English translation of the German original judgment

Regional Court of Munich I

Case no.: 7 O 17752/17

IN THE NAME OF THE PEOPLE

In the legal dispute

[parties and representatives omitted]

for preliminary injunction, copyright infringement "Fack Ju Göhte 3 via Kinox.to"

the Regional Court of Munich I - 7th Civil Chamber - through the Chief Judge at the Regional Court Dr. Zigann, the Judge at the Regional Court Dr. Heister and the Judge at the Regional Court Dr. Schön on the basis of the oral hearing of 21 December 2017, found as follows

Final Judgment

I. The Respondent to be prohibited, on penalty of a fine, to be set for each act of non-compliance, of up to €250,000.00, or alternatively imprisonment in the case of non-payment, or imprisonment of up to 6 months, up to 2 years in the case of repeat offence, with the imprisonment or alternative imprisonment in the case of non-payment to be levied on the members of the board of the Defendant,

from providing their customers internet access to the film "Fack Ju Göhte 3", to the extent that this film is retrievable on the website service currently known as "KINOX.TO", as shown below: *[4 screenshot omitted]*

II. The Respondent shall bear the costs of the legal dispute.

III. The judgment is preliminarily enforceable.

Facts of the Matter

The Applicant seeks, by way of an injunction based on copyright law, that the Respondent be ordered to block access to the website of the provider "Kinox.to".

The Applicant is a film distributor and purports to have ownership of exploitation rights in the film "Fack Ju Göhte 3", in particular the exclusive right of making available to the public from places and at times individually chosen by the user as per Sec. 19a German Copyright Act, including the exclusive right for Germany to retrieve the film free of charge via streaming and downloading, as well as the associated rights of reproduction. The digital videograms/phonograms used for the distribution of the film in German cinemas carry the notice: "Exclusive owner of all exploitation rights in all language versions in German speaking Europe in this film is Constantin Film Verleih GmbH."

The Respondent provides cable connections, supplying 3.340 million customers with internet connections.

The Film "Fack Ju Göhte 3" was released on 26 October 2017 in German cinemas and had already reached an audience of 5.7 million cinemagoers by 3 December 2017. It is the third part in the "Fack Ju Göhte" film series, which is one of the most commercially successful German-speaking film productions.

A range of films and TV series is offered on the website KINOX.TO. The website is in German and all relevant notices are in German. The structure of the service is such that one can find - ordered according to specific classification criteria - links to file hosting services, which enable streaming of the respective films. The content is stored on the servers of the file hosting services in such a way that users can, by clicking on the link, retrieve the stream for free at a time and from a place individually chosen by the user.

Kinox.to is one of the 100 most popular websites in Germany. From August to October 2017 it had 87.93 million "total visits" per month, of which 85% of users were from Germany.

The website KINOX.TO has no legal imprint. A formal notice sent via the contact form went unanswered. In the scope of preliminary criminal investigations, the Selimi brothers were determined as being responsible for the website. As far as the further details of the criminal investigations are concerned, the Court refers to the Application.

The film was continuously available on the website KINOX.TO from 7 November 2017 onwards.

The Applicant asserts that they became aware of the film being available on KINOX.TO on 7 November 2017. On 20 November 2017, the Applicant sent KINOX.TO a formal notice (AST 7). On 21 November 2017, the Applicant contacted various hosting providers.

The Applicant filed the application for injunctive relief in the case at hand on 6 December 2017.

The Applicant asserts that the costs for a DNS and IP block would be between €2,000 and €4,000.

An analysis of the content of the website KINOX.TO between 20 and 29 November 2017 showed that between 98.5% and 100% of the content is illegal (Exhibit AST 6a).

The Applicant is of the opinion that KINOX.TO is an internet service with an illegal business model. Thus, the criteria set out in the German Federal Court of Justice's decision in "Störerhaftung des Access-Providers" (Breach of duty of care (Störerhaftung) of access providers) (Judgment of 26 November 2015 - I ZR 174/14 = GRUR 2016, 268) apply. The principles set out in that judgment have not been made inapplicable by the Third Act Amending the German Telemedia Act (TMGÄndG). Instead, the German Telemedia Act has to be interpreted in a directive compliant manner.

The Applicant is of the opinion that a so-called DNS block or a block relating to an IP address must be implemented. In arguing this, the Applicant relies primarily on the principles of Störerhaftung (breach of duty of care) and in the alternative on an analogue application of Sec. 7 (4) German Telemedia Act (TMG).

