these proceedings regarding the appeal on points of law.

In accordance with the law.

Facts:

1 Claimant 1) is a scientific publishing house, Claimant 2) is a publishing house
for scientific works, textbooks and economic works. The Claimants are the owners of
exclusive rights of usage to the literary works specified in Exhibits K1a and K1b.
Defendant 1) (hereinafter referred to as "the Defendant"), a stock company
(*Aktiengesellschaft*) domiciled in Switzerland, offers storage space on the internet to
its users, under the internet address www.rapidshare.com ("file hosting service").

When using this service, the user can upload files to the Defendant's internet site which will then be stored on the Defendant's server. After uploading has taken place, the user is provided with an electronic link via which he/she can retrieve and download the stored file via his/her browser ("download link"). Defendant 2) is a member of the supervisory board (*Verwaltungsrat*) of Defendant 1) with sole power of representation; Defendant 3) was Defendant 1)'s managing director (*Geschäftsführer*) up until 2010.

2 The Defendant does not provide a table of contents of the uploaded files, nor a search function or other type of catalogue of these files. However, the Defendant's users can place the download links in link libraries. It is possible to search the link libraries for certain files stored on the Defendant's servers.

3 The Defendant offers two options for the utilization of its service. The service can be used free of charge without registration, however, only to a restricted extent. For instance, downloads are delayed, additional downloads are not possible immediately afterwards, and the download speed is limited; furthermore, uploaded files - according to the Defendant's submissions - cannot be downloaded more than ten times. In addition to this, there is the option of opening a fee-based Premium Account after registering as a user. The Premium Account in particular allows faster and simultaneous downloading of several files.

4 Furthermore, the Defendant awarded "Premium Points" to users whose uploaded files were retrieved by other persons. These Points could be exchanged for a free Premium Account or other high-value bonuses. As of July 1, 2010, the Defendant gave up the system of Premium Points awarded for retrieved files. Users are now able to purchase so-called "Rapids", and then the service package "PremiumPro" which substantially corresponds to the former Premium Account.

5 In a letter from their attorneys of December 2, 2009, the Claimants submitted the information that, among others, the literary works specified in Exhibits K1a and K1b had been made publicly available via the Defendant's service and without the Claimants' consent. As the files specified in the Exhibits continued to be offered for download between January 10 and 15, 2010 on link lists via other links to other storage locations of the Defendant, the Claimants sent the Defendant a warning letter

(*Abmahnung*), and requested that the Defendant issue a cease-and-desist declaration subject to a penalty in the event of further violations.

6 The Claimants requested to prohibit the Defendant, subject to the threat of the statutory measures to enforce compliance, from

making publicly accessible and/or allowing to be made publicly accessible,

1. in relation to Claimant 1 the literary works owned by Claimant 1) and specified in Exhibit K1a,

2. in relation to Claimant 2) the literary works owned by Claimant 2) and specified in Exhibit K1b,

as done via the online service www.rapidshare.com.

7 The Regional Court (*Landgericht*) held as requested (LG of Hamburg, ZUM 2011, 435). The Court of Appeal dismissed the Defendant's appeal with the proviso that the judgment is restricted to allowing the works in dispute to be made publicly available.

8 With the appeal on points of law, the filing of which the Court of Appeal had permitted, and the dismissal of which the Claimants are requesting, the Defendants continue to pursue their request to dismiss the claim.

Grounds:

- 9 A. The Court of Appeal held that the claim - for reasons of clarity restricted to the activity of “allowing to be made publicly accessible” and to infringing activities in Germany - was justified, and stated as follows:
- 10 that, based on sections 97 (1), 19 a, 120, 121 (4) of the German copyright act (UrhG), Art. 5 (1), 3 (1) 2 (6) of the Berne Convention, the Claimants can request that the Defendants refrain from allowing the literary works specified in the operative provisions to be made accessible to the public;
- 11 that the works in dispute were made accessible to the public at the moment when the download links for the Defendant’s service were made available to third parties without restrictions in link libraries on the internet; that this had been done with regard to the literary works specified in the operative provisions;
- 12 that the Claimants informed the Defendant in a letter of December 2, 2009 of the fact that, among others, the literary works specified in the claim were able to be downloaded publicly via the Defendant’s platform; that therefore the Defendants would have been able to prevent future infringements; that nevertheless these literary works continued to be retrievable via the Defendant’s service after that date; that the Defendant is liable as an “indirect infringer” (*Störer*) for these copyright infringements;
- 13 that, even if the Defendant’s business model in principle was eligible for protection by the law, its structure bears the risk of massive copyright infringements, to an extent which permits making the Defendant subject to significantly increased examination and action obligations in order to prevent copyright infringements; that the Defendant had gone beyond the position of a neutral intermediary; that at the time the infringements were committed at the end of 2009, the Defendant had significantly targeted its service, at least among others, at the massive committing of copyright infringements; that private users were encouraged to distribute the uploaded files as widespread and extensively as possible; that it is obvious that a download frequency of more than 100,000 acts, which is what the Defendant advertises with, cannot be reached within the framework of confidential commercial or private communications, but only with highly attractive, and therefore usually unlawful, content; that the Defendant furthermore significantly enhanced unlawful activities via its service through the awarding of Premium Points which was linked to

