

**NORDEMANN**

**33<sup>rd</sup> Tokyo International Film Festival – 10<sup>th</sup> MPA Seminar  
– The Constitutionality of Site Blocking in Japan**

# **The Constitutionality and Legality of Piracy Website Blocking in the EU and Germany**

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# Agenda

## The Constitutionality and Legality of Piracy Website Blocking in the EU and Germany

- (1) EU law: The starting point: “Art. 8 (3)”
- (2) EU law: Leading case
- (3) German law: Leading case
- (4) German Law: Blocking orders
- (5) Selected legal issues
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  - “Subsidiarity”
  - Constitutional law issues
- (6) Summary

# (1) The starting point: “Art 8 (3)”

## Art. 8 (3) EU Copyright Directive (2001/29)

- *“Member States shall ensure that right holders are in a position to apply for an **injunction against intermediaries whose services are used** by a third party **to infringe a copyright** or related right.”*

# (1) The starting point: “Art 8 (3)”

## Art. 8 (3) EU Copyright Directive (2001/29)

- *“Member States shall ensure that right holders are in a position to apply for an **injunction against intermediaries whose services are used** by a third party **to infringe a copyright** or related right.”*
- Recital 59 EU Copyright Directive :
  - *“In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such **intermediaries are best placed** to bring such infringing activities to an end. Therefore, ... **right holders** should have the possibility of applying for an **injunction against an intermediary ...**”*

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- Result: **Helping duties** of intermediaries, even if no fault (innocent).

## **(2) EU law: leading case**

### **Court of Justice of the EU (CJEU) case**

#### **“UPC Telekabel Wien/Constantin” (C-314/12 of 27 March 2014):**

- Site blocking in general admissible under Art. 8 (3) EU Copyright Directive.
- Access providers have duty to take action because “best placed”.

# EU – The map of website blocking

**Due to Art. 8 (3 ) EU Copyright Directive most EU countries have a site blocking regime in place.**



## (3) German law: leading cases

### German Federal Supreme Court (BGH) “Stoererhaftung des Access-Providers” (I ZR 174/14 of 26.11.2015):

- Site blocking in general admissible under German (civil) law.
- Legal doctrine so-called “**Stoererhaftung**”.
  - **Civil Injunction** claims only;
  - Breach of duty of care after notification.



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### German Federal Supreme Court (BGH) “Dead Island” (I ZR 64/17 of 26.07.2018):

- Legal doctrine changed to **§ 7 (4) German Telemedia Act** in analogue application;
- No change of material requirements for site blocking.

## (4) German law: Blocking orders

### **District Court Munich I (1 February 2018), upheld by Court of Appeal Munich (14 June 2018)**

- Site blocking of “kinox.to”, a website making illegally available thousands of films including movies still in the theatres.
- Claimant = German film producer Constantin.



# (4) German law: Blocking orders

## District Court Munich I (18 July 2018 and 25 October 2019):

- Site blocking of “LibGen” and “Sci-Hub”, each website illegally making available vast amount of scientific books or scientific journals.
- Claimants = Scientific publishers Elsevier and Springer Nature.



## (5) Selected legal issues - Efficacy

### Efficacy of site blocking - DNS blocking:

- **Empirical data** shows that DNS blocks are effective, although DNS-blocks may be circumvented.
  - **United Kingdom** (INCOPRO, 2015): minus 77% usage in 2 months.
  - **Portugal** (INCOPRO, 2017): minus 70% usage in 1 year.

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### Efficacy of site blocking - DNS blocking:

