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Electronic Commerce and Consumer Protection in Europe

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ESSAY

Electronic Commerce and Consumer Protection in Europe[†]

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I. CONSUMER PROTECTION AND THE LAW OF CONFLICTS IN EUROPE

In the face of continual globalization of markets, a brief look at European consumer protection law reveals a key provision anchored

[†] This essay was originally published, abroad, in the original German. The Santa Clara Computer and High Technology Law Journal is pleased to present the English translation of this essay and wishes to thank Dr. Lehmann for his cooperation and patience in such an arduous task. Please note, the footnotes for this essay have *not*, in many instances, been translated from the original German. Furthermore, the footnotes have *not* been formatted according to THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 17th ed. 2000). This was done in order to avoid conflicts that might have arisen in translation and to avoid creating conflicts in citation accuracy. The Journal apologizes for any difficulties with the citations or translation. We hope that this Essay will be used, not so much as a source of legal reference or citation, bur rather as a survey of consumer protection laws in Europe, as they apply to electronic commerce, and a departure point for more in depth research and study for those who find an interest in the topic. *Eds.*

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in Article 5(2) of the European Treaty of Rome relating to the law of obligations and contractual relations. This Article 5(2), and an identical provision found in Article 29 of the German Law of Conflicts both read, the "mandatory provisions of the law of the state" in which the consumer has his customary abode are to be observed in all consumer contracts, "if conclusion of the contract was preceded by an express offer or advertising in that state and if the consumer undertook in that state the legal acts required for conclusion of the contract." As a result, these requirements will need to be met in each consumer transaction on the Internet within the context of electronic commerce. Thus, when the consumer makes a declaration of acceptance or places an order via the Internet in his or her home country, Article 5(2) of the Treaty of Rome and likewise, in Germany, Article 29 of the Law of Conflicts, must come into effect.

In Germany, for example, the consumer would be protected by the benefits of the Law on Standard Business Conditions, the Law Regarding Revocation of Door-to-Door and Similar Dealings, the Law on Consumer Credits and, as in some instances as they apply to package tours, Section 651a of the German Civil Code. From this perspective, electronic commerce does not appear to present any particular risks for European consumers nor is there an apparent necessity for legislative measures to improve European consumer protection.[1] However, the European Commission, through Directorate General of the Commission (DG) XXIV, relating to consumer protection, and DG XV, pertaining to the internal market, takes a different view.

II. NEW SOURCES OF EUROPEAN LAW RELATING TO E-COMMERCE

In coordination with the European Parliament, the European Commission has recently devoted considerable efforts to structuring an adequate framework for electronic commerce transactions in the European internal market.[2] As a part of that effort, the Commission

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[1] *See generally* Krämer, L. "EWG-Verbraucherrecht" *passim* (1985); Reich, N. "Europäisches Verbraucherschutzrecht: Binnenmarkt und Verbraucherinteresse" *passim* (2d ed. 1993); Drexl, J. "Die wirtschaftliche Selbstbestimmung des Verbrauchers" 43 *et seq.* (1998); *see also* v. Hippel, E. "Verbraucherschutz" *passim* (3d ed. 1986); Pützhoven, A. "Harmonisierung des europäischen Verbraucherschutzrechts," 1999 EWS 447; specifically on "consumer protection on the Internet" *see* Drexl, J. in: Lehmann, M. "Rechtsgeschäfte im Netz - Electronic Commerce," 75 (1999); Hoeren & Oberscheidt, "Verbraucherschutz im Internet," 1999 VuR 371; Ernst, S., "Verbraucherschutzrechtliche Aspekte des EU-Richtlinienvorschlags zum Electronic Commerce," 1999 VuR 397; *see also* the Council resolution of 19 January 1999 on the "consumer dimensions in the information society," OJ EC C 23/1 of 28 January 1999.

