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Liability for Links in Germany

Liability of Information Location Tools under German law after the implementation of the European Directive on E-Commerce

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1. Introduction

German lawyers have been debating for six years the issue of liability for links in Internet services. Germany in 1997 was one of the first countries to enact special laws for multimedia liability. The federal state encated the Teleservices Act / Teledienstegesetz[1] (TDG) based on it's legislative competence to regulate telecommunications and economics. The TDG regulates the liability of the provider for contents of so-called Teleservices. According to the legislative competence Teleservices have to be regarded as a form of individual communication. Those Internet services which belong to mass-communication are regulated by the *Länder* (federal states): Based on their legislative competence to regulate cultur the specific law which includes liabilty rules is the Interstate Treaty on Media Services, the so called Mediendienste-Staatsvertrag (MDStV).[2] In many cases in the media sector this structure of legislative competences and the different aims of economical and cultural regulation lead to conflicts between federal and state governments.[3]

This problem has been solved for the topic of liability in 1997 and in 2002 (implementation of the Directive on electronic commerce (DEC)[4]) with an identical text of the laws. Because of the modifications of the laws, which where needed to implement the DEC, the problem must be looked at again and the debate of the liability regime of German multimedia laws could go in its final round.

2. Liability for Hyperlinks and the Teleservices Act 1997

As already mentioned the TDG and the MDStV have – regarding the liability regulation – the same wording. Because of this reason the article will only mention the Teleservices Act. The recent discussion about liability for links under the legal regime before the Directive was implemented focused in particular on the issue whether § 5 TDG was applicable to information brokering via links, and if so, which alternative of § 5 TDG was applicable.[5] The Wording of § 5 TDG was the following:

§ 5 - Responsibility

1. Providers shall be responsible in accordance with general laws for their own content, which they make available for use.
2. Providers shall not be responsible for any third-party content which they make available for use unless they have knowledge of such content and are technically able and can reasonably be expected to block the use of such content.
3. Providers shall not be responsible for any third-party content to which they only provide access. The automatic and temporary storage of third-party content due to user request shall be considered as providing access.
4. The obligations in accordance with general laws to block the use of illegal content shall remain unaffected if the provider obtains knowledge of such content while complying with telecommunications secrecy under § 85 of the Telecommunications Act and if blocking is technically feasible and can reasonably be expected.

In summary, the discussion was that the wording of the law seemed to permit an interpretation that content made accessable via links could be either regarded as own content of the provider (§ 5 sec. 1)[6], as third party content that is made available for the

1 To be found at <http://www.iid.de/iukdg/gesetz/teledienste-gesetz_engl.pdf>.

2 In German to be found at <http://www.iid.de/iukdg/gesetz/mdstv_021009.pdf.>

3 *Schulz / Dreyer / Held / Jürgens*: Regulation of Broadcasting and Internet Services in Germany - A brief overview, 2002 (Working Papers of the Hans Bredow Institute No. 13); <http://www.rrz.uni-hamburg.de/hans-bredow-institut/publikationen/apapiere/13mediaregulation.PDF>

4 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ L 178/1 of 17.7.2000; <http://europa.eu.int/ eurlex/pri/en/oj/dat/2000/l_178/l_17820000717en000100 16.pdf>

5 Internet Hyperlinks Can Become a Legal Pitfall <http://www.bmck.com/ecommerce/hyperlinks.doc>.

6 LG München MMR 2002, 56; LG München MMR 2000, 566; LG Lübeck NJW-CoR 1999, 429; LG Lübeck NJW-CoR 1999, 244; LG Lübeck CR 1999, 650. Available via Internet LG Lübeck <http://www.netlaw.de/urteile/ lglue_1.htm>, LG München <http://www.jurawelt.com/ gerichtsurteile/436>; LG München <http://www.afs-rechtsanwaelte.de/urteile81.htm>.

user by the service provider (§ 5 sec. 2)[7] or as content to which the user gets access through the provider (§ 5 sec. 3)[8]. The fourth alternative, that the liability regime was applicable only to the "classical" triad content -, host- and access-providing and had nothing to do with a regulation of liability for links,[9] has been the less common opinion in the german debate.