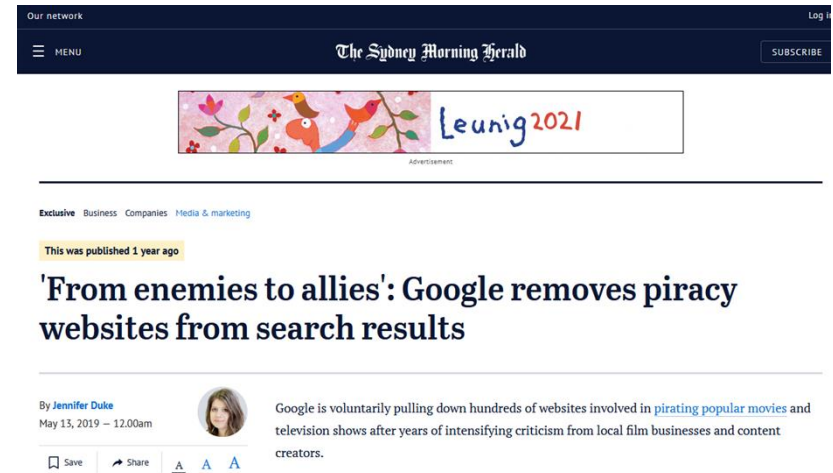
- **Empirical data** shows that DNS blocks are effective, although DNS-blocks may be circumvented.
  - **United Kingdom** (INCOPRO, 2015): minus 77% usage in 2 months.
  - **Portugal** (INCOPRO, 2017): minus 70% usage in 1 year.
- **No empirical proof** of efficacy necessary, as DNS blocks close the path for access and raise the understanding of acting wrongly.
  - (German BGH “Stoererhaftung des Access-Providers” - I ZR 174/14 of 26.11.2015 para. 48)

# (5) Selected legal issues - Efficacy

## Efficacy of site blocking - Search Engines:

- De-indexing claim against search engines (Google etc.)
  - (French Cour d'Appel de Paris Pole 5 Chambre 1, arret of 15.3.2016. no. 040/2016).
- See also Australia: Voluntary agreement by Google etc. to de-index structurally infringing websites.

<https://www.smh.com.au/business/companies/from-enemies-to-allies-google-removes-piracy-websites-from-search-results-20190510-p51m55.html>



The screenshot shows the top portion of a news article on The Sydney Morning Herald website. The header includes the site's name, a menu icon, and a 'SUBSCRIBE' button. Below the header is a colorful graphic with the text 'Leunig 2021'. The article's main headline is "'From enemies to allies': Google removes piracy websites from search results". The byline indicates it was written by Jennifer Duke on May 13, 2019, at 12:00am. The article text begins with "Google is voluntarily pulling down hundreds of websites involved in pirating popular movies and television shows after years of intensifying criticism from local film businesses and content creators." and continues with "The tech giant has entered into a voluntary agreement to help stop the spread of illegally downloaded material by removing sites blocked by internet service providers from its search results, allowing copyright holders to avoid taking the US-based behemoth to court."

# (5) Selected legal issues - Subsidiarity

## Subsidiarity of site blocking:

- Site blocking must be “**last resort**”.
- Claimant must use **proportionate efforts to stop infringements**.  
at the source to make site blocking proportionate:
  - (Reasonable) legal steps against **site operator** unsuccessful;
  - (Reasonable) legal steps against its **technical service providers**, such as the site’s host providers, unsuccessful.
- (German BGH “Stoererhaftung des Access-Providers” - I ZR 174/14 of 26.11.2015 para. 83)

# (5) Selected legal issues - Subsidiarity

## Subsidiarity of site blocking:

- Site blocking must be **“last resort”**.
- But note: To meet the subsidiarity requirement only **“reasonable”** legal steps necessary.
- The **subsidiarity requirement** can usually be **met for sites with illegal business models without any prior court action**, as they will have taken precaution that no legal action against them is possible.



# (5) Selected legal issues – Constitutional law

## Constitutional telecommunication secret not breached:

- Art. 10 (1) German Constitution (“Grundgesetz”) and Art. 7 EU Charter of Fundamental Rights.
- DNS blocks, IP address blocks, URL blocks evaluated by BGH.
- **Result = No breach, because scope of constitutional protection not touched.**
- **Two reasons:**
  - (German BGH “Stoererhaftung des Access-Providers” - I ZR 174/14 of 26.11.2015)