the frequency of file download; that even though the Defendant has in the meantime ceased the active promotion of copyright infringing activities, this continues to have its effect in the consciousness of the relevant target group;

14 that, independently from the above considerations, a decisive factor for the assumption of an active promotion of copyright-infringing activities is that the Defendant ultimately continues to enable its users to act in complete anonymity, that the Defendant, due to the offered anonymity, intentionally made it impossible for itself to take effective action against infringers; that the fact that the Defendant continues to substantially fund its service through the volume of downloaded files rather than the provision of storage space shows that the Defendant encourages the committing of a multitude of copyright infringements;

15 that against this background the Defendant failed to comply with its comprehensive diligence and examination obligations as an indirect infringer, so that the Defendant is liable to cease and desist;

16 that Defendants 2) and 3) were liable in a similar manner on the basis of general legal principles.

17 B. The appeal on points of law (*Revision*) filed by Defendant 1) against this assessment is not successful. The Defendant violated the examination obligation incumbent upon it as an indirect infringer; had it fulfilled these obligations, further infringements upon the Claimants' rights could have been prevented.

18 I. The international jurisdiction of the German courts results from Art. 5 No. 3 of the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of September 16, 1988 (BGBl. 1994 II p. 2658). The Claimants are asserting claims on account of tort committed in Germany - i.e. making the literary works specified in Exhibits K1a and K1b publicly accessible.

19 II. The appeal on points of law unsuccessfully argues that the appeals judgment was not furnished with grounds for the decision (section 547 No. 6 of the ZPO - German Civil Procedure Code), because the grounds did not support the cease-and-desist order set out in the operative provisions; that the grounds only impose upon the Defendant the obligation to take reactive measures within a very

short period of time with the objective of ending new infringements, and that this does not to comply with the prohibition set out in the operative provisions.

20 The Court of Appeal ordered the Defendant as an indirect infringer to cease and desist. This is shown in the operative provisions of the order through the words “allowing to be made publicly accessible”. The infringer’s cease-and-desist obligation, which is linked to the violation of examination obligations, relates to the necessary and reasonable measures for the elimination of the existing infringements and for the prevention of future infringements. This makes it necessary that the grounds of the decision primarily deal with the infringer’s examination and action obligation. The grounds for the decision as worded by the Court of Appeal suffice to fulfill the formal requirement of section 547 No. 6 of the ZPO, which is to provide grounds for the cease-and-desist order set out in the operative provisions.

21 III. The operative provisions of the appeals judgment are sufficiently precise. Even though the Defendants are unable to directly see from these provisions which specific action and examination obligations are incumbent upon them, the details of the diligence and examination duties to be complied with result, however, from the grounds of the judgment (see BGH, judgment of April 19, 2007 - I ZR 35/04, BGHZ 172, 119 par. 52 - Internet-Versteigerung II; judgment of April 30, 2008 - I ZR 73/05, GRUR 2008, 702 par. 27 = WRP 2008, 1104 Internet-Versteigerung III). In addition to this, the limits of that which can reasonably be expected from the Defendants cannot be defined in more detail during the litigation proceedings (*Erkenntnisverfahren*), as future infringements committed by making the works in dispute publicly accessible cannot be foreseen specifically. Therefore, it cannot be avoided that part of the dispute is shifted to the enforcement proceedings (*Vollstreckungsverfahren*), as otherwise the legal protection aimed at an enforceable cease-and-desist claim would have to be sacrificed (see BGHZ 172, 119 par. 48 - Internet-Versteigerung II). As in the enforcement proceedings the Defendants can always only be charged with culpable violations, any activities without culpability cannot justify the imposition of measures to enforce compliance.

