





defendant. The legal conclusions drawn by the plaintiff with regard to the main and auxiliary claims are incorrect, which is why the action must be dismissed.

In detail:

## A. Facts

### I. Regarding the offer of the defendant

#### 1. charitable foundation

The defendant is a non-profit foundation under Swiss law, which is financed by donations and does not pursue any commercial purposes.

**Evidence:** Internet excerpt from the Commercial Register Office of the Canton of Zurich, as **Annex B1**.

#### 2. translation of IP addresses

The Domain Name System (DNS) is responsible for resolving domain names into IP addresses on the Internet in order to establish a connection to a website or other services, for example. This name resolution is performed by so-called recursive DNS servers (DNS resolvers).

The vast majority of Internet users enter the domain name of a website and not the IP address in the address field of their browser to retrieve website content. The web page content cannot be retrieved in this type of use if the DNS resolver would not resolve the name into an IP address, since it is mandatory to call an IP address.

Usually, Internet users use a DNS resolver of their access provider for name resolution. However, Internet users can change the DNS resolver preset or assigned by the access provider and use a publicly operated DNS resolver service, such as that of the defendant (reachable at the IP address 9.9.9.9). Many larger organizations, such as Google (reachable at IP address 8.8.8.8) and Cloudflare (reachable at IP address 1.1.1.1), operate their own DNS resolvers. Any DNS resolver, whether public or a partial service of an access provider, can be used to query an IP address. The DNS is comparable to a "telephone book for IP addresses". However, the DNS resolver does not have the DNS records itself, but it acts as an intermediary that can retrieve and pass on the request for a domain or IP address. If the information is already in the cache of a DNS resolver, the DNS resolver can return the IP address to a DNS query itself. Otherwise, it forwards the query to retrieve this information within the hierarchically structured DNS. Regarding the technical facts, reference is made in particular to [ ]'s written private opinion as well as to [ ]'s comments. Mr. [ ] was a co-founder of PowerDNS, the company responsible for developing DNS software used by access providers such as British Telecom, Deutsche Telekom, KPN and Liberty Global. Mr. [ ] is further the main author of the Internet security standard RFC 5452, which is used by all DNS



resolvers worldwide. Mr. [ ] is a member of the "Toetsingscommissie Inzet Bevoegdheden" (see <https://www.tib-ivd.nl>) of the Dutch Intelligence and Security Services and as a technical expert he decides alongside two (former) judges on the proportionality, subsidiarity and necessity of the use of powers of the civil and military Dutch Intelligence and Security Services. Mr. [ ] is a board member of eco-Verband der Internetwirtschaft e.V. and is responsible for the Internet infrastructure and networks division. As an entrepreneur, he operates Internet service providers in Germany and 14 other European countries that maintain DNS servers and DNS resolvers for their customers. Mr. [ ] is also regularly consulted by the German Federal Government, the EU Commission, and the German Federal Constitutional Court as an expert on Internet infrastructure issues, such as cybersecurity. Furthermore, he is a member of the Committee for Technical Regulation of Telecommunications (ATRT) of the German Federal Network Agency. If the court considers an official translation of Mr. [ ]'s private expert opinion to be necessary and the references selected here to be inadmissible for the technical facts of the case, we would ask to be notified accordingly.

- Proof:**
1. Private expert opinion of [ ], as **Annex B2**.
  2. testimony of [ ], to summon on the defendant.
  3. Submission "affidavit" of [ ] as **Annex B3**.
  4. Testimony of [ ], to be summoned via the defendant.
  5. obtaining a written technical DNS Expert opinion.

The resolution of the IP address by the DNS resolver then automatically leads to the retrieval of the requested web page content. The DNS is a mandatory component for website page retrieval when the Internet user decides to enter the domain name in the Internet browser. By resolving the IP address, a DNS resolver provides the requestor with access to the requested content.

### **3. market ratio open DNS resolver**

The most widely used open DNS resolver by far is operated by Google. In December 2021, the German Federal Cartel Office determined that Google has "overriding importance across markets" for competition. Google is largely financed by targeted advertising, which is made possible by tracking user behavior.

- Evidence:**
1. Google case report: finding of superior cross-market significance for competition, decision dated Dec. 30, 2021, **attached** as **Exhibit B4**, available at: [https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Missbrauchsaufsicht/2022/B7-61-21.pdf?\\_\\_blob=publicationFile&v=7](https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Missbrauchsaufsicht/2022/B7-61-21.pdf?__blob=publicationFile&v=7).
  2. Submission "affidavit" of [ ] p. 5 as **Annex B3**.
  3. testimony of [ ], to be summoned via the defendant.