3. German implementation of the Directive

This last interpretation according to which German multimedia laws are not applicable at all to link liability, becomes once again relevant after the implementation of the DEC which modifies the liability system of multimedia law. The DEC as regards liability of information location tools simply deals with the three "classical" forms of providing that have already been mentioned: Article 12 regulates pure access providing,article 14 hosting and caching as special form of hosting in article 13. Other than in the wording of articles 12 et sqq, following the will of the European legislator, the Directive does not mention link liability: Article 21 sub-section 2 DEC points out that in future the need for an adaptation of the Directive has to be examined by the Commission. "…in particular" the Commission shall "analyse the need for proposals concerning the liability of providers of hyperlinks" and "shall also analyse the need for additional conditions for the exemption from liability, provided for in Articles 12 and 13….". Something quite similar is expressed in recital No. 42 of the Directive.[10]

The Directive was implemented into German law by the *Gesetz für elektronischen Geschäftsverkehr (EGG)* (Electronic Commerce law) that amended the TDG. Soon afterwards the *Länder* amended the MDStV as well. The liability regulation of the TDG now reads as follows:

Section 9 Transmission of Information [Mere Conduit]

(1) Providers shall not be responsible for third-party information that they transmit in a communications network or to which they provide user access if they have

1. not initiated the transmission
2. not selected the addressees of the information that has been transmitted
3. not selected or modified the information that has been transmitted.

Sentence 1 shall not apply, when the service provider deliberately collaborates with one of the recipients of his service in order to undertake illegal acts.

(2) The transmission of information pursuant to Paragraph 1 and the provision of access to it shall also constitute the automatic, short-term intermediate storage of such information to the extent that this is done only to facilitate the transmission in the communications network and the information is not stored any longer than normally required for transmission purposes.

Section 10 Intermediate Storage to Accelerate Data Transmission [Caching]

Providers shall not be responsible for automatic, intermediate storage for a limited period of time, carried out solely to enhance the efficiency of the transmission of third-party information to other users upon the latter's request, if they

1. do not modify the information
2. comply with conditions on access to the information
3. comply with rules regarding the updating of the information specified in a manner widely recognised and used by industry
4. do not interfere with the lawful use of technology widely recognised and used by industry to obtain data on the use of the information
5. acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it

7 LG München ZUM 2000, 418, LG München <http://www.netlaw.de/urteile/lgm_14.htm>.

8 LG Frankenthal MMR 2001, 401; OLG Schleswig MMR 2001, 399; LG Frankfurt MMR 2001, 403; LG Frankenthal< http://www.jurawelt.com/gerichtsurteile/zivilrecht/lg/2284>

9 *Völker/Lührig*, Abwehr unerwünschter Inline-Links, K&R 2000, 21; *Schack*, Urheberrechtliche Gestaltung von Websites unter Einsatz von Links und Frames, MMR 2001, 9; *Lohse*, Inhaltsverantwortung im Internet und E-Commerce-Richtlinie, DStR 2000, 1874, 1878 ff.; LG Hamburg MMR 1998, 547 <http://www.jurawelt.com/gerichtsurteile/zivilrecht/lg/1938>.

10 "The exemptions from liability established in this Directive cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored."

has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

1. Section 9 (1) Sentence 2 shall apply mutatis mutandis.

Section 11 Storage of Information [Hosting]
Providers shall not be responsible for third-party information that they store for a user if

1. they have no actual knowledge of illegal activity or information and, as regards claims for damages, are not aware of facts or circumstances from which the illegal activity or information is apparent, or
2. act expeditiously to remove or to disable access to the information as soon as they become aware of such circumstances. Sentence 1 shall not be applied if the user is subordinate to or supervised by the provider.