22 IV. Pursuant to the findings of the Court of Appeal, which have not been contested in the present proceedings, the Claimants, as the owners of the exclusive rights of usage to the literary works listed in Exhibits K1a and K1b and protected

under section 2 (1) No. 1, (2) of the UrhG, can assert cease-and-desist claims against the Defendant based on copyright law.

23 V. The Court of Appeal correctly assumed that liability as a perpetrator or an accomplice always takes priority over the liability as an indirect infringer. In the case in dispute, it cannot be entirely excluded that the Defendant participated, for instance as an abettor, in the copyright infringements committed by its users (see BGH, judgment of January 15, 2009 - I ZR 57/07, GRUR 2009, 841 par. 18 = WRP 2009, 1139 - Cybersky). However, liability as an accomplice requires knowledge of a specific pending main offence. The determinations made in the case in dispute do not allow the assumption that the Defendant had such knowledge.

24 VI. However, claims against the Defendant can be based on its position as an indirect infringer, as the Defendant infringed upon its examination obligations (see BGH, judgment of July 12, 2012 - I ZR 18/11, BGHZ 194, 339 par. 15 et seq. - Alone in the Dark). Contrary to the opinion of the appeal on points of law, the examination obligations imposed upon the Defendant by the Court of Appeal do not go beyond the limits of that which is reasonable.

25 1. Claims for cease and desist can be asserted against a party as an indirect infringer in the event of a violation of absolute rights if a party - who is not to be considered as a perpetrator or accomplice - has in any manner intentionally and in an adequately causal way contributed to the violation of the legally protected right. As the liability of an indirect infringer must not be excessively extended to third parties who have not themselves committed the unlawful impairment, the Senate's case law is that the indirect infringer's liability requires the violation of examination obligations. The extent of these obligations is determined by whether and to what extent the party against whom claims are asserted as an indirect infringer can, under the specific circumstances, reasonably be expected to carry out such examinations (see BGH, judgment of April 30, 2008 - I ZR 73/05, GRUR 2008, 702 par. 50 = WRP 2008, 1104 - Internetversteigerung III, judgment of May 12, 2010 - I ZR 121/08, BGHZ 185, 330 par. 19 - Sommer unseres Lebens; BGH, judgment of November 18, 2011 - I ZR 155/09, GRUR 2011, 617 par. 37 = WRP 2011, 881 - Sedo; BGHZ 194, 339 par. 19 - Alone in the Dark). Otherwise, section 7 (2) 1 of the TMG (Telemedia Act) stands against a general examination obligation for service providers as defined in sections 8 through 10 of the TMG for the files uploaded to the servers by their users.

According to this, service providers are not obligated to monitor the information transferred or stored by them, or to search for facts which indicate the existence of unlawful activities. Pursuant to this provision, which is based on Art. 15 (1) of Directive 2000/31/EC on electronic commerce, monitoring obligations of a general nature are excluded. However, monitoring obligations in specific cases are not excluded. Service providers who store the information provided by the users are furthermore obligated to apply the reasonable care which they can be expected to apply and which is set out in the domestic legal provisions, in order to detect and prevent certain types of unlawful activities (Recital 48 of Directive 2000/31/EC; see BGH, GRUR 2011, 617 par. 40 - Sedo). These principles developed by the Senate are in compliance with the standards set by the Court of Justice of the European Union in its judgment of July 12, 2011 (C-324/09, ECR 2011, I-6011 = GRUR 2011, 1025 par. 109 et seq., 139, 144 - L'Oréal/eBay) (see BGH, judgment of August 17, 2011 - I ZR 57/09, BGHZ 191, 19 par. 22 et seq. - Stiftparfüm).

26 Additional examination obligations may exist if the offered service is associated with specific risks. This is assumed to be the case if the business model is targeted from the outset at rights infringements by the users, or if the operator promotes the risks of infringing utilization through its own measures (see BGH, GRUR 2009, 841 par. 21 et seq. - Cybersky; BGHZ 194, 339 par. 22 - Alone in the Dark).

27 2. These principles also apply in the case in dispute here.

28 a) The Defendant is a service provider in accordance with the definition in section 2 No. 1, section 10 1st sentence No. 1 of the TMG, due to the fact that the data stored on its servers constitute third-party information pursuant to section 10 1st sentence of the TMG (see BGHZ 194, 339 par. 21 - Alone in the Dark).