The specific retrieval path via the DNS resolver service of the defendant is only of minor importance in relation to the actual retrievals of the disputed domain. According to the evaluation of the Asia Pacific Network Information Centre (APNIC), the usage rate of the defendant's service in the Federal Republic of Germany on July 22, 2022 is only 0.159% compared to 16.790% for Google.

**Evidence:** Screenshots statistical DNS resolver evaluation of APNIC as of 07/22/2022, available as **Exhibit B5** at:  
<https://stats.labs.apnic.net/rvrs/QO?o=cXAw111s0t10x>

#### 4. characteristics of the service of the defendant

The services provided by the defendant are characterized by three main features. These are

- the protection of personal data,
- the neutrality of a technically high-quality and fast DNS resolver service as well as
- protection against IT security threats.

**Evidence:** 1. template "affidavit" of [ ] p.7/8  
as **attachment B3**.  
2. testimony of [ ], to be summoned via the defendant.  
3. Obtaining a written DNS technical  
Expert opinion.

#### *Privacy*

The defendant offers a particularly data protection-friendly service. It neither processes personal data of the inquirers nor does it commercially evaluate personal data or transmit it to third parties. In particular, this rules out the use of the inquirers' data to create comprehensive profiles, unlike the open DNS resolvers of large Internet companies.

**Evidence:** 1. template "affidavit" of [ ]  
as **attachment B3**.  
2. testimony of [ ], to be summoned via the defendant.  
3. Obtaining a written DNS technical  
Expert opinion.

#### *Neutrality*

The Defendant's open service, which is offered uniformly in 90 countries worldwide, can be configured as a DNS resolver by any Internet user by means of a corresponding setting on the terminal device. Use is free of charge and not associated with the acceptance of contractual terms. The Defendant treats all requests equally, regardless of the person making the request and the target of the request. The Defendant has no knowledge of the content offered under the domains to which it resolves the queries and cannot obtain such knowledge due to the



technical function of its service. It does not offer any other services and, moreover, has no contractual relationship with providers of offers on the Internet, such as websites. The defendant offers a completely neutral service.

- Proof:**
1. Private expert opinion of [ ] as **Annex B2.**
  2. testimony of [ ], to summon on the defendant.
  3. obtaining a written DNS technical Expert opinion.

*Protection against IT security threats*

The Defendant's service is characterized in particular by the fact that it offers the requesting parties a particularly high level of protection against IT security threats, so that malware, for example, cannot get onto the requesting parties' computers.

In order to protect requesters from IT security threats, the Respondent uses globally uniform filter lists containing domain names from which IT security threats emanate. The use of these filter lists results in the respective domains being inaccessible to all users of the Respondent worldwide. By preventing the Respondent from connecting to these domains at the earliest possible time, the IT security risks of its users are minimized, since a connection to these domains does not occur in the first place.

- Evidence:**
1. Private expert opinion of [ ] as **Annex B2.**
  2. Submission "affidavit" of [ ] as **Annex B3.**
  3. testimony of [ ], to be summoned via the defendant.
  4. Obtaining a written technical DNS Expert opinion.

The defendant receives these lists from external IT security service providers who maintain and keep updated lists of websites or servers that pose a threat to the security of Internet users' end devices because they contain malicious code. These may be sources of phishing, botnets, pharming, or malware, for example. The defendant works with established IT security service providers, including IBM X-Force, F-Secure, Abuse.ch or Switch, the Computer Emergency Response Team (CERT) that protects the Swiss university and banking network from cyberattacks.

- Evidence:** Screenshots of the partner page of the defendant as **attachment B6**, available at: <https://www.quad9.net/about/partners/>

The defendant implements these lists completely, unchecked and globally uniformly. The lists are based on a scoring of the external IT security service providers, are maintained by them and are updated dynamically, every minute. This is a key reason why inquirers select the defendant's service specifically.

- Evidence:**
1. private expert opinion of [ ] as **Annex B2.**



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2. testimony of [ ], to summon on the defendant.
3. Submission "affidavit" of [ ] as **Annex B3**.
4. testimony of [ ], to be summoned via the defendant.
5. obtaining a written technical DNS Expert opinion.

Because of this feature, public bodies, such as the City of London Police, also recommend the use of the defendant's service.