## (5) Selected legal issues – Constitutional law

### Constitutional telecommunication secret not breached - 1<sup>st</sup> reason:

- The telecommunication secret **does not protect public offers and their access, but only individual (non-public) communication:**
  - *“The starting point for the protection in Art. 10 (1) German Constitution is always the non-public exchange of specific communications of participants; in contrast, communications addressed to the general public are not covered by this provision.”*
- A site offering content to an unspecific number of addressees and accessing such information does not constitute confidential individual communication; rather it is, as a **public offering, not covered** by the scope of protection of the German Constitutional telecommunication secret.
  - (German BGH “Stoererhaftung des Access-Providers” - I ZR 174/14 of 26.11.2015, para. 68)

## (5) Selected legal issues – Constitutional law

### Constitutional telecommunication secret not breached - 2<sup>nd</sup> reason:

- **Merely preventing communication** without storing the individual use data **not covered** by scope of constitutional telecommunication secret:
  - **DNS blocks:** mere prevention and no storing of individual data.
  
- (German BGH “Stoererhaftung des Access-Providers” - I ZR 174/14 of 26.11.2015, para. 69)

# (5) Selected legal issues – Constitutional law

## Other constitutional rights involved:

- **Right holders:** Right to intellectual property.
  - Specific weight, as site blocking claims due to subsidiarity requirement “last resort”.
  - Protection gaps would open up, if no site blocking claims.
- **Access providers:** Freedom to operate business.
- **Internet users:** Freedom to access information, right to self-determination for information data.
- **Weighing of constitutional rights necessary.**
  - (CJEU “UPC Telekabel Wien/Constantin”, C-314/12 of 27 March 2014)
  - (German BGH “Stoererhaftung des Access-Providers” - I ZR 174/14 of 26.11.2015 paras. 21, 28 et seq.)

# (5) Selected legal issues – Constitutional law

## Constitutional right to information:

- Art. 5 (1) German Constitution (“Grundgesetz”) and Art. 11 (1) EU Charter of Fundamental Rights.
- **No overblocking.**
  - Blocking of **illegal content** (not owned by claimant) irrelevant.
  - Blocking of **legal content**:
    - **Blocking some legal content tolerable**, as otherwise infringing site operators could hide behind some legal content;
    - **Overall relationship legal/illegal content** crucial;
    - Blocking 4% legal content in any case allowed.
  - (BGH “Stoererhaftung des Access-Providers” - I ZR 174/14 of 26.11.2015 paras. 53 et seq.)
  - (Swedish SVEA Court of Appeal “ThePirateBay” – PMT 13399-19 of 29.6.2020, p. 16-17)

## (5) Selected legal issues – Constitutional law

### Constitutional right to information:

- Note: **Internet users** must have **right to sue access provider** to lift disproportionate overblocks, e.g. using contractual claim against access provider.
- (German BGH “Stoererhaftung des Access-Providers” - I ZR 174/14 of 26.11.2015 paras. 57)

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## (6) Summary

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- Site blocking in the EU and Germany is rooted in Art. 8 (3) EU Copyright Directive.
- The CJEU has recognized piracy website blocking as permissible the leading case “UPC Telekabel Wien/Constantin” in 2014.
- The German Federal Supreme Court (BGH) has recognized piracy website blocking under German law and has clarified the most important open issues.
- First site blocking practice show blocks of illegal sites with film content and with illegal scientific content.

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- Blocking measures like DNS-blocks are efficient both from an empirical and from a legal perspective.
- According to the German BGH, site blocking claims must be the last resort, if reasonable legal steps against the site operator and its providers were unsuccessful (“subsidiarity”). Sites with an illegal business model will usually meet this requirement.

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- This weighing is between (1) Rightholders: Right to intellectual property, (2) Access providers: Freedom to operate business, (3) Internet users: Freedom to access information.

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- A Weighing of these constitutional rights necessary.



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- The German BGH has emphasized that a weighing of constitutional rights must take place when assessing proportionality.
- This weighing is between (1) Rightholders: Right to intellectual property, (2) Access providers: Freedom to operate business, (3) Internet users: Freedom to access information.
- A Weighing of these constitutional rights necessary.
- It is no infringement of the freedom to access information if a (piracy) website is blocked, which predominantly consists of copyright infringing content.

**NORDEMANN**

**Best regards to Tokyo.  
Thank you.**

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