29 b) The Defendant's business model is not from the outset targeted at rights infringements. The Court of Appeal assumed, without committing any legal errors, that the lawful possibilities of using the Defendant's service, for which there is significant technical and commercial demand, exist to a significant extent and are customary.

30 In addition to the utilization as a "virtual locker" for the safe storage of large volumes of business or private data, the Defendant's service can be used in order to

make own or public-domain data available to certain users for downloading or editing. This may, for instance, be used by business customers who wish to provide their clients with access to certain information, or by private persons who wish to exchange their self-created digital photographs or films with friends or acquaintances. In this context, there may also be a justified interest in the frequent downloading of large files by third parties - a characteristic which the Defendant stresses to be one of the advantages of its service (BGHZ 194, 339 par. 23 - Alone in the Dark). The Court of Appeal furthermore pointed out - although in a different context - that decentralized storage locations are being used for the distribution of software backups, and that the Defendant's service was placed by a reputable industry magazine on the same level as other providers of lawful services in the area of "Cloud Computing".

31 c) However, the Court of Appeal, on the basis of the factual determinations made by said Court, correctly assumed that the Defendant - even though it cannot be assumed that it had knowledge of the specific pending copyrights infringements - increased through its own measures the risk that its service may be used in a manner which violates copyrights. The deviating assessment of the Senate in the decision "Alone in the Dark" (BGHZ 194, 339 par. 25 et seq.) was based on the determination by the court adjudicating on the facts in said case.

32 As a commercial company, the Defendant endeavors to generate revenue. In contrast to other services, for instance in the area of "Cloud Computing", the Defendant does not charge a fee for the provision of storage space. Rather, under its business model, its turnover is exclusively generated through the sale of Premium Accounts or - after the conversion of the offers which has taken place in the meantime - of "Rapids" and "PremiumPro" Accounts.

33 Even though the associated comfort characteristics, in particular with regard to the loading speed, duration of data storage and size of uploadable files, are also important for many lawful utilization options (see BGHZ 194, 339 par. 26 - Alone in the Dark), the Court of Appeal assumed that a frequency of 100,000 downloads for some files - which the Defendant advertises - can only be achieved with highly attractive and therefore usually unlawful content. This evaluation by the court adjudicating on the facts does not violate general rules of logic or experience, and is sustained in these proceedings on the appeal on points of law. Even though the Defendant's service may also be of interest for the distribution of software updates

intended for a large number of persons, the assumption by the Court of Appeal that it is the infringing download of copyrighted works such as films, music or software products which is attractive for many users is not vitiated by an error in law.

34 With an increasing frequency with which these users actually download or intend to download such protected content from the Defendant without any additional costs, they are increasingly prepared to use the Defendant's fee-based offers. Therefore, the Court of Appeal assumed, without any error in law, that the Defendant increases its turnover through an increasing number of downloads, and that it therefore significantly profits especially from mass downloads for which in particular files with protected content provided for unlawful download are attractive.

35 This attractiveness for illegal utilization is, as the Court of Appeal correctly held, increased by the possibility of using the Defendant's service anonymously (see BGH, judgment of July 12, 2007 - I ZR 18/04, BGHZ 173, 188 par. 25 - Jugendgefährdende Medien bei eBay). This fact is not changed by the obligation for the service provider to always allow an anonymous utilization of telemedia, provided this is technically possible and reasonable (see section 13 (6) of the TMG).

36 Against this background, the Court of Appeal was permitted without any error in law to consider the awarding of Premium Points to the Defendant's users, which was done up until June 30, 2010 and depended on the download frequency of the uploaded files, as a further indication for the fact that the Defendant encouraged infringements, due to the fact that the Defendant, in doing so, also rewarded the high attractiveness of the downloading of files with copyrighted content which were made available on the Defendant's servers without the consent of the owners of the rights.

37 From the above determinations, the Court of Appeal, without any error in law, came to the factual conclusion that the specific design of the Defendant's service creates a significant incentive to use it for massive rights infringements. In this context, the Court also took into consideration that the Defendant itself was assuming that the abuse rate was between 5 and 6 %, which, for a daily upload volume of 500,000 files, results in approx. 30,000 copyright-infringing acts of use.