**Evidence:** Screenshots of the City of London Police release as **Exhibit B7**, available at:

[http://news.cityoflondon.police.uk/r/945/ibm\\_\\_packet\\_clearing\\_house\\_and\\_global\\_cyber\\_allia](http://news.cityoflondon.police.uk/r/945/ibm__packet_clearing_house_and_global_cyber_allia)

A limitation of the filtering of harmful offers to certain countries, to certain user groups or regions is neither intended nor necessary due to the nature of the listed offers. The worldwide equal treatment of list entries of harmful offers also explains that a functionality to differentiate list entries per country does not occur in the defendant's system. The implementation of a DNS blocking limited geographically to a certain territory is not possible by including an entry in the filter list.

**Evidence:**

1. private expert opinion of [ ] as **Annex B2**.
2. testimony of [ ], to summon on the defendant.
3. Submission "affidavit" of [ ] as **Annex B3**.
4. testimony of [ ], to be summoned via the defendant.
5. obtaining a written technical DNS Expert opinion.

### 5. effect of the DNS lock

The plaintiff is concerned with preventing the accessibility of certain destinations via which, according to its submission, objectionable files can be downloaded. Due to the technical circumstances of a DNS resolver service, the defendant is not able to block individual content.

**Evidence:**

1. private expert opinion of [ ] as **Annex B2**.
2. testimony of [ ], to summon on the defendant.
3. Submission "affidavit" of [ ] as **Annex B3**.
4. testimony of [ ], to be summoned via the defendant.
5. obtaining a written technical DNS Expert opinion.

Technically, blocking is therefore only possible at domain level (such as domain.de or abc.domain.de).

**Evidence:**

1. private expert opinion of [ ] as **Annex B2**.



2. testimony of [ ], to summon on the defendant.
3. Submission "affidavit" of [ ] as **Annex B3**.
4. testimony of [ ], to be summoned via the defendant.
5. obtaining a written technical DNS Expert opinion.

However, this necessarily means that all content and services under the domain in question will always be blocked. The requirement of the court order can only be implemented by completely blocking all requests to the [ ] and [ ] domains. This means that not only the web pages under this domain can no longer be called up, but also any other services that may have been set up, such as FTP for file exchange or an e-mail service linked to the domain name. As a result, a website operator can no longer be reached via any e-mail addresses set up under the domain in question. Blocking a domain by means of a DNS block is the most far-reaching way of making a domain inaccessible.

While other Internet service providers, such as host providers, can delete and block content or services with pinpoint accuracy, DNS services only have a binary choice of options, namely the entire accessibility or non-accessibility of a domain name, combined with the risk that legitimate services or content under the domain name will inevitably also remain inaccessible.

- Evidence:**
1. private expert opinion of [ ] as **Annex B2**.
  2. testimony of [ ], to summon on the defendant.
  3. Submission "affidavit" of [ ] as **Annex B3**.
  4. testimony of [ ], to be summoned via the defendant.
  5. obtaining a written technical DNS Expert opinion.

## **6. implementation of DNS blocking**

The implementation of the DNS blocking requested in the statement of claim affects the defendant in technical, legal, organizational and economic terms.

### **a) Initial situation**

To date, the Defendant's open service has been offered globally in a uniform manner in 90 countries. As described, every Internet user worldwide can use the defendant's service by entering the defendant's service as DNS resolver in the network settings. In the present case, the plaintiff requests a blocking of the domains in dispute with effect for the territory of the Federal Republic of Germany. This territorial limitation is not provided for in the defendant's system, and its implementation is only possible with considerable effort.

- Proof:**
1. Private expert opinion of [ ] as **Annex B2**.
  2. testimony of [ ], to summon on the defendant.
  3. obtaining a written technical DNS Expert opinion.



Insofar as the plaintiff refers to the paper of the eco association submitted with Annex K22 as evidence that "DNS blocking" is a cost-effective method to prevent the resolution of a domain name, the paper refers exclusively to the DNS resolver operated by an access provider. In the case of access providers, however, the question of territorial limitation, which is associated with the time-consuming determination of the location of the requestor, does not arise at all.