Only § 9 sub-section 1 TDG does not implement the regulation of the directive word for word but still use the expression from the former TDG “third party information…to which they provide user access” which according to the legislator covers access-providing to communication networks as set out by the directive. This leads to the question whether § 9 TDG, in comparison to the Directive, extends the scope of its application, which could include link liability. Should § 9 TDG only cover forms of access providing, it would have been obviously easier to use the clearer formulation of the Directive ("Provision of access to a communication network"). These circumstances might lead to the interpretation that the new regulation as the former § 5 sec. 3 TDG could also cover liability for links.[11] But the clear will of the legislator rules out such an interpretation: According to the recitals of the EGG the legislator did not want to regulate the liability for links and stressed that this is governed by the binding laws alone. Even if link liability can be read in the wording of the new TDG/MDStV such an interpretation must fail because of the expressed will of the legislator. Therefore the question arises whether the liability privilege applicable to "classical" forms of providing are applicable for links by analogy. This has to be answered in the negative, as well as there is no non-planned regulation gap, as the legislator stated that only binding laws apply.[12]

4. Liability for Hyperlinks and the binding laws

The next step is to determine under which circumstances liability for hyperlinks or rather content made available via links can exist according to the binding law. The follow must always be borne in mind: under general German civil law there is no standardized system of liability for contents, which includes links. Liability varies according to the norms applicable to the different areas of law and their aims. There is for example a difference between competition and copyright law. The liability for links therefore cannot be described in general and a description of all liability constellation is outside the scope of this article. Free speech law shall therefore be used as an example for liability constellations and the idea behind them. In free speech law the most important idea is the relation of the speaker or spreader to the statement itself.

One must first consider: The person who makes a statement is always and absolutely responsible for it as an originator according to German law. The originator could, by way of civil liability, be held liable to withdraw the statement or to compensation or damages. Criminal liability is of course not ruled out. Secondly a limited liability is also conceivable for the bare "distribution" of third party contents. Three cases can be distinguished: Mere technical distribution, the intellectual distribution and adoption of a third party’s statement as one’s own.

If somebody spreads a third party statement as his own he is liable like an author without restriction. Whether a content is adopted as one’s own has to be judged from the perspective of the recipients. If somebody mere spreads a statement from a third party, one has to distinguish whether this dissemi-

11 Compare *Dippelhofer*, Verkehrssicherungspflicht für Hyperlinks? JurPC Web-Dok. 304/2002, http://www.jurpc.de/aufsatz/20020304.htm>; *Hoeren*, Internetrecht (Februar 2003), <http://www.uni-muenster.de/Jura.itm/hoeren/material/Skript/skript.pdf>; *Köhler / Arndt*, Recht des Internet, S. 186.

12 Compare *Spindler*, Verantwortlichkeit und Haftung für Hyperlinks im neuen Recht, MMR 2002, 495; *Köster / Jürgens*, Haftung professioneller Informationsvermittler, MMR 2002, 420 ff.; *Jürgens / Köster*: Linkhaftung: Gesetzgeberische Untätigkeit schafft endlich Klarheit <http://www.heise.de/tp/deutsch/inhalt/on/12721/1.html>, *Stadler*, Verantwortlichkeit für Hyperlinks nach der Neufassung des TDG, JurPC Web-Dok. 2/2003, <http://www.jurpc.de/aufsatz/20030002.htm>

nation is of a technical or intellectual nature. The technical disseminator has no relation to the contents and no knowledge of them. The intellectual disseminator at least refers to the contents as heard "from another side", in the form of quotations, rumours etc. and is aware of the nature of the content. In principle the liability of the intellectual disseminator can go as far as of an originator. However he is privileged in comparison with the one who makes third party content as his own: The intellectual disseminator can avoid liability in most cases by a dissociation from the remarks. The technical disseminator has - independently of knowledge and negligence - only a restricted liability in cases where an impairment of the rights of others has to be feared. Claims against him in principle are limited to injunctive relief and is only effective in the case of knowledge of the contents.

Under which variant a provider is liable for the contents made available through hyperlinks, must consequently to be determined primarily using the subjective standards of the relation of the provider to the contents. In this article only standardized liability constellations will be discussed. Two approaches are conceivable, on the one hand a distinction between single variation of reference (links, Inline links, deep-links, framing etc.); on the other hand the different forms of information location tools. This article in the follwing will deal with the second alternative as this is the focus of the debate and also enables comparison with other countries to be made.

5. Information location tools: From Online Directories to P2P

Plenty forms of these different Information location tools can be found on the Internet. They have in common that their services provide information a user could usually not find without knowing the exact address of the information. Information location tools achieve this by means the user is used to from other forms of media such as an alphabetic list in an encyclopaedia.