The **Applicant applies for**:

> *The Respondent to be **prohibited** - on penalty, for each case of non-compliance, of a fine of up to EUR 250,000.00, or imprisonment in the case of non-payment, or up to 6 months imprisonment, to be levied on the respective Managing Director of the Respondent -*
>
> *from providing their customers internet access to the film "Fack Ju Göhte 3", to the extent that this film is retrievable on the website service currently known as "KINOX.TO", as shown below: [4 screenshots omitted]*

In the alternative:

The Respondent to be obligated to block the provision of access to their customers over the internet to the film "Fack ju Göhte 3", to the extent that this film is retrievable on the website service currently known as "KINOX.TO", as shown below: *[4 screenshots omitted]*

The **Respondent applies for**,

> the application for injunctive relief to be dismissed.

The Respondent asserts that the costs for the installation of a DNS and IP block are a minimum of €150,000.

The Respondent is of the opinion that the statements in the BGH decision "Störerhaftung des Access-Providers" are no longer applicable because the law has been changed through the TMGÄndG. According to the Respondent, access providers are now exempt from Störerhaftung. The Respondent argues that the obligation of service providers to block internet services is exhaustively regulated in Sec. 7 (4) TMG.

Moreover, in the case of IP blocks, there is a danger of "over-blocking". The Respondent asserts that a considerable number of websites could be retrievable under one IP address.

DNS blocks would require, according to the Respondent, a considerable manipulation in the Respondent's DNS server system. In order to be able to implement a DNS block, technical

means would allegedly have to be installed in the system to instruct all DNS servers, upon receipt of a user request to connect to a specific domain, not to transmit the corresponding IP address. Furthermore, the Respondent is of the opinion that a DNS block is easy to circumvent.

According to the Respondent, with the introduction of Sec. 8 (1) second sentence TMG, the legislature broadened the exemption of service providers within the meaning of Sec. 8 TMG. The Respondent argues that this provision covers all service providers who transmit information in a communications network or provide access to use such information. The legislature took action, as asserted by the Respondent, after the BGH judgment "Störerhaftung des Access-Providers" and in knowledge of this judgment and removed the liability of access providers, which the BGH had created by way of judicial further development of the law (Official Reasoning BT-Printed Paper 18/12202, p. 13). According to the Respondent, access providers are now only liable in accordance with the provisions of Sec. 7 (4) TMG and the requirements of this provision are not fulfilled in the present case.

Furthermore, the Respondent argues that the Applicant's motion lacks a ground for injunction. As far as the analogue application of Sec. 7 (4) TMG asserted in the alternative, the Respondent argued that the simple urgency is lacking, as the subject matter of the subsidiary motion is a different object of dispute.

The Respondent submits that if the Chamber were to base a claim on Sec. 7 (4) TMG, the associated costs would have to be imposed on the Applicant.

Furthermore, the Applicant would have to be ordered to lodge a high security payment.

The Chamber decided on 13 December 2017 that an oral hearing would be held to deal with the application for injunctive relief. Instructions were issued by way of an order on the same day.

In addition, reference is made to the writs exchanged including exhibits - including the protective letter of 4 December 2017 - as well as to the minutes of the oral hearing of 17 January 2018.

Grounds for decision

The application for injunctive relief is admissible and well-founded. The Applicant is entitled to a claim for injunctive relief according to the principles of breach of duty of care (Störerhaftung).

I. Admissibility

The application for injunctive relief is admissible. In particular, the motions are admissible in the form in which they are filed. Even though it is not directly clear from the application as to which specific obligations to act and due diligence obligations are being demanded of the Respondent, it is sufficient if the duty of care and due diligence obligations can be deduced from the Statement of Grounds and the Grounds for the Decision (BGH, Judgment of 26 November 2015, I ZR 174/14 - Störerhaftung des Access-Providers). This is the case here. The Applicant submitted in the Application and also in the writ of 11 January 2018 that it was not seeking any specific measures but that it wanted to leave it to the Respondent to decide how it wanted to effect the implementation. Whether the prohibition sought can be granted in full is a question of the well-foundedness of the Action.

II. Standing

The Applicant has standing. The Applicant bases its position on the right of making available to the public in relation to the film "Fack Ju Göthe 3". In this respect, the Applicant submitted that it holds the rights to "on demand" exploitation. The Applicant argued that that followed from, among other things, the notice with which the digital videograms were sent to the cinemas showing the film. In that notice, the Applicant stated, it was named as the exclusive owner of all exploitation rights. The Defendant has not provided substantiated counter-arguments against that position.

III. Entitlement to the claim

The Applicant is entitled to a claim for injunctive relief according to the principles of breach of duty of care (Störerhaftung). According to European law considerations, legal action may also be taken against providers of telemedia services as per the German Telemedia Act (see: BGH, Judgment of 26 November 2015, I ZR 174/14 - Störerhaftung des Access-Providers). The Third TMG Amendment Act has not altered the provisions governing the possibility of legal action against "regular" internet access providers, hence in particular Sec. 8 (1) second sentence TMG does not preclude legal action based on breach of duty of care (Störerhaftung).