38 3. The Court of Appeal, within the scope of its assessment of these facts as the court adjudicating on the facts, assumed without any error in law that even though the Defendant cannot be made subject to a non-fact-related monitoring

obligation, it can be made subject to a fact-related monitoring obligation which follows an infringement which has already been committed and prevents future infringements.

39 a) The scope of the examination obligation of a party against whom claims are asserted as an indirect infringer depends on whether and to what extent such party can reasonably be expected to carry out such examination (BGH, judgment of October 15, 1998 - I ZR 120/96, GRUR 1999, 418, 419 et seq. = WRP 1999, 211 - Möbelklassiker; judgment of April 1, 2004 - I ZR 317/01, BGHZ 158, 343, 350 - Schöner Wetten; judgment of February 9, 2006 - I ZR 124/03, GRUR 2006, 875 par. 32 = WRP 2006, 1109 - Rechtsanwalts-Ranglisten; judgment of May 12, 2010 - I ZR 121/08, BGHZ 185, 330 par. 19 - Sommer unseres Lebens). As the Defendant increases the risk of a rights-infringing usage of its service through its own measures, it is as a matter of principle subject to extensive examination obligations within the framework of its liability as an indirect infringer. However, the Defendant - in as far as claims are asserted against the Defendant as an indirect infringer - cannot reasonably be expected to examine all files uploaded by users to its servers for infringing content. This would endanger its business model which is not from the outset designed for the users to commit infringements, but can rather - as has been shown above - also be used for a variety of legal purposes (see BGH, judgment of March 11, 2004 - I ZR 304/01, BGHZ 158, 236, 251 et seq. - Internet-Versteigerung I), and for which the liability privilege in section 10 sentence 1 of the TMG applies as a matter of principle (see BGHZ 185, 330 par. 24 - Sommer unseres Lebens; also see ECJ, ECR 2011, I-6011 = GRUR 2011, 1025 par. 139 - L'Oréal/eBay).

40 An examination obligation for the Defendant with regard to the literary works protected for the various Claimants, the violation of which can lead to a danger of repetition, could therefore only arise once the Defendant had been made aware by the Claimants of a clear infringement with regard to the specific literary works (BGHZ 194, 3390 par. 28 - Alone in the Dark). The fact that the Defendant increases the risks of an infringing usage of its service through its own measures is, however, to be taken into consideration when determining the scope of the Defendant's examination obligations.

41 b) In a letter from the Claimant's attorneys of December 2, 2009, the Defendant was made aware of clear infringements with regard to the works specified

in Exhibits K1a and K1b. Therefore, from this time onwards, the Defendant was not only obligated to immediately block the specific offers immediately, but was also obligated to take precautions to ensure that, if possible, further similar infringements would not occur (see BGHZ 191, 19 par. 39 - Stiftparfüm; BGHZ 194, 339 par. 29 - Alone in the Dark).

42 c) According to the determinations of the Regional Court to which the Court of Appeal made reference - and which were not contested by the appeal on points of law -, the literary works in dispute were accessible on the servers even after the letter from the Claimants of December 2, 2009 which gave rise to the Defendant's examination obligations. The Defendant violated the examination obligations incumbent upon it as an indirect infringer, as, after the notification of December 2, 2009, it failed to do everything which was reasonable from a technical and commercial point of view in order to prevent further infringements on its servers with regard to the works protected for the Claimants (see BGHZ 194, 339, par. 31 - Alone in the Dark).

43 aa) Even though the Defendants submitted that the Defendant deleted the files specified in the letter of December 2, 2009, without the Court of Appeal having made any deviating determinations in this respect, the Defendant failed to fulfill its further diligence and examination obligations to prevent further similar infringements.

44 Not only offers which are identical to the cases which have become known, i.e. the making available of the same literary works by the same user, are to be regarded as such "similar infringements". Rather, the Defendant is obligated within the framework of that which is reasonable from a technical and commercial point of view to ensure that neither the user responsible for the notified infringement nor other users offer the specific copyrighted works to third parties via the Defendant's servers. The copyright infringement relates to the specific copyrighted work. Infringing acts are to be considered as "similar" in the context of an indirect infringement if they once more infringe upon the same copyright. In this context, the identity of the person who commits the infringing act of making the protected work available is irrelevant (see BGHZ 194, 339 par. 32 - Alone in the Dark).