A common and well-known information location tool is a moderated online directory, a service like *Yahoo!*. This form of service focuses and structures linked content according to special criteria. The information location tools edit the entries in the relevant categories. In some cases the content is described and evaluated.

Search engines such as *Alta Vista* or *Google* do not select linked contents according to editorial criteria; the links that are found by the service are rather the result of a search of a data base by a search program. Search engines collect data by so called *Robots* which analyse internet sites. Links are followed up within the service by the search engine. The Robot indexes content of the pages found.

Technically, thematically limited search engines function identically. They search only through certain ranges of the Web or rate content accordingly to special limited criteria. An example of such a service that concentrates its search on certain web pages or data types is *Pointera*, a medium search service for MP3 and video files. *Scirus* (scientific contents) is an example for a thematically limited information agent. The thematic limitation takes place via a restriction of the indices on certain content for example to file endings such as jpg, which promises pictorial material or code words which should in principle always be found (Science et. al.). Another possibility to concentrate the volume of data on a certain topic is to limit it to editorially selected web pages or to pages announced by a provider.

Information location tools with a totally different function are peer-to-peer system (P2P). One can further distinguish between centralised and decentralized P2P systems. Centralised P2P Systems like *Napster* place all information on a central server; the registered users receive the file information from this server and place their information at the server's disposal. There is in principle no difference to the query of a search engine.

The only genuine P2P system is the decentralized P2P. Queries by users are answered by a third party computer, which is registered with the P2P and contains the actual information. Decentralized P2P systems can be technically qualified as a kind of closed network, although it is publicly accessible. The approved files of all computers, which receive the retrieval query are also evaluated. Providers like Gnutella or Morpheus are therefore not information intermediaries, they only deal with a program, which allows to locate information on computer networks.

6. Liability for Links of Information Location Tools

6.1 Moderated online directories

Moderated online directories are made up of three parts: the text describing the link, the link itself and finally the content made available through the link. These elements must be examined concerning liability:

6.1.1 Liability for own content

Providers of information location tools are responsible for their own contents under binding laws as content provider. This means that a provider is responsible for all the parts of the information that he can change or has any other influence on. This declaratory regulation (§ 8 TDG / 6 MDStV) refers to the text describing the link and layout of the service. The provider of a moderated online directory is responsible just like an author for the texts describing a link. The same applies in principle for the links themselves. These can be differentiated into two different components: On the one hand a text or a picture, and on the other hand the address or the IP number referred to. Since the information location tool can decide in which way the visualised part of the link appears in his service, this is his own content, for which he is fully liable.

It is questionable whether the provider is liable for the text of the IP address as own content. Given that the provider can decide in which form he shows the results found i.e. either as a text that could be legally problematic (www.nazifor ever.com) or only as an legally without exception unproblematic IP-address (e.g. 192.135.01.0), this could speak in favour of a liability. The fact that IP-numbers vary, especially with popular services, which makes it difficult for the service provider to show always the correct address, cannot be an argument against liability compared with few and particularly remarkable liability-relevant domains.

6.1.2 Liability for third party content

The more relevant problem is the liability for content made available through links. This is in principle third party content. If the provider makes this content available as if it were his own he is fully liable for it, otherwise he is liable in accordance with the parameters of an intellectual and/or technical distributor.

Applying the principle developed for "making-available" of third party content with the consequence of full liability under binding laws is not ruled out because of the liability regime of the TDG: Even in case one reads § 8 TDG as a liability regulating only “classic” forms of providing (made available or stored content – content providing) this would not exclude a determination of liability for links (which would then not be covered by the TDG) according to general rules on liability. Considering third party content that is made available by a provider as own content the purposes of § 8 TDG lead only to the difference that liability would be examined by applying the binding laws or by applying § 8 TDG which refer to the binding laws.