In the decision of the German Federal Court of Justice (BGH) of 26 November 2015, case no. I ZR 174/14 - Störerhaftung des Access-Providers, the BGH decided, on the basis of European law considerations, that legal action may be brought against a telecommunications company which provides third parties with access to the internet on account of their being a party in breach of a duty of care (Störer) and seeking an order that they must prevent access to the websites on which copyright protected works are unlawfully being made available to the public. However, the BGH stated that the assessment of reasonableness which must be undertaken, must take into account and balance the fundamental rights under European Union law and national law of protection of property of copyright holders, the freedom of occupation of the telecommunications companies and the freedom of information as well as the informational self-determination of internet users.

The BGH also found that the breach of duty of care (Störerhaftung) of the provider of internet connections is subsidiary. According to the BGH, Störerhaftung can only be considered if the rightholder has first made reasonable efforts to take action against those parties who - like the operator of the internet site itself - have committed the rights infringement themselves or - like the hosting provider - have contributed to the rights infringement by providing services. Only if legal action against those parties has failed or no prospect of success is evident and thus only if a gap in the legal protection would otherwise exist, the BGH concluded, could action against the access provider for a breach of duty of care be considered reasonable. The BGH stated that when ascertaining the main parties against whom action is to be taken, the rightholder needs to make investigations to an extent which may be reasonably expected.

Moreover, when assessing the effectiveness of possible blocking measures, the assessment must be based on the effects of the blocks on the access to the website which is specifically objected to. In the BGH’s opinion, the circumvention possibilities available due to the technical structure of the internet do not preclude the reasonableness of blocking orders provided the blocks prevent or at least impede access to the rights infringing content.

Finally, according to the BGH decision, the interests of the operator of the blocked website must be considered. In this respect, however, a decision on the balancing of interests must

be reached. The BGH found that a block is not only considered reasonable if solely rights infringing content is accessible via the website but also simply if a global assessment of the site reveals that the lawful content is a negligible amount compared to the unlawful content. In the BGH's estimation, the fact that a block also covers, in addition to the subject matter protected for the claiming rightholder, subject matter which is protected for third parties in which the claiming rightholder is not entitled to assert rights does not preclude its reasonableness.

1. Revised version of the German Telemedia Act

The application of these principles is not precluded by Sec. 8 (1) second sentence TMG in its current version. Whilst the wording at first seems to contradict the application, however its interpretation has to be limited, such that Sec. 8 (1) second sentence TMG only applies to the privileged users named in Sec. 7 (4) TMG, as there is a clear contradiction to the relevant explanatory memorandum.

With the Third TMG Amendment Act, the legislature intended to regulate solely the liability of providers of WLAN networks. In detail:

a. Timeline

The BGH decision, Judgment of 26 November 2015, I ZR 174/14 - Störerhaftung des Access-Providers - was issued at a time when Sec. 8 (1) TMG had the following wording:

> *"(1) Service providers are not responsible for third party information which they transmit in a communications network or to which they provide access to use, provided they*
> *1. have not initiated the transmission;*
> *2. have not selected the receiver of the transmission; and*
> *3. have not selected or modified the information contained in the transmission. The first sentence shall not apply if the service provider intentionally collaborates with a user of its service, in order to commit unlawful acts."*

The Third TMG Amendment Act amended Sec. 8 (1) TMG such that it then read:

> *"(1) Service providers are not responsible for third party information which they transmit in a communications network or to which they provide access to use, provided they*
> *1. have not initiated the transmission;*
> *2. have not selected the receiver of the transmission; and*
> *3. have not selected or modified the information contained in the transmission. Insofar as these service providers are not responsible, they can, in particular, not be subject to legal action seeking damages or removal or injunctive relief in respect of a rights infringement due to an unlawful act of a user; the same applies in respect of all costs for the assertion and enforcement of those claims. The first and second sentences shall not apply if the service provider intentionally collaborates with a user of its service, in order to commit unlawful acts."*

The Respondent is of the opinion that Sec. 8 (1) second sentence TMG *"Insofar as these service providers are not responsible, they can, in particular, not be subject to legal action seeking damages or removal or injunctive relief in respect of a rights infringement due to an unlawful act of a user; the same applies in respect of all costs for the assertion and enforcement of those claims."* precludes legal action being taken against the Respondent as a party in breach of a duty of care (Störer). The Chamber does not share this legal view. Rather, in the opinion of the Chamber it is clear that the legislature did not intend such an exemption to be effected by the amendment of Sec. 8 TMG.

b. Legislative process

The documents pertaining to the legislative for the Third Act Amending the German Telemedia Act (TMGÄndG) show that the legislature only intended to regulate the liability of providers of WLAN networks.