[2] From the perspective of economic law see Widmer & Bähler, "Rechtsfragen beim Electronic

has presented numerous Directives, which must be adapted by the European Member States into national law and Proposals for Directives relating to electronic business transactions to the general public. Directives of importance include the Directive on Distance Contracts[3] (Directive 97/7/EC of 20 May 1997), relating to consumer agreements concluded through the use of distance communication technology; the Data Protection Directive (Directive 95/46/EC of 24 October 1995) on the protection of natural persons during processing of personal data and relating to free data transfer[4] and the Database Directive (Directive 96/9/EC of 11 March 1996), relating to copyright and *sui generis* protection for databases.[5] The latter Directive is of

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Commerce" (on Swiss law) (Zurich 1997); Lehmann, M. (*ed.*), "Rechtsgeschäfte im Netz - Electronic Commerce" (Stuttgart 1998); Loewenheim & Koch (*eds.*), "Praxis des Online-Rechts" (Weinheim 1998); Hoeren & Sieber (*eds.*), "Multimedia-Recht" (Munich 1999), all *passim.*

[3] OJ L 144 at 19 *et seq.*, of 4 June 1997; *see* in this respect Hoffmann, D., "Die Europäische Fernabsatz-richtlinie," in: Lehmann, M. (*ed.*), *op. cit. supra* note 1, 61 *et seq.*; Rechtsgeschäfte im Netz - Electronic Commerce 75 (1999) 61; Drexl, J. "Verbraucherschutz im Netz," in: Lehmann, M. (*ed.*), *op. cit., supra* note 1, 76 *et seq.*; *see also* the ministerial draft of a German Act on Distance Contracts dated 31 May 1999, which in particular provides for a new Section 29a of the Introductory Law of the German Civil Code, which appears to render Section 12 of the Law on Standard Business Conditions superfluous.

Article 29a: Consumer Protection for Special Areas:

> (1) Where a contract, due to a choice of law, is not governed by the law of a Member State of the European Union or another contracting state of the EEA Treaty, then the provisions of the Law on Standard Business Conditions, of the Act on Distance Contracts, the Act on Distance Learning and of the Act Relating to Time-Sharing, shall nevertheless be applied if and when the contract has a close connection with the territory of one or more Member States of the European Union or another Contracting State of the European Economic Area. In particular, a close connection shall be assumed if and when:
>
> (a) the contract is brought about on the basis of a public offer, public advertising or a similar business activity which takes place in a Member State of the European Union or another Contracting State of the EEA Treaty, and
>
> (b) the other party has his residence or place of customary abode in a Member State of the European Union or in another Contracting State of the EEA Treaty at the time he makes the declaration directed towards conclusion of the contract . . . ."

The draft Directive for the long-distance sales of financial services to consumers of 14 October 1998, COM (1998) 468 and the enacted Directive 1999/44/EC of the European Parliament and Council of 25 May 1999 on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees, OJ EC L 171/12 of 7 July 1999 may also be indirectly relevant; *see* Lehmann, M., "Informationsverantwortung und Gewährleistung für Werbeangaben beim Verbrauchsgüterkauf," 2000 JZ 280.

[4] OJ L 281 at 31 *et seq.* of 23 November 1995.

[5] OJ L 77 at 20 *et seq.* of 27 March 1996; *see also* Lehmann, M. "Die Europäische

particular significance for multimedia content on the Internet, *e.g.*, the traditional World Wide Web as well as other assorted on-demand services.[6]

Of the draft Proposals presented for public and parliamentary discussion, particular mention should be made of the revised Proposal for a Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society of 21 May 1999.[7] This Proposal would not only implement the World Intellectual Property Organization (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty of 20 December 1996 into European law,[8] but would also have the objective of rendering all copyrighted digital content on the Internet fit for commercial trade. Within this context, the Directive on a Community Framework for Electronic Signatures should not be forgotten.[9]

The Community Framework Directive aims to overcome the half-hearted approach taken in such laws as the German Digital Signature Act, part of the Law on Information and Communication Services (Multimedia Law) of 22 July 1997,[10] which, subject to certain restrictions, equates digital signatures with a handwritten signature within the meaning of Section 126(1) of the German Civil Code. The revised Proposal for a decision of the European Parliament and Council on the acceptance of a long-term plan of action to promote safe use of the Internet[11] is also relevant, as is the communication of the Commission on Internet Governance, the technical administration

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Datenbankrichtlinie und Multimedia," in: Lehmann (*ed.*), "Internet-und Multimediarecht (Cyberlaw)," 67 (1997); *id.* "The European Database Directive and its Implementation into German Law," 29 IIC 776 (1998).