45 bb) The Court of Appeal considered the facts submitted by the Defendant regarding its monitoring measures as overall unsubstantiated, as these submissions

were limited to naming general organizational measures which were not related to the specific infringements against which they were supposed to be used. Furthermore, the court held that it was unclear when, with which means, how, by whom, how often and with what result measures were carried out. However, the appeals judgment is not based on a rejection of the Defendant's submissions as unsubstantiated. Rather, the Court of Appeal addressed in detail the various measures alleged by the Defendant. The appeal on points of law is unsuccessful in contesting this.

46 (1) The appeal on points of law states that the Defendant submitted that it runs a 17 person team for the combat of abuse (Abuse Team) which works seven days per week and 24 hours per day on examining and deleting files connected with potential copyright infringements; that the Defendant's employees investigated corresponding notifications and actively visited relevant internet sites in order to end or prevent copyright infringements. Through this, the Defendant has not submitted information on specific measures relating to the prevention of the infringements which were subject to the complaint. The mere number and period of deployment of the involved employees cannot be considered as sufficient submission of facts, as it does not contain any information as to the intensity and method of the examination in the specific cases.

47 (2) The Defendant's note in the terms and conditions of use, stating that it is not permitted to upload works in violation of copyrights, was regarded by the Court of Appeal, without an error in law, as a necessary, but not very effective measure.

48 (3) The use of MD5 filters alleged by the Defendant can prevent infringing acts only to a limited extent, as these filters can only detect files which are identical with the infringing file. Therefore, the use of MD5 filters does not suffice to fulfill the Defendant's examination and control obligations.

49 (4) The Defendant can furthermore not fulfill its diligence and examination obligation through the deletion interface for owners of rights which the appeal on points of law had emphasized in particular. The deletion interface only provides the Claimants with a limited possibility of taking action against illegal usage. They can only delete the specific infringing files or links of which they have already become aware, but cannot themselves search for potential new infringements. Furthermore,

the Claimants cannot take action against the persons behind the infringing offers, as these persons remain anonymous in the Defendant's service, and therefore also during the usage of the offered deletion interface. These two characteristics of the deletion interface established by the Defendant on their own constitute a significant difference to the program on which the Senate commented in the decision "Kinderhochstühle im Internet" (judgment of July 22, 2010 - I ZR 139/08, GRUR 2011, 152 par. 43 = WRP 2011, 223). In contrast to the situation in said case, which related to trademark infringements, the copyright infringements in this case are obvious as soon as a link leading to a protected work has been published. The Defendant therefore cannot avoid the control measures incumbent upon it by offering the Claimants its deletion interface.

50 cc) Pursuant to the determinations of the Court of Appeal, which do not contain any error in law, the Defendant violated the examination obligations incumbent upon it, and therefore failed to prevent similar infringements in the cases notified by the Claimant.

51 (1) The Defendant violated its examination obligations, due to the fact that it refrained from searching the relevant link libraries for the literary works listed in the claim.

52 In as far as hyperlinks in link libraries refer to files stored on the Defendant's servers which contain works which are protected for the Claimants, these are infringing activities which are similar to the infringements found, and which are covered by the Defendant's examination obligations once the Defendant has been informed of the corresponding infringements (see BGHZ 193, 339 par. 37 - Alone in the Dark).

53 As pursuant to the determinations made by the Court of Appeal without an error in law it can be assumed that the Defendant significantly encourages copyright infringements with its specific business model, the Defendant can reasonably be expected to extensively control the link libraries which contain links to its service. In as far as the Senate stated in the decision "Alone in the Dark" that the Defendant can in principle reasonably be expected to carry out a manual control, at least of a single-digit number of link libraries to be monitored (see BGHZ 194, 339 par. 39), this was due to the claim filed and the determinations made by the court adjudicating on the

facts in said case. However, the judgment “Alone in the Dark” does not contain a general limitation of the number of link libraries which need to be monitored.

54 According to this, the Court of Appeal has not overstretched the Defendant’s examination obligations by imposing upon it the obligation to comprehensively monitor link resources, by searching in a targeted manner for further links which contain the title of the work, either completely or to an extent which allows the conclusion that the relevant work is being made accessible, whereby the verbal description in the accompanying text is to be included in the examination. This general “market monitoring obligation” imposed upon the Defendant by the Court of Appeal is reasonable and necessary, taking into consideration the specific circumstances of the case in dispute. Therefore, the Defendant is obligated to determine via general search engines such as Google, Facebook or Twitter, using suitable search requests, and, possibly, also with the help of so-called web-crawlers, whether there are indications of further infringing links to its service with regard to the works to be monitored specifically.