This follows right from the introduction to the explanatory memorandum (Printed Paper 18/12202 of 28 April 2017) in which the following is stated, under the heading "Problem and Objective":

> "The Second Act Amending the German Telemedia Act, which came into force on 27 July 2016, already intended to give operators of wireless local networks (Wireless Local Area Network - WLAN) the necessary legal certainty to be able to provide their WLAN to third parties without having to fear legal warnings against them or being made liable for rights infringements of third parties.
> *On 15 September 2016, the Court of Justice of the European Union (CJEU) issued its judgment in the case C-484/14 (McFadden v Sony Music). It was based on referral proceedings of the Regional Court of Munich I and dealt with, among other things, the question of whether WLAN operators can be warned, with costs, for rights infringements of third parties and to what extent the exemption from liability in the E-Commerce Directive 2000/31/EC suffices, as was implemented in Germany in the Telemedia Act (TMG). The CJEU found no liability for damages for rights infringements of third parties whilst at the same time finding that a court or a national authority can issue an injunction against a WLAN operator requiring the WLAN provider to prevent the recurrence of the rights infringement. According to the CJEU, this could, for example, be achieved through the use of password protected access, in which users have to reveal their identity. The coalition fractions of the CDU/CSU and SPD had agreed, in the parliamentary procedure, not to impose any due diligence or encryption obligations on WLAN hotspot operators. They set out their intention to eliminate the principle of breach of duty of care (Störerhaftung) and exempt WLAN operators generally from the costs of warnings in the reasoning for their motions to amend Sec. 8 TMG.*
>
> The judgment once more led to legal uncertainty as WLAN operators now feared that they had to encrypt their WLAN hotspot and receive warnings. This would not only impede the spread of public WLAN but also limit many business ideas and hinder innovation.
> The objective of this Act is to provide WLAN operators with legal certainty as far as possible such that the increased need for public access to the internet can also be met by through the use of WLAN.

This presentation of the objectives shows that the legislature did not intend to regulate anything beyond WLAN operators. This follows, in particular, also from the fact that the decision of the German Federal Court of Justice of 26 November 2015, case no. I ZR 174/14- Störerhaftung des Access-Providers is not mentioned at any point in the legislative process whilst the decision of the CJEU in the case C-484/14 (McFadden v Sony Music) is. Both decisions were discussed extensively in the specialist press and one cannot assume that the intention was to dispose of the principles set out by the German Federal Court of Justice without any reference to that fact.

The Respondent's arguments against that position are uncompelling. The Respondent argues that it follows from the ministerial draft that there was an intent to regulate more than just the liability of WLAN networks. The Respondent bases this argument on the fact that the following proposed text can be found in the draft produced by the German Federal Ministry for Economic Affairs and Energy:

"If an information society service is utilised by a user in order to infringe an intellectual property right and if the proprietor of that right has no other possibility for legal remedy against the infringement of his right, the proprietor of the right may demand, from the respective ***service provider as per Sec. 8****, in particular the blocking of the use of information in order to prevent the recurrence of the rights infringement."*

The current wording of Sec. 7 (4) first sentence TMG is, however:

"If a telemedia service is utilised by a user in order to infringe an intellectual property right and if the proprietor of that right has no other possibility for legal remedy against the infringement of his right, the proprietor of the right may demand, from the respective service provider as per Sec. 8 (3), the blocking of the use of information in order to prevent the recurrence of the rights infringement."

Thus, in the opinion of the Respondent, the ministerial draft provided for a situation whereby a blocking responsibility as per Sec. 7 (4) first sentence TMG was possible in respect of all access providers. A limitation to operators of wireless local area networks was not provided for.

This line of argument is uncompelling, however. Independent of the question as to what significance a ministerial draft can even have at all, it can be seen in the cited passage that a complete exemption of "normal" access providers was not planned. Rather, the draft quoted above was worded such that all access providers were to be placed into the milder - in comparison to the principle of breach of duty of care (Störerhaftung) - liability regime of Sec. 7 (4) TMG.

Moreover, the outcome claimed by the Respondent would also be paradoxical. Prior to the Third TMG Amendment Act, it was questionable whether operators of wireless local area networks could claim privileged status under Sec. 8 for themselves. This situation caused the Chamber in the McFadden case to refer various questions on the interpretation of European law to the Court of Justice of the European Union. If one followed the Respondent's argument, however, the outcome of the Act to protect WLAN operators would be that all "normal" access providers would be completely exempt - unless they themselves acted wilfully - and solely WLAN providers could be the subject of legal action seeking an order compelling them to install network blocks.