[6] *Cf., e.g.,* Ostermaier, C., "Video on Demand und Urheberrecht" 63 (1997); *id.*, 1998 CR 539.

[7] COM (99) 250 final of 21 May 1999; regarding the original draft *cf.* Reinbothe, J. "Der EU-Richtlinienentwurf zum Urheberrecht und zu den Leistungsschutzrechten in der Informationsgesellschaft," 1998 ZUM 429; Flechsig, N.P., "EU-Harmonisierung des Urheberrechts und der verwandten Schutzrechte in der Informationsgesellschaft," 1998 ZUM 139; *id.*, "Urheberrecht und verwandte Schutzrechte in der Informationsgesellschaft" 1998 CR 225; Lehmann, M., "Electronic Commerce und Urheberrecht" *op. cit. supra* note 1, at 105; Dreier, Th., "Adjustment of Copyright Law to the Requirements of the Information Society," 29 IIC 623 (1998).

[8] *Cf.* in this respect the unofficial draft for a Fifth Law to Amend the Copyright Act of 7 July 1998 (German Ministry of Justice: 3600/13-5300/98) and the proposal of the Commission dated 27 April 1998 (98/C165/08) COM (1998) 249 final.

[9] Directive 1999/93/EC, OJ L 13/12 of 13 December 1999.

[10] BGBl. I 1869 of 28 July 1997; which did not oblige the judge to accept digital signatures as evidence.

[11] *Cf.* 10 September 1998, COM(1998)518 final, *cf.* now the Joint Opinion (EC) No. 56/98 of 24 September 1998, OJ C 360, 83.

of names and addresses on the Internet[12] and the joint declaration of the European Union and the United States relating to Electronic Commerce issued at the Washington Summit on 5 December 1997.[13]

The above Directives and Proposals have now been supplemented by Directive 2000/31/EC on certain legal aspects of Information Society Services, in particular, Electronic Commerce in the Internal Market of September 1999 (the E-Commerce Directive).[14] Finally, the new Proposal for a Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters should also be mentioned.[15] Article 16 of said Proposal provides that a consumer may always file an action at his place of residence even where the action is directed against a foreign, European supplier.

III. EUROPEAN INTERNAL MARKET AND E-COMMERCE

The E-Commerce Directive addresses new rules and responsibilities on the Internet and also strives to arrive at a uniform regulation of numerous other legal issues on a horizontal basis throughout Europe. Several particularly important aspects illustrating the spirit and objections of the Directive are discussed below.

Articles 1 through 3 of the E-Commerce Directive define the scope of application of the Directive and provide numerous definitions of terms, namely *commercial communication* as commercial advertising in the broadest sense, including product

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[12] *Cf.* 29 July 1998, COM(1998)476 final.

[13] *Cf.* http://europa.eu.int/eu/comm/dg01/ele/rst.htm.

[14] *Cf.* June 8, 2000, OJ L 178/1 ss.; regarding the predecessor, the amended proposal of the Commission, cf. COM (1999) 427 final; *cf.* also the consolidated draft of the General Secretariat of the Council of Ministers of 13 August 1999; the original text is available at http://www.online-law.de; *see generally* Maennel, F., "Der Multimedia-Rechtsrahmen der europäischen Union: Ein Überblick," in: Lehmann (*ed.*), *op. cit. supra* note 1, at 32; Lehmann, "Rechtsgeschäfte und Verantwortlichkeit im Netz," 1999 ZUM 180; Waldenberger, A., "Electronic Commerce: der Richtlinienvorschlag der EG-Kommission," 99 EuZW 296; Tettenborn, A., "Europäischer Rechtsrahmen für den elektronischen Geschäftsverkehr," 99 K & R 252; Hoeren, Th., "Vorschlag für eine EU-Richtlinie über E-Commerce. Eine erste kritische Analyse," 99 MMR 192; Landfermann, H-G., "Der Richtlinienvorschlag "Elektronischer Geschäftsverkehr" - Ziele und Probleme," 1999 ZUM 795; Spindler, G., "Der neue Vorschlag einer E-Commerce Richtlinie," 1999 ZUM 775.