6.1.2.1 Liability for content adopted as one s own

Intellectual distributors or intermediaries are liable as authors with respect to information, if they make a third party expression their own, i.e. if the third party expression has the same effect on an average reader as the text of the distributor. Medium-specific characteristics must be taken into account. In a newspaper, information can be treated as a distributor’s own if the information is shown without indication of a source, while for broadcaster stricter requirements apply. On the Internet, information is adopted as one’s own which are switched by use of so called inline-links. This form of link shows the information totally integrated in the provider’s own content so that the user cannot distinguish between the sources of the information. Only in the exceptional case that the provider genuinely expresses that he disagrees with the linked content can it be assumed that he does not approve the content and/or encourages an opposite stand.

However links, which are not integrated in such a manner into a provider’s service, can be considered as adopted as one’s own. It is therefore questionable whether a link which is shown without further comments is adopted as own content, although as shown above, this would be the case in the context of press law. One indication could be circumstances of the reference. Even if it is obvious

that the links offered are deliberately put on a links list by a provider e.g. a list of links to daily newspapers these cannot be seen as own content of the provider as they change their content constantly and the provider just wants to give a general reference (e.g. www.ft.com). Links with "static" content such as less often modified homepages or concrete articles are a different matter. However there is a further difference between a link list with no comments and information adopted from a newspaper article, because an average user will recognise the link by its presentation (different colour of text, underlined). Furthermore, another difference with press articles, is that the provider has not the "sovereignty" over the content he links to, as it is unclear to him what kind of modifications are made to the content he links to. Adopted are therefore only links the content of which is approved expressly or "between the lines" by the provider. In such a case a mere formal dissociation will not change the position. With increasing obviousness of the unlawful nature of the information the threshold for adoption as own content will become lower, so that such an adoption, like in press law, can in exceptional cases be retained.

6.1.2.2 Liability of an intellectual distributor

A provider of links can nevertheless be liable as an intellectual distributor even if he does not adopt the content as his own. The criteria applicable are those known in press law for liability for letters to the editor. In these cases the foreign nature of the content is obvious to the average recipient. Case law on liability for letters to the editor show that liability can be excluded by general words of dissociation - provided the offences do not reach a certain degree, which the courts presume in the case of defamation. This information should be disguised or rather should not be offered via link without specific dissociation concerning liability-relevant contents. In every individual case the legality of the distribution must be assessed by balancing the interest of the public with the seriousness of the offence taking all circumstances into account. Providers of moderated link collections are therefore always responsible for providing web pages containing serious offences, unless the providers distance themselves from the link by a specific dissociation.

6.1.2.3 Liability of a technical distributor

Even if such a qualified dissociation is given or concrete liability-relevant contents were unknown to the provider and the context did not suggest liability-relevant contents, liability is not completely impossible to avoid. This constellation is relevant for cases of the so-called technical publication liability or rather disturbance liability, although the remedy might however be limited to an injunction. This applies to cases in which the behaviour of a user might lead to an infringement of third party rights. These liability constellations are familiar e.g. to distribution companies, which do not have any connection to goods distributed. This form of liability is potentially relevant to information providers particularly, as specified above, with regards to general references to constantly updated offers. The exclusion of the investigation obligation according to § 8 sec. 2 TDG does not refer to information distribution via links, but this would be the appropriate form of liability. A liability for lack of recognition is only possible if the illegality of distributed contents was communicated.[13] Something else must be assumed

13 The US Digital Millenium Copyright Act also contains provisions dealing with the liability for links. § 512 (d) of the Act states that a service provider is not liable for the use of a hypertext link if he does not have actual knowledge that the material or activity is infringing, and in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent, upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material. Furthermore the provision states that if the provider does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity. The regulation provides a 'notice and take down' procedure upon notification of claimed infringement as described in subsection (c) (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity, except that, for purposes of this paragraph, the information described in subsection (c)(3)(A)(iii) shall be identification of the reference or link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link. This regulation might be one of the reasons why the European Commission stated in article 21 subsection 2 of the DEC that "In examining the need for an adaptation of this Directive, the report shall in particular analyze the need for proposals concerning the liability of providers of hyperlinks and location tool services, 'notice and take down' procedures and the attribution of liability following the taking down of content." Compare Compare *Bettinger / Freytag*, Privatrechtliche Verantwortlichkeit für Links, CR 1998, 545, 553 ff.; *Pankoke*, Von der Presse- zur Providerhaftung, München 2000, S. 116 ff.

in cases in which the circumstances show that the service contains possibly liability-relevant contents. Here it must be presumed that the provider has an obligation to investigate.