Such an outcome would be illogical and scarcely compatible with the principle of equal treatment (Art. 3 GG). The contradiction can only be solved by interpreting Sec. 8 (1) second sentence TMG as only applying to WLAN operators.

This interpretation was then incorporated into the explanatory memorandum. That memorandum states, in regard to Sec. 8 I second sentence TMG:

"Sec. 8 (1) second sentence German Telemedia Act is intended, following the judgment of the Court of Justice of the European Union of 15 September 2016 in case C-484114 (Mc Fadden v Sony Music), to clarify what the coalition parties had intended in the reasoning of their motions to amend Sec. 8 German Telemedia Act in parliamentary proceedings on the Second Act Amending the German Telemedia Act. Störerhaftung for access providers was to be limited and access providers generally to be freed from notification costs. Furthermore, the legislative text now also clarifies that service providers who are not responsible cannot be made the subject of legal claims for damages or removal or injunctive relief. The same applies in respect of legal action for the assumption of all costs in connection with third party rights infringements. This includes, in addition to judicial and extrajudicial costs, also pre-trial costs (e.g. attorney costs in connection with warning notices)."

In this respect, reference should also be made to the explanatory memorandum for the Second Act Amending the TMG (Printed Paper, 18/6745). The following passages can be found in that memorandum:

"The following second and third sentences are added:
"(3) Paragraphs (1) and (2) also apply to service providers as per paragraph (1), who provide internet access to users via a wireless local area network.
(4) Service providers as per paragraph (3) cannot be the subject of legal action, seeking removal or injunctive relief, due to an unlawful act of a user if they have taken reasonable measures to prevent a rights infringement by users. This is considered the case, in particular, if the service provider
1. has taken reasonable security measures against unauthorised access to the wireless local area network and
2. only grants access to the internet to users who have declared that they will not commit any rights infringements in the course of their use."

By way of reasoning, the following is offered:

"Until now, there has been legal uncertainty as to whether the operators of wireless local area networks could cite the liability exemption as per Sec. 8. This is clarified by paragraph (3). According to that paragraph, service providers who provide access to the use of their wireless local area network are access providers as per Sec. 8 TMG. Consequently, the provisions of Sec. 8 TMG do apply to them. WLAN operators are thus given legal certainty that they cannot be liable for compensation or criminal charges in respect of rights infringements committed by their users, customers etc."

The Bundesrat stated the following in this respect:

"2. On Article 1 Number 3 (Sec. 8 (3) TMG)
In Article 1 Number 3, Sec. 8 (3) should be worded as follows:

"(3) The exclusion of liability (Paragraph 1) also covers providers of wireless networks and radio networks which are aimed at a group of users which are not determined by name (public radio networks). The first sentence shall not apply if the service provider intentionally collaborates with a user of its service, in order to commit unlawful acts."
Reasoning:

According to the existing legal situation, internet service providers are not liable under Sec. 7 et seqq. TMG and in implementation of Directive 2000/31/EC for rights infringements perpetrated by their users; moreover, proactive monitoring obligations may not be imposed on such providers. Sec. 7 et seqq. TMG exclude a responsibility - under the respective conditions - of internet service providers for the unlawful acts of their users. For the access provider, the exemption in Sec. 8 TMG applies, according to which liability is excluded, provided the provider - put briefly - has not contributed, beyond its neutral intermediary position in transmitting the user's data, to the user's rights infringement (Mantz/Sassenberg, NJW 2014, pp. 3537 et seqq.). According to its wording, the exemption in Sec. 8 TMG applies to service providers who provide access to the use of information, thus to access providers. The question as to the extent to which a private or commercial provider of WLAN internet connections must be liable for the rights infringements of its users has not yet been clearly regulated under the law; the case law of the highest court - which only covers partial aspects - has also not provided a reliable clarification of this situation. Therefore, paragraph (3) stipulates, for reasons of legal clarity, that operators and providers of wireless networks and radio networks which are aimed at a group of users which are not determined by name (public radio networks)" can also rely on the liability exemption in Sec. 8 TMG. This wording is clearer than that used in the government draft "service providers as per paragraph (1), who provide internet access to users via a wireless local area network". This wording does not explicitly include operators and providers of public access points.
The second sentence is an amendment to the government draft. This wording takes the interests of parties affected by unlawful acts into account. In this respect, the proposed wording limits more clearly to whom the exemption in Sec. 8 TMG does not apply. If a service provider colludes with users to commit unlawful acts, that service provider expressly does not enjoy that exemption."