This issue is also closely related to the draft Counsel Regulation on Jurisdiction and the Recognition and Enforcement of Decisions in Civil and Commercial Matters dated 14 July 1999, COM(1999)348 final.

[15] Dated 14 July 1999, COM(1999)348 final; *cf.* Schwab, 1999 EuZW 737; and in general Junker, A., "Internationales Vertragsrecht im Internet. Im Blickpunkt: Internationale Zuständigkeit und anwendbares Recht," 1999 RiW 809.

placement, sponsoring and public relation activities. Of particular importance is the establishment of Article 3(1) and *the home country principle*,[16] originally anchored in the Cable and Satellite Directive,[17] which presupposes the existence of a similar level of legal protection throughout the European Union. Establishment of such a principle creates a race to the bottom system of consumer protection because it allows an advertising entity to essentially engage in forum shopping within the different Member States of the European Community. Such a race to the bottom is detrimental to consumer protection, in view of Article 95(3) of the European Commission Treaty (formerly Article 100a which provided for a "high level of protection"), since a consumer would be unable to rely on its traditional national level of protection.[18]

It is for this reason that the particularly low level of protection in several Scandinavian countries should not become the European standard on the Internet.[19] Nor should English law relating to the criteria for defamatory remarks and violations of general laws on privacy become the standard.[20] Since the Internet offers especially extensive possibilities for defamatory remarks, to cite just one example,[21] particularly low standards, like those in England, should not be adopted as the criteria within the European Union. Hence, the home country principle is unsuitable with respect to electronic

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[16] This principle is eased by Article Three (3) in conjunction with the Appendix for this Directive for copyrights, related rights, topography and database protection, in particular, and for all other industrial property rights, *e.g.*, trademarks, to the extent that the traditional principle of territoriality applies to these rights. *See* the Berne Convention and Trade Related Aspects of Intellectual Property (TRIPs) as well as the World Intellectual Property Organization (WIPO) Copyright Treaty.

[17] *Cf.* for detailed discussion Dreier, Th., "Kabelweiterleitung und Urheberrecht," 13 (Munich 1991); *id.*, in: Quellen des Urheberrechts, Europäisches Gemeinschaftsrecht II-3 (1994); *id.*, 1995 ZUM 458.

[18] For example, in Germany, the consumer would be unable to protect himself against misleading advertising statements pursuant to Sections 1 and 3 of the Act Against Unfair Competition.

[19] Scandanavian countries have a significantly more liberal regulation, for example, of bans on pornography.

[20] Adoption of English laws would not have left any scope for the decisions relating, for example, to Caroline of Monaco rendered under German law in defense of 'personality rights.' *Cf.* decision of the German Federal Court of Justice of 19 December 1995, 1996 NJW 1128; Steffen, E., "Schmerzensgeld bei Persänlichkeitsverletzungen durch Medien," 1997 NJW 10; Prinz, M., "Geldentschädigung bei Persänlichkeitsverletzungen durch Medien," 1996 NJW 953. According to the Directive, the general right of privacy is to be excluded from the scope of application of the "principle of the internal market," which is a welcome move.

[21] Decision of the Munich Regional Court of 17 October 1996, 1997 CR 155 - defamatory criticism via Internet; *see also* decision of Higher Regional Court of Nuremberg, 1998 CR 686.

commerce since it would result in legal harmonization at the lowest common denominator and equate to commercial law dumping. In contrast, application of a modified conflict-of-laws regime geared to the location at which the effects of an illegal act are felt—a familiar concept in European antitrust and competition law—would seem preferable.

Articles 4 and 5 of the E-Commerce Directive set forth exclusion of authorization requirements for all consumer service providers on the Internet and lay down certain general obligations to provide information in order to improve the transparency of those businesses involved in electronic commerce. In this respect, there are certain parallels to the Directive on Distance Contracts,[22] which was originally developed for mail order sales but can be now equally applied to electronic commerce. In particular, the withdrawal period of seven working days, anchored in Article 6 of the E-Commerce Directive, will be relevant in practice by allowing rescission of an otherwise binding contract, as will the new Article 29a of the German Introductory Law of the Civil Code as contained in the new German Act on Distance Contracts.