In exceptional cases online directories can also be operated non-moderated. The appropriate links are then only “announced" and sorted in their respective groups (message, sport, culture, erotic, etc..). This form of link collection is not edited by the provider; it is an uncontrolled self classification to be shown in the appropriate categories. Even if it is first of all own content of a content provider in terms of § 8 TDG, it cannot be ruled out that this third party information should be equated e.g. to advertisements in newspapers – which would be an intellectual distribution - or the provider’s position equated to that of a distributor which assume only a technical distribution. Following this liability would only exist in cases, in which a special reason exists to restrict the distribution and/or reference (duty to take due care). For this argument a comparison with the liability for live-broadcasting should be considered, where due to the characteristics of the distribution there is no liability for failure of dissociation. As in broadcasting a control of third party content does not take place and/or cannot take place. Depending on whether one recognizes this form of service as independent or not, one has to use either the liability principles for moderated web listings or one has to develop parameters adapted to the characteristics of the service, which might lie "between" the liability of the press for advertisements and that of the broadcaster for statements made in interviews etc.

6.2 Search engines

Results of search engines are results of a purely technical process, so that liability in this case is based on the rules applied to technical distributors. The information agent has no intellectual association with the results or to the displayed links or to the content provided through these links or to the content that is shown in the service itself by the information agent. Even partially archived content will be regarded only as technically obtained content as there is a lack of intellectual association.

Nevertheless an intellectual association by a search engine provider may exist: If search result lists contain certain services that were knowingly placed on these lists (e.g. if a search engine sells to an airline certain places on a search result list if the user searches for air-travel, holidays, cheap flights etc.), this can be equated to an intellectual distribution. If the assortment is made according to automatically generated criteria such as call ratios, an intellectual association is not established. Operators have therefore no obligation to investigate.

Compared with web listings an obligation to investigate cannot be expected by a search engine operator. In view of the vast amount of provided content this cannot even be expected for certain potentially liability-relevant content. This vast amount of provided content also make it questionable whether it is reasonable to impose on the provider an investigation obligation for possible unlawful content following notification by a third-party. This of course does not concern cases, in which the averaged contents was held to be unlawful by a court of law judicially determined.

6.3 P2P-Systems

Centralised (non-genuine) P2P-Systems like Napster are bare search engines, however one can take this example to highlight a special characteristic of this form of search engine: *Napster* for example never examines contents of the averaged files. Liability for adopted content or intellectual liability could merely occur on the basis of the file name. But as there is no real intellectual connection to the file name or to the provided content, the only possible form of liability would be a liability as a technical distributor.

The users of decentralized (genuine) P2P systems are undoubtedly responsible for contents stored on their computers. However, there can be no liability of the provider for results of his information averaging program as these "search results" are, as those of Napster and other search engines, an accumulation of IP addresses (links).[14] Neither is liability possible for the users of this software, as the results of the search are not made available to other users.

14 See for american law <http://www.nwfusion.com/newsletters/fileshare/2003/0428p2p2.html>

7. Conclusion

There exists in Germany – in the absence of express regulation – a distinct system of liability for links which is embedded in the general media law framework. Whether liability for offered third-party contents is possible depends according to German law on the one hand on the objective characteristic of the medium used (press, broadcast etc.) and on the other hand on the intention of the distributor of the content. This article has focused on four important constellations of liability – liability for own content or content adopted as one's own, liability for the deliberate distribution of foreign contents and liability for merely technical distribution - through typical forms of information location tools. These four categories offer the possibility of looking at liability questions in a differentiated and flexible fashion, enacting an adequate balancing of interests.