The German Federal Government responded to this as follows (emphasis added by the Court):

"On number 2
The German Federal Government does not agree with the proposal. ***It is stated on page 48 of the Coalition Agreement that the potential of radio networks (WLAN – wireless local area network) as access to the internet in public spaces should be fully utilised.***

Accordingly, the German Federal Government clarified in its draft bill, that the liability exemption for access providers as per Sec. 8 (1) and (2) TMG also applies to service providers who provide internet access to users via a wireless local area network.
In contrast, number 2 of the Statement of the Bundesrat had the intention of extending the liability exemption to all "service providers of wireless networks and radio networks". However, wireless networks and radio networks are synonyms. No differentiation is required in this respect. ***Furthermore, removing***

the local aspect of wireless networks would mean that the liability exemption would apply without exception to the entire radio communications, i.e. in addition to mobile and bluetooth networks also satellite communications and radio relay links. The wording used by the Bundesrat therefore does not represent a clarification but an extension of the scope of application of the provision. *In contrast, the German Federal Government draft bill, limited to local networks, remains in line with the Coalition Agreement.*
The amended Sec. 8 (3) second sentence TMG included in the Statement is equivalent to Sec. 8 (1) second sentence of the current TMG. There is therefore no need for that provision."

It clearly follows from those remarks that the Second TMG Amendment Act is limited solely to local networks. The reference in the Third TMG Amendment Act to the reasoning of the German government shows clearly that the term access provider should be interpreted narrowly as only covering providers of WLAN networks.

c. European law aspects

As can be seen from the decision of the German Federal Court of Justice (BGH) of 26 November 2015, case no. I ZR 174/14 - Störerhaftung des Access-Providers, the principle of breach of duty of care (Störerhaftung) must be applied to access providers, due to European law requirements. It cannot be assumed that the legislature, in pursuing the objective of lessening the impact of the CJEU decision in C-484/14 (McFadden v Sony Music) on operators of public WLANs, wanted to ignore other mandatory provisions of European law, in particular in respect of the possibility of effecting network blocks, required under Art. 8 (3) of Directive 2001/29/EC.

In this respect, it should be noted that the result of interpretation regarding Sec. 7 and 8 TMG (new version) reached by the Chamber is in line with European law. In contrast, the interpretation favoured by the Respondent would be a clear contradiction of European law.

2. Principles under breach of duty of care (Störerhaftung)

According to the case law of the 1st Civil Senate of the German Federal Court of Justice, any person or entity can be subject to legal action for injunctive relief, in the case of infringement of absolute rights, who - without being perpetrator or accessory - somehow wilfully and adequately causally contributes to the infringement of the protected right. As the principle of Störerhaftung (breach of duty of care) may not be excessively extended to third parties who have not committed the unlawful impairment themselves, any finding of a breach of duty of care on the part of the Störer requires the violation of due diligence obligations. Their extent is determined by whether and to what extent the party cited as a Störer can reasonably be expected to undertake due diligence in the circumstances.

The service Kinox.to (pronounced: "Ki- nox Punkt to") is a well-known service providing access to films made available illegally. not even the Respondent disputes that Kinox.to has a highly criminal nature.

The Respondent is not associated with Kinox.to in any way. A liability as perpetrator or accessory is therefore out of the question. As internet service provider, however, the Respondent did make an adequately causal contribution to the rights infringements committed via Kinox.to. Without the internet connection provided by the Respondent, its users would not be able to access the service of Kinox.to.

The Respondent should be seen as a party in breach of a duty of care (Störer) because it is subject to due diligence obligations as an internet service provider at least if it has been notified of a clear rights infringement and provided any monitoring obligations do not economically jeopardise its business model or disproportionately complicate its activities. In this respect, reference is made to the remarks of the German Federal Court of Justice in its judgment of 26 November 2015, case no. I ZR 174/14 - Störerhaftung des Accessproviders). Finally, this responsibility is based on the basic principle that the person who creates a source of risk must also contribute to ensuring that this risk is not realised or at least is kept to a minimum level.

3. Prior action against Kinox.to

The Applicant submitted that it had attempted various measures against those responsible for the service "Kinox.to". However, these were, according to the Applicant, not successful. The Applicant argued that an efficient legal prosecution was not possible due to the regular switching of servers by Kinox.to. Moreover, it can be seen that even after one of the managing directors of the operational entity behind Kinox.to was arrested, the service continued unhindered.

In light of this, further legal action is not required. In the decision of the German Federal Court of Justice (BGH) of 26 November 2015, case no. I ZR 174/14 - Störerhaftung des Access-Providers, it is stated that rightholders must attempt, in a reasonable manner, to prioritise action against the perpetrators. In the case to be decided, this was the reason for the dismissal of the action.

For the case at hand, however, it can be seen that the Applicant made active attempts to take action against the operators of Kinox.to. It also took action against a number of hosting providers. Nevertheless, the film "Fack Ju Göthe 3" was available continuously on Kinox.to from 7 November 2017 onwards. That shows that legal action against other - direct - involved parties had little chance of success.