Articles 6 through 8 of the E-Commerce Directive set forth a number of principles for advertising on the Internet that fall within the definition of commercial communication.[23] According to Article 7, unsolicited commercial communications have to be clearly and unambiguously identifiable as such upon their receipt by the user, which could result in the previous national ban on unsolicited e-mails being lifted. However, preference should be given to German case law relating to Section 1 of the Act Against Unfair Competition,[24] *e.g.*, to the fundamental prohibition against spam, for each consumer, first and foremost, is entitled to be let alone in regards to advertising. As a matter of principle, a consumer should not have to ward off advertising (an opt-out model) but rather, the advertising entity should

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[22] *See supra* note 3.

[23] *Cf.* the document subsequent to the Green Book on Commercial Communication in the Internal Market, CAB 15/0012/98 - DE, and commercial communications: Commission agrees measures to ensure single market and protect public policy, dated 4 March 1998.

[24] Starting with the Traunstein Regional Court, 14 October 1997, 1997 NJW-CoR 494; *see also* decisions of the Regional Court of Berlin, 1998 NJW-CoR 431; Local Court of Brakel, 1998 NJW-CoR 431; *see* further references in Lehmann, *op. cit. supra* note 1, 171; Glöckner, J., "Cold Calling" und europäische Richtlinie zum Fernabsatz," 2000 GRUR Int. 29.

It is disputed whether or not this results in an independent claim to injunctive relief accruing to the individual consumer; *cf.* denying such a claim decision of the Local Court of Kiel, 2000 NJW-CoR 49; affirming such a claim Hoeren & Oberscheidt, 1999 VuR 371; Emst, 1999 VuR 397, at 402, all with further references.

have to indicate clearly that its communications are in fact advertisements (an obligation of transparency) and facilitate cessation or removal of the communication.[25]

Due to the extreme risk of copycats and the particularly high degree of annoyance perpetuated through unwanted e-mail advertisements, the party advertising should first have to ask the potential recipient whether he wishes to be contacted in this manner at all.[26] Subsequently, the principle of *qui tacet consentire non videtur* (who does not answer is deemed to say no) must apply. This opt-in model can be reasonably expected of advertisers since advertisement via the Internet is particularly inexpensive and adequate regard of privacy must be paid to any potential customer.[27] With a view to the explicit exception made in the Annex for "unsolicited commercial communication by means of electronic mail," this German legal opinion can still be upheld.

The regulation of contract conclusion on the Internet, beginning with Article 9, of the E-Commerce Directive now seems acceptable since it no longer requires four declarations of will as originally planned by DG XXIV.[28] According to the Directive, two declarations—order (given by the consumer) and confirmation (sent by the seller)—within the meaning of Sections 145 and 147 of the German Civil Code will lead to legal conclusion of the contract. However, Article 11 of the E-Commerce Directive leaves unanswered the question whether advertising goods or services on the Internet amounts to *invitatio ad offerendum* (an invitation to make an offer by his side) or is to be deemed an offer.

The offer can be accepted by clicking on a symbol in compliance with Section 147 of the German Civil Code; however, the contract is only deemed concluded if and when the seller confirms, vis-à-vis the user, that it has received the acceptance or the user can download such confirmation from the seller. This process is facilitated by a legal fiction similar to Section 151 of the German Civil Code, for the

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[25] *Cf.* for fundamental grounds decision of the German Federal Court of Justice, 1973 GRUR 557 – "Briefwerbung." See also Article 9 of the draft of a Directive on distant financial services, OJ C 177 E/21 of 27 June 2000.

[26] According to previous experience the voluntary control mechanisms are insufficient in the face of completely new forms of advertising, yet *see* Leupold, A., "Die massenweise Versendung von Werbe e-mails: Innovatives Direktmarketing oder unzumutbare Belästigung," 1998 WRP 270; *see also* Funk, A., 1998 CR 411.

[27] For details *see* Lehmann, in: "FS Hubmann 1985" 255; Freund, S., "Der persönlichkeitsrechtliche Schutz des Werbeaddressaten," 1986 BB 409; Ehlers, W., 1983 WRP 187.

