

## Third Party Liability

Liable for infringements is the person who's act constitutes the infringement (infringer or perpetrator = "Täter").

Under certain circumstances also third parties may be liable for the infringement. This is most of all relevant for platforms and market places on the Internet (i.e. eBay, Amazon, Instagram etc.).

### I. General principles (offline)

In the case of **third-party** liability for legal violations committed by a perpetrator, a distinction must be made between various constellations.

#### 1. Accomplice

An **accomplice** is a person who controls the causal process leading to the success of the violation.

#### 2. Participants

A **participant** is a person who assists the violating person (aider or abettor) or who causes him to commit the violation (instigator).

However, liability as an accomplice or as a participant always requires intent pursuant to Sec. 830 (1), (2) of the German Civil Code (BGB).

#### 3. Disturber liability

From Sec. 1004 of the German Civil Code (BGB) the concept of liability for contributory actions derives, so-called "disturbance liability" ("Störerhaftung").

##### a) Wide disturber liability

Originally, a disturber was understood in a very broad sense to mean **anyone** who **willingly and adequately contributed** to causing or maintaining an unlawful interference

(cf. BGH GRUR 2001, 1038 [1039 f.] - *Ambiente.de*; GRUR 2021, 1303 para. 43 - *Die Filsbacher*).

b) Shift to tort Law (“Verkehrspflichten”)

In response to criticism in literature, case law initially abandoned this concept in *unfair competition law* and replaced it with perpetrator or direct liability on the basis of general tort law. Everyone, who creates a source of danger in his area of responsibility or allows such to continue existing, has the common obligation to undertake all reasonable precautions necessary to protect others against the risks emanating from that source of danger (so-called “Verkehrssicherungspflicht” or “Verkehrspflicht”). Accordingly, anyone who makes it possible for third parties to commit infringements is liable as a **perpetrator** if he fails to take reasonable security measures against such infringements (BGH GRUR 2007, 890 para. 22 et seq. - *Jugendgefährdende Medien bei eBay*).

In the case of *infringements of intellectual property rights*, on the other hand, case law initially upheld the broad distributor liability (BGH GRUR 2011, 152 para. 45 - *Kinderhochstühle im Internet I*; GRUR 2016, 936 para. 16 - *Angebotsmanipulation bei Amazon*).

c) Recent development: General shift from disturber liability to direct liability.

In the area of *copyright law*, the ECJ has begun to incorporate the standard of disturber liability into the facts of the infringing act itself, so to speak:

The intermediary (e.g., a platform operator, such as YouTube) may itself make a communication to the public in the form of making available to the public pursuant to Sec. 15, 19a UrhG, Art. 3 (1), (2) (a), (b) of Directive 2001/29/EC and thus commit a copyright infringement if it has itself played an active role (e.g., participated in selection or offered aids) or has not taken any concrete measures despite indications (ECJ GRUR 2021, 1051, para 77, 81, 23) - *YouTube v. Cyando*; BGH WRP 2022, 1106 Rn. 76 et seq. - *YouTube II*; WRP 2022, 1269 - *Upload III*).

## II. Liability privilege on the internet (online)

In the case of actions on the Internet, the general liability regime is overlaid by special regulations that are intended to enable liability privileges for certain service providers in the interest of the functioning of this means of communication. A distinction must be made between the access provider, the host provider and the provider of own information.

### 1. Access provider

The access provider merely transmits third-party information or arranges access to the network.

=> No liability for third-party information, cf. Art. 4 (1) DSA 2022/2065.

### 2. Host provider

The host provider only stores third-party information.

=> No liability for third-party information, if he

- has no actual knowledge of the unlawful activity or information, *and*
- takes immediate action to remove or disable access to information as soon as it becomes aware of it (so-called "notice and take down" procedure)

Cf. Art. 6 (1) DSA 2022/2065.

Moreover, this exemption from liability as a host provider only comes into consideration insofar as purely technical and automatic data processing takes place, but not if an active role is assumed, for example in providing assistance to the third-party providers by optimizing their presentation or by advertising the offers, for example in the context of keyword advertising (cf. ECJ GRUR 2011, 1025 para. 112 -116 - *L'Oréal/eBay*).

### 3. Provider of own information

Anyone who provides or offers his own information is fully responsible; likewise, anyone who adopts third-party infringing information as his own (cf. BGH GRUR 2018, 924 para. 59 - *ORTLIEB*; GRUR 2010, 616 para. 23 et seq. - *Marions-Kochbuch.de*).