Moreover, it can be seen that in the case at hand, a private rightholder is asserting rights in a film which has just been released and therefore is in the most important phase of commercial exploitation. To refer the Applicant under these conditions to a time consuming prior legal process against a foreign based, obviously non-contactable and furthermore highly criminal rights infringer is unreasonable. This is a considerable difference to the case decided by the German Federal Court of Justice in which a collecting society asserted rights in works which were already over 30 years old and which can be counted among the classics of pop music (e.g. Michael Jackson: Thriller). In such a case, requiring a long, prior legal action against the direct perpetrator can be justified.

4. Effectiveness of the blocking measures

The Respondents assertion that all possible blocking measures would be easy to circumvent and that this must be taken into account in the Respondent's favour when assessing the reasonableness of a block, did not convince the Chamber.

Firstly, it is evident that there are various possibilities for how access to the service of Kinox.to can be prevented. As Kinox.to is not worthy of protection, the measures with the strongest impact can be chosen. In the decision of the German Federal Court of Justice of 26 November 2015, I ZR 174/14 - Störerhaftung des Access-Providers, three blocking possibilities are discussed:

- a so-called DNS block (DNS: Domain Name System), in which, in the manner of a telephone book, every domain name has a numerical IP address attributed to it. This numerical IP address is, when the domain name is entered into the address bar of the browser, found by the internet service provider's DNS server, so that the request can be forwarded to the server with the corresponding IP address. The DNS block consists of the prevention of the attribution of the domain name and IP address on the BDS server of the internet access provider. The domain name in question therefore no longer leads to the respective website, comparable to deleting a telephone book entry.

- an IP block with which the IP address (internet protocol address) of a website, through which the website can be found on the internet, is blocked. The forwarding of data to the target address to be blocked is prevented through a change in the routing tables operated by the access provider. All websites operated under that IP address are then no longer accessible.

- introduction of a "forced proxy" which blocks access to a specific single page of the website. To this end, the entire data traffic is rerouted via a special server, namely a forced proxy. This is able to analyse, via the URL, the information embedded in the data packets of the user queries regarding the website visited.

The Respondent's submissions express the view that it is unreasonable to expect the measures to be implemented because they can be easily circumvented. This is uncompelling, however, since ultimately all protection options can be circumvented with a little specialist knowledge.

This is unremarkable, however, because it cannot be expected that legal action against an internet access provider finally prevents the dissemination of copyright infringing content on the internet. The relevant factor is instead that the block causes access to infringements of the Claimant's exploitation right in "Fack Ju Göthe 3" for normal users - namely casual users. The Applicant has shown credibly that in countries in which access to comparable sites has been blocked - also by foreign sister companies of the Respondent - the illegal download has considerably reduced.

5. Worthiness of protection of the blocked website

A further argument in the assessment of whether a block of a website can be implemented is the worthiness of protection of the website to be blocked and the consideration of the interests of other impacted parties.

The service of KINOX.TO is clearly aimed, in a highly criminal manner, at the infringement of copyrights in the thousands. This follows even just from the simple design of the site and the fact that no imprint information is present. In a blatant manner, users of the website are enabled illegal access to films and TV series. Looked at overall, it is clear to anyone that the service is one which is obviously aimed at distributing content obtained in violation of copyright. Moreover, it is apparent that the Respondent has not presented substantiated counter arguments to the Applicant's claim that over 98.95% of the content is rights infringing (AST 6).

An evaluative assessment shows that the service of Kinox.to is not worthy of protection. Furthermore, no other third party interests are apparent. A legal use of Kinox.to with any bearing seems to be beyond the realms of reality.

6. Weighing up of interests

In the scope of the weighing up of interests to be undertaken, one must take into account that the case in hand concerns an especially successful film, the Respondent is the largest internet provider and the website KINOX.TO is obviously operated with criminal intent. As far as this situation regarding the interests is concerned, it is obvious that it would be reasonable to expect the Respondent to accept even a considerable level of cost and effort in order to prevent future rights infringements.

In particular, it is evident that it needs to be prevented that the Respondent abets a huge number of rights infringements by its customers.

It is a subject of dispute between the parties as to what costs would be incurred for the instalment of a DNS and IP block. The Applicant argues it would be an amount between 2,000 and 4,000 euros whilst the Respondent argues a level of costs of around 150,000 euros. The witnesses brought by the parties for this issue and present at the oral hearing on 18 January 2018 did not have to be heard. This is because it was not disputed by the Respondent that the costs in the amount of 150,000 euros included primarily the costs which would be incurred by the first time instalment of a block. However, the Respondent cannot hold these costs against the Applicant. Otherwise, any legal action against the Respondent by a first rightholder would always fail due to the fact that the Respondent could hold the initial set up costs against them.