[28] An order, an acceptance and two further confirmations, one by the seller and one by the buyer.

confirmation of receipt is deemed received by the consumer "if and when the party to which it is directed can download it." This process now seems to be a network suitable solution and the seller is not exposed to the possible accusation that the consumer did not receive confirmation. It does not seem necessary to diverge from the traditional, two-phase contract conclusion concept that has thus far proven successful in Germany in the tele-shopping environment.[29]

Consumer protection considerations within the Act on Distance Contracts are reflected in a withdrawal period of at least seven working days, corresponding to the right to withdraw from door-to-door transactions applicable throughout the European Union.[30] Consumers also have extensive possibilities for correction under Article 11(2) of the E-Commerce Directive. Pursuant to Article 10(3) of the Directive, the contractual terms and the standard business terms must be made available to the user in a manner that enables them to be stored and reproduced. Moreover, Section 29a of the German Law of Conflicts of Laws continues to apply so that even where application of foreign law is agreed on with legal effect, national monitoring under the above Act is not precluded. As a rule, the prerequisites in this respect will be met where consumer-oriented electronic commerce is involved.

This derives from a principle of European law since the provision is based on Article 6(2) of Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts. Frequently, foreign law is cleansed by a supervisory filter of national provisions relating to standard business conditions. Numerous standard business terms under foreign law are unable to pass these controls in individual cases and, therefore, are unable to become effective to the disadvantage of European consumers within the Union. This applies in particular to potential Swiss and United States suppliers, which do not have a similar control of standard terms of contracts as the European Community.

IV. LIABILITY ON THE INTERNET

The liability provisions set forth in Articles 12 through 15 of the E-Commerce Directive comprise another core aspect of the

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[29] *Cf. also* Taupitz & Kritter, "Electronic Commerce - Probleme bei Rechtsgeschäften im Internet," 1999 JuS 839.

[30] *Cf.* as regards application of the Act on Withdrawal from Door-to-Door and Similar Transactions Ruoff, A., 2000 NJW-CoR 38.

Directive.[31] As the liability provisions pertain to consumer protection, however, their effect is only reflexive. The object of the provisions is to exempt network service providers from liability as far as possible, provided they merely enable or support electronic commerce in the capacity of technical intermediaries. As such, network service providers are not obligated to devote their attention to the content transmitted over their networks. In this respect, the approach adopted is similar to that anchored in the German Telecommunications Act[32] and the Tele-Services Act in coordination with the State Media Services Treaty.[33] Hence, Article 15 of the E-Commerce Directive stipulates that a general obligation may not be imposed on service providers "to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity."[34] Similarly, mere conduit providers, *e.g.*, routers or communication relay stations, are also exempted from liability under Article 12 as are mere access and connectivity providers.

Article 12(2) corresponds on this point to Article 5(1) of the draft Directive on Copyright in the Information Society[35] which expressly excludes certain primarily technical acts of reproduction from the definition of *reproduction* within the meaning of copyright law. Similarly, Article 13 of the E-Commerce Directive provides that automatic, temporary storage processes, *e.g.*, through a proxy server,[36] in principle, are exempt from liability under civil law. This privilege does not extend to claims of injunctive relief[37] that do not turn on elements of fault (intent or negligence), in analogy to Section 1004 of the German Civil Code or pursuant to Section 97 of the

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[31] *See generally* on civil-law liability on the internet Hoeren, Th., in: Lehmann, *op. cit. supra* note 1, at 45; Spindler, G., "Die Haftung von Online-Diensteanbietern im Konzern," 1998 CR 745; *id.*, 1996 ZUM 533; Bettinger & Freytag, "Privatrechtliche Verantwortlichkeit für links," 1998 CR 545; *see also* Freytag, "Urheberrechtliche Haftung im Netz," 1999 ZUM 185; *id.*, "Haftung im Netz" *passim* (1999).

[32] Dated 25 July 1996, BGBl. I 1120, *cf. also* Büchner et al. (*eds.*), "Beck'scher Kommentar zum Telekommunikations-gesetz" 533 *et seq.* (1997).