The ongoing discussion surrounding liability for links in Germany and the European Union shows that legislation could be desirable to clarify this legal question. An example of such legislation can be found in South Africa[15] and especially Austrian e-commerce law which contains a liability system for links.[16] This law was enacted in connection with the implementation of the EU Directive on Electronic Commerce. The new Austrian law, called E-Commerce-Act[17] (ECA), enacted on January 1, 2002, contains two special provisions which deal with search engines and links. Aprovider of a search-engine or any other electronic location tool services is not liable for the information found, if he does not cause the transfer of the information searched for, does not choose the user and does not choose or change the information searched for (Art. 14 ECA). Art. 17 ECA provides in sub-section 1 that a provider who gives access to third party information via electronic reference, is not liable for this information. Sub-section 1 sets out two exceptions from this exemption from liability. Firstly the provider is not liable if he does not know of any infringing behavior or information in connection with the reference. Secondly if he becomes aware of such a behavior or information he will escape liability if he takes steps to remove the reference from his service. Art. 17 sub-section 2 states that the exemption of sub-section 1 is not applicable if the provider adopts the third party information as his own.

The way Austria implemented the DEC in its law can be described as pragmatic. The legislator did not implement the DEC word for word into Austrian law but a text that goes beyond the provisions of the DEC. Through this, it appears that the legislator wanted to find a way to regulate practical problems. This task may have been made easier due to the fact that Austrian law did not have any pre-existing regulation of E-Commerce, and this did not have the

15 Electronic Communications and Transactions Bill: Sec. 80 - Information location tools: "A service provider is not liable for damages incurred by a person if the service provider refers or links users to a web page containing an infringing data message or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hyperlink, where the service provider *(a)* does not have actual knowledge that the data message or an activity relating to the data message is infringing the rights of that person; *(b)* is not aware of facts or circumstances from which the infringing activity or the infringing nature of the data message is apparent; *(c)* does not receive a financial benefit directly attributable to the infringing activity; and *(d)* removes, or disables access to, the reference or link to the data message or activity within a reasonable time after being informed that the data message or the activity relating to such data message, infringes the rights of a person.". Sec. 81 - Take-down notification: "For the purposes of this Chapter, a notification of unlawful activity must be in writing and be addressed to the service provider or its designated agent and must include *(a)* the full names and address of the complainant; *(b)* the written or electronic signature of the complainant; *(c)* identification of the right that has allegedly been infringed; *(d)* identification of the material or activity that is claimed to be the subject of unlawful activity; *(e)* the remedial action required to be taken by the service provider in respect of the complaint; *(f)* telephonic and electronic contact details, if any, of the complainant; *(g)* a statement that the complainant is acting in good faith; *(h)* a statement by the complainant that the information in the take-down notification is to his or her knowledge true and correct; and *(i)* an undertaking given by the complainant to indemnify the service provider from any liability incurred as a result of remedial action taken by it in complying with the notification." Sec. 82 - No general obligation to monitor: "(1) When providing the services contemplated in this Chapter there is no a general obligation on a service provider to *(a)* monitor the data which it transmits or stores; or *(b)* actively seek facts or circumstances indicating an unlawful activity. (2) The Minister may subject to section 14 of the Constitution, prescribe procedures for service providers to *(a)* inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service; and *(b)* to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service." <http://www.gov.za/gazette/bills/2002/b8-02.pdf>

16 *Waß*: Think before you link <http://www.rechtsprobleme.at/doks/clemens-wass-verantwortlichkeit-links.pdf>

17 ÖBGBl Nr. 152/2001 <http://www.rzb.at/eBusiness/services/resources/lnz_resource_rzb_dynamic/0,4756,1023296711504-1024688366582-1027726916678-1,00.pdf>.

problems created by the old TDG in Germany, which are still not solved as shown above. In any event it can be seen as an illustration of how the regulation could have focused more on practical issues.

These regulations which broadly correspond to the general German liability system could not only serve as an example to German regulation but could also be used in the already mentioned discussion in connection with the Directive on Electronic Commerce concerning European link liability.

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A wide Collection of information about the legal implications of hyperlinking, inlining and framing.
Linking and Liability <http://www.bitlaw.com/internet/linking.html>

Technical aspects of linking and legal theories that may limit the right to link to other pages.

Links & Law <http://www.linksandlaw.com/>
Information about legal aspects of search engines, hyperlinks (surface and deep links), inline links and frames, including case law summary, links to relevant court rulings worldwide and to relevant articles (in English and German).

Internet for jurists
<http://www.internet4jurists.at/default.htm>
Collection of information about the legal implications, links to relevant court rulings worldwide and to relevant articles (in English and German).