Instead, the costs must be looked at in relation to the total revenues of the Respondent. The total revenue is, according to the Respondent's figures, in the billions. Compared to that sum, costs in the amount of 150,000 euros would be inconsiderable especially as the Respondent had to have expected, at the latest since the judgment of the German Federal Court of Justice of 26 November 2015, case no. I ZR 174/14, that it would have to have the respective blocking mechanisms available. To the extent that the Respondent has nevertheless not set up such mechanisms, it is not worthy of protection. Moreover, the Respondent can pass the costs of the blocking measures onto its customers. Due to the large number of contractual relationships, only a fraction of a cent would be apportioned to each customer.

IV. Grounds for injunction

There is a ground for injunction in respect of the principal claim asserted and adjudicated. The claim was filed within the one month time limit applicability in the jurisdiction of the Appeal Court of Munich. The Applicant showed credibly that the film was first available on KINOX.TO on 7 November 2017. The application for injunctive relief was received by the court on 7 December 2017 and thus in time.

The urgency does not cease to apply due to the Applicant's utilising the full month time limit. According to the general understanding, the month time limit is strict. It cannot be extended but it is also allowed for it to be utilised in full. Only in this way can the purpose associated with the strict time limit, namely providing legal certainty, be achieved.

The Respondent asserts that the urgency is lacking for the simple reason that the Applicant has not shown credibly that the publication occurred on 7 November 2017. This is not true but is also irrelevant, as the urgency would only cease to apply if the Applicant had already had knowledge prior to that. This, however, constitutes a negative fact. The Respondent, who bears the burden of proof in this respect for a prior awareness, has not submitted any facts to support a prior awareness.

The ground for injunction also does not cease to apply because the question to be decided on is a complex legal question. The summary character of the injunction proceedings solely concerns the question of the standard of evidence and the available evidence. The legal question can be assessed in full and decided on in the same way as in main proceedings. The present case essentially concerns the evaluation of the extent of the statutory amendment. This only concerns a legal question which, as the decision at hand shows, can be answered clearly.

A decision in preliminary injunction proceedings is also not precluded under the aspect of anticipation of the main proceedings. The fact that the Respondent will incur disproportionately high costs for the instalment of the ordered blocks has, as has been shown by the foregoing, not been proven. These costs are also not wasted if this judgment is reversed by a higher instance court on the basis of a differing evaluation of the case. In such a case, the blocking mechanism could be used to implement the blocking requests of other rightholders.

V. Operative provisions

A prohibition had to be ordered, as originally applied for because the basis for the claim is the principle of breach of duty of care (Störerhaftung). The Respondent has no claim for reimbursement of costs because in the case at hand, Sec. 7 (4) TMG was not applied analogously rather the principles of breach of duty of care (Störerhaftung) argued, as set down by the German Federal Court of Justice in the decision of 26 November 2015, case no. I ZR 174/14.

Accordingly, the operative provisions were also worded openly and thus the Respondent was given the choice of how it would specifically implement the prohibition. By way of clarification, it should be said that point 1 of the operative provisions does not relate to the domain "Kinox.to" but to the overall service "Kinox.to", which is offered under that company name, irrespective of the respective domain. The screenshot shown follows the claim and is intended to make the design of the internet service "Kinox.to" clear. A limitation of the prohibition to the URL which can be seen in the screenshots has therefore not been applied for nor is it intended by the Chamber.

The Chamber is aware that as such the discussion regarding the measures to be undertaken is shifted to the execution proceedings. This can be accepted, however, due to the nature of the internet. For the Respondent as the largest internet provider in Germany, the assessment of proportionality of the necessary measures only requires a slight effort. Furthermore, the Chamber considers its finding to be in line with the decision of the Court of Justice of the European Union of 27 March 2014, case no. C-314/12 (UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH, Wega Filmproduktionsgesellschaft mbH).

VI. Ancillary decisions

The decision on costs is based on Sec. 91 (1) German Code of Civil Procedure.

No security payment needed to be ordered. The present case concerns the prevention of an obvious rights infringement. Insofar as the Respondent argues that it would have to incur costs in the amount of 150,000 euros in order to comply with its blocking obligation, this argument cannot be heard. As set out above, the Respondent could have and should have taken the necessary measures at the latest after the BGH decision in "Störerhaftung des Access Providers" was issued, in order to have been able to prevent obvious rights infringements upon request swiftly and without additional technical cost and effort.

signed in original Dr. Zigann Chief Judge at the Regional Court	signed in original Dr. Heister Judge at the Regional Court	signed in original Dr. Schön Judge at the Regional Court

Issued on 1 February 2018

signed, Schuster
Registrar of the Court