55 (2) Pursuant to the determinations by the Court of Appeal, the Defendant did not use a word filter in order to check the stored file names with regard to whether they contained the titles of the protected works - completely or in an obvious abbreviated form -, and in order to prevent the new uploading of corresponding files. This constitutes another violation of the examination obligations incumbent upon the Defendant (see BGHZ 194, 339 par. 33 et seq. - Alone in the Dark).

56 The suitability of a word filter - which also displays similar results - including subsequent manual control for detecting copyright infringements is not countered by the fact that this method may possibly not detect all infringing activities (see BGHZ 194, 339 par. 35 - Alone in the Dark). In the case in dispute, it furthermore does not stand against the application of a word filter that the Court of Justice of the European Union rejected this measure in its “SABAM” decision (judgment of November 24, 2011 - C-70/10, GRUR 2012, 265 par. 50). This is because this case concerned the filtering of personal information in social networks, so that the users’ fundamental rights were affected (see Peifer, jurisPR-WettbR 3/2013 note 1). On the other hand, said decision dealt with liability for access rather than - as is the case here - with the host provider’s liability. Furthermore, the Defendant is free to obtain the consent of its

users to inspect the contents of uploaded files to the extent to which this is necessary in order to exclude infringements in suspicious cases.

57 The Senate is not prevented from considering the failure to use a word filter as an additional violation of the examination obligations by the Defendant, even though the Court of Appeal did not consider this to be the case. Under aspects of procedural law, this does not constitute an additional burden for the Defendant, but rather an element of the grounds through which the cease-and-desist obligation - which was confirmed by the Court of Appeal, and which was reworded for purposes of clarity - is merely substantiated without modifying the object in dispute.

58 (3) The fact that the examination obligations incumbent upon the Defendant may in individual cases also result in a deletion of lawful back-up copies does not render their fulfillment unreasonable (see BHGZ 194, 339 par. 45 - Alone in the Dark). Therefore, it is irrelevant that the mere uploading onto the Defendant's servers on its own does not allow the conclusion that this is done in preparation of making the files publicly available in an unlawful manner. If a specific copyrighted work has already once been made publicly accessible in an unlawful manner via the Defendant's service, any subsequent uploading of such work always bears the risk of also being used in violation of copyrights. The Defendant is obligated to effectively counter this risk in view of the significant risk potential which originates from its business model for protected copyrights. Contrary to the opinion set out in the appeal on points of law, there is no empirical principle which states that this would lead to such a large number of deletions for lawful usages of stored files that this would endanger the Defendant's existence.

59 4. The Court of Appeal also correctly assumed that the Defendant is liable as an indirect infringer for the subsequent similar infringements, as it would have been able to prevent these had it fulfilled the reasonable examination obligations incumbent upon it. The works listed in the claim were offered for download between January 10 and 15, 2010 on link lists via certain links to storage locations on the Defendant's servers. There is no obvious reason why the Defendant as an industry insider should not have been able to find the link lists serving to search for the relevant links, just as the internet users interested in infringing downloads, or the Claimants. The appeal on points of law does not argue in this manner either.

60 C. The appeal on points of law by Defendant 2) and 3), however, is successful. As a consequence, the appeals judgment is repealed in as far as this judgment was given to the detriment of Defendants 2) and 3), and, to this extent, the matter is referred back to the Court of Appeal.

61 The determinations made up to now by the Court of Appeal do not suffice to justify the liability of Defendants 2) and 3). Their liability as indirect infringers, which is the only type of liability which comes into consideration, does not apply if they neither participated in the infringement, nor knew about it, nor had the possibility of preventing it (see BGH, judgment of September 26, 1985 - I ZR 86/83, GRUR 1986, 248 - Sporthosen). The activity which is relevant for the infringement in this case is the violation of examination obligations incumbent upon the Defendant after it had been made aware by the Claimants of the copyright infringements with regard to the literary works set out in the claim. The Court of Appeal has up to now not made any determinations in this respect relating to Defendants 2) and 3).

Bornkamm

Büscher

Schaffert

Kirchhoff

Löffler

Previous instances:

LG of Hamburg, decision of Jan. 14, 2011 - 310 O 116/10 -

OLG of Hamburg, decision of Mar. 14, 2012 - 5 U 41/11 -

Executed

[signature]

as the Registrar
of the Court