[33] *See* for details Freytag, *supra* note 27, *op. cit.*

[34] Why the cashing services were originally not to profit from this still remained unclear after having read the memorandum; but Article 15(1) now specifies Articles 12 to 14.

[35] *See supra* note 6, "temporary acts of reproduction referred to in Article 2, such as transient and incidental acts of reproduction which are an integral and essential part of a technological process, including those which facilitate effective functioning of transmission systems, whose sole purpose is to enable use to be made of a work or other subject matter, and which have no independent economic significance, shall be exempted from the right set out in Article 2."

[36] *See* Section 5(3), second sentence, Tele-Services Act.

[37] The original German text was not so precise, what is meant by "injunctive relief?"

Copyright Act.

A regulation almost as complex as Section 5(2) of the Tele-Services Act,[38] and even more detailed, but substantially better drafted than the liability rules set forth in the United States' Digital Millennium Copyright Act,[39] is Article 14 of the Electronic Commerce Directive. Article 14 regulates liability for the making available of third-party content on a server (so-called hosting, *e.g.* through a bulletin board service, (BBS)). In this context, liability is only to be excluded where the service provider "does not have actual knowledge that the activity is illegal" and where, in as far as claims for damages are concerned, the service provider "is not aware of facts or circumstances from which the illegal activity is apparent."[40] In addition, after the provider has been informed or has realized that the activity is illegal, the service provider must take immediate measures "to remove or to disable access to the information." This may consist of an adequate reaction to a warning letter stating that material that infringes copyright is stored on the server.

This broad exemption from liability is rather surprising in view of the legal-historical perspective. Strict liability was introduced by the German legislature as a matter of principle (after Savigny, an eminent legal German scholar of the 19th century), to cover new and particularly technical risks, such as railways and nuclear fission plants, which are to be supervised by the operator.[41] Following an economic analysis of the law, one may infer that the objective of liability regimes[42] is to encourage good conduct, not moral hazard. Furthermore, recently formed Internet business enterprises do not require financial support through liability exemptions, but, if anything, legal certainty[43]; all other aspects should be left to the market. Therefore, on a critical note it appears somewhat unreasonable for the service provider of a BBS system on the Internet to be governed by more lenient liability rules than would any traditional publisher under Section 13(5)(1) of the German Act Against Unfair Competition, which restates the civil responsibility of editors, publishers, printers or distributors of periodic publications for acts of unfair competition.

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[38] *Cf.* on this point Lehmann, M., "Unvereinbarkeit des § 5 TDG mit Völkerrecht und Europarecht," 1998 CR 232.

[39] H.R. 2281, section 202; paragraph 512 *et seq.*; *see also* Bettinger & Freytag, 1998 CR 552.

[40] Yet an active obligation to investigate cannot be imposed in view of Article 15(1).

[41] *Cf.* only Kötz, H., "Deliktsrecht" 134 (8th ed. 1998).

[42] *Cf.* Lehmann, M., "BGB und HGB - eine juristische und ökonomische Analyse" 91 (1983).

[43] Lehmann, 1998 CR 234.

Under Section 13(5)(1), every publisher is liable for all infringement rooted in competition and copyright law of which it had positive knowledge, without any further restrictions such as those rooted in Section 5(2) of the Tele-Services Act ("reasonable") or Article 14 ("apparent illegality"). It is true that in competition law[44] and copyright law,[45] the German Federal Court of Justice has only recognized third-party liability where grave and evident infringements were concerned. However, in each case, it also recognized a certain independent obligation incumbent on the potentially interfering third-party to verify content.[46] From a legal-consistency viewpoint, it is not clear why this principle should suddenly cease to apply simply because the same interfering acts are shifted to the Internet environment.

V. OBLIGATIONS UNDER EUROPEAN AND INTERNATIONAL LAW

Such new liability regulations have to comply with European law and obligations under international law in this field.[47] Due to the fact that the European Union signed the World Trade Organization (WTO) Agreement independently from its individual states, the Trade Related Aspects of Intellectual Property (TRIPs) provisions belong to the *acquis communitaire* (the acquired legal rules of the EC)[48] just as they have generated obligations under international law for all signatory states.

According to Article 41 of the TRIPs Agreement, the Member States to the Agreement must "ensure that the enforcement procedures as specified in this Part[49] are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement." It, therefore,

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[44] Decision of the German Federal Court of Justice, 1997 GRUR 313–"Architektenwettbewerb."

[45] Decision of the German Federal Court of Justice, 1999 GRUR 418– "Möbelklassiker"; *cf.* on this point Haedicke, M., "Lex informatica oder allgemeines Deliktrecht?" 1999 CR 309.

[46] *Cf.* just the headnotes of this decision, *supra* note 38, *op. cit.*: "Liability in copyright law of third parties who have not themselves done the unlawful acts of use presupposes - as does liability of third parties under competition law - a breach of obligations to inspect."

[47] For example, those obligations applicable in the fields of copyright, patent and trademark law, with the exception of competition law, namely the WTO/TRIPs Agreement. *Cf.* in general Beier & Schricker (*eds.*), "From GATT to TRIPS. The Agreement on Trade Related Aspects of Intellectual Property Rights" *passim* (Munich 1996); and for copyright law in particular Katzenberger, P., "TRIPS und das Urheberrecht," 1995 GRUR Int. 447; on Section 5 Tele-Services Act *see* Lehmann, 1998 CR 234.

[48] Drexl, J. 1994 GRUR Int. 777.

[49] Meaning Part III of the TRIPs Agreement which focuses on sanctions, see Dreier, Th., "TRIPS und die Durchsetzung von Rechten des geistigen Eigentums," 1996 GRUR Int. 205.

is highly questionable whether the E-Commerce Directive will comply with this fundamental obligation in view of the broad exemption from liability those aforementioned provisions grant. Article 45 of the TRIPs Agreement stipulates, specifically, regarding damages that "the infringer [shall] pay the right holder damages adequate to compensate for the injury the right holder has suffered because of an infringement of that person's intellectual property right by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity." This specified obligation cannot be aligned with the wording "not aware of facts or circumstances from which illegal activity or information is apparent" in Article 14 of the Directive, even when the broadest interpretation is applied, for Article 15(1) does not impose any obligation to monitor or investigate on the hosting services.

However, this precise obligation is found in Article 45, namely "or with reasonable grounds to know," when measured against the familiar negligence standard pursuant to Section 122(2) of the German Civil Code, which contains a legal definition of "should have known" within the sense of "did not know due to negligence." Hence, Article 14 of the E-Commerce Directive violates established European law and obligations of the European Union and its individual member states pursuant to international law as set forth in Article 45(1) of the TRIPs Agreement. A restrictive interpretation in conformity with international law or a reduction, comparable to Section 5 of the Tele-Services Act, is not possible in this case, because of the specific wording chosen by the TRIPs Agreement.

VI. CONCLUSION

Although it was highly honorable of the Commission to have put forward a Directive so quickly[50] for the regulation of electronic commerce in the European internal market, the ensuing economic and legal discussion must be conducted on a broader basis. The home country principle appears ill-balanced, the possibility of unsolicited advertising via the Internet inconsistent and major parts of the exemptions from liability, in particular regarding industrial and intellectual property protection, amount to violations of European and international law. Hence, during the course of implementing this Directive into the various national legal systems, it is foreseeable that

[50] First negative experiences - *see* SZ of 29 December 1998, page 18: "Purchasing per Internet brings frustration only. Increasing numbers of Americans turn away from 'Cybershopping' - which now seems to be a thing of the past."

there will be intense discussions throughout Europe.

However, from the viewpoint of European consumer protection, there are no major deficits to be noted and numerous service providers on the Internet already comply with the future protection provisions in Europe. Furthermore, Article 3(4)(a) of the E-Commerce Directive contains a kind of emergency brake in that for the "protection of consumers including investors," European Member States may derogate from the home country principle, as this has already been established by the case law of the European Court of Justice relating to Article 30 of the EC Treaty (formerly Article 36). Moreover, in the Annex, the area of "contractual obligations concerning consumer contracts" is specified as being an exception from the principle of the internal market as it is set forth in Articles 3(1) and (2) of the E-Commerce Directive, without this establishing any real legal clarity.