Access providers offer name resolution through their DNS resolvers exclusively to their contract customers. They therefore know their customers and who dials into their infrastructure from where. Access providers can therefore easily implement DNS blocking on a territorial basis, since they only receive requests from one country. For example, Deutsche Telekom's DNS resolver in Germany is used exclusively by its customers based in Germany. The defendant, on the other hand, offers its service worldwide, without regard to the location of the inquirer, about which it accordingly has no knowledge. From a technical and organizational point of view, setting up a DNS block limited to the territory of Germany represents a completely different and significantly greater challenge for independent DNS resolvers such as the defendant than for access providers.

- Proof:** 1. Private expert opinion of [ ] as **Annex B2**.  
2. testimony of [ ], to summon on the defendant.  
3. obtaining a written technical DNS  
Expert opinion.

**b) No equal treatment with IT security threat filtering.**

First, DNS blocking cannot be implemented by adding the disputed domain names to the security threat filter lists, as suggested by the Complainant.

- Evidence:** 1. private expert opinion of [ ] as **Annex B2**.  
2. testimony of [ ], to summon on the defendant.  
3. Submission "affidavit" of [ ] as **Annex B3**.  
4. testimony of [ ], to be summoned via the defendant.  
5. obtaining a written technical DNS  
Expert opinion.

This is technically a different issue. The filtering of IT security threats is based on maintained lists of IT security service providers that contain access prohibitions, access permissions and information on the probability of the existence of security threats (scores) and are also continuously updated by the IT security service providers, i.e. are dynamic. In contrast, the required DNS blocking is rigid and would have to be implemented in such a way that it always takes precedence over the rules of list-based, dynamic filtering.

- Proof:** 1. Private expert opinion of [ ] as **Annex B2**.  
2. testimony of [ ], to summon on the defendant.  
3. obtaining a written technical DNS  
Expert opinion.



Moreover, if the Defendant were to add other entries to the filter lists that do not pose an IT security threat, this would violate the integrity of the filter lists and damage the trust of the Defendant's requesters in the Defendant. This would devalue the unique selling point of Defendant's service - to provide the broadest possible protection against IT security threats through the use of precise filter lists that are as accurate and up-to-date as possible. Further, the lists used to enhance IT security would be "diluted," thereby eroding Defendant's service characteristic of enhancing the protection of requesters. Requestors of Respondent's service would not be able to discern whether access to a domain name cannot be established because it poses security threats or because it is a jurisdiction-specific block. This would massively damage both the feature of neutrality and the confidence of the inquirers in the IT security of the Respondent's service, with the consequence that inquirers of the Respondent would migrate to other DNS resolvers.

- Proof:** 1. Private expert opinion of [ ] as **Annex B2**.  
2. testimony of [ ], to summon on the defendant.  
3. obtaining a written technical DNS  
Expert opinion.

**c) Technical implementation of the requested DNS blocking.**

The jurisdiction-related blocking of domain names is not provided for in the Respondent's system. In order to implement the order obtained by the plaintiff, the defendant had to make an elaborate technical change in its system that allows domain names to be blocked for inquirers from the territory of the Federal Republic of Germany.

- Proof:** 1. Private expert opinion of [ ] as **Annex B2**.  
2. testimony of [ ], to summon on the defendant.  
3. obtaining a written technical DNS  
Expert opinion.

The technical changes required for this lead to considerable resource consumption in the affected technical infrastructure, to losses in computing power and to longer response times for all requests to the affected systems.

- Proof:** 1. Private expert opinion of [ ] as **Annex B2**.  
2. testimony of [ ], to summon on the defendant.  
3. obtaining a written technical DNS  
Expert opinion.

Recursive DNS resolvers can only perform the blocking of a domain name by setting up an appropriate filtering system that checks each request to the system and responds with an appropriate blocking command, if necessary. The Respondent must perform this computational operation for each request, in addition to the existing system of filtering IT security threats.

- Evidence:** 1. private expert opinion of [ ] as **Annex B2**.



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2. testimony of [ ], to summon on the defendant.
3. Submission "affidavit" of [ ] as **Annex B3**.
4. testimony of [ ], to be summoned via the defendant.
5. obtaining a written technical DNS  
Expert opinion.

The technical commands "SERVFAIL" and "NXDOMAIN" can be used to manipulate the domain name system so that DNS queries are not answered with the appropriate IP address but incorrectly with a blocking command.

- Evidence:**
1. private expert opinion of [ ] as **Annex B2**.
  2. testimony of [ ], to summon on the defendant.
  3. Submission "affidavit" of [ ] as **Annex B3**.
  4. testimony of [ ], to be summoned via the defendant.
  5. obtaining a written technical DNS  
Expert opinion.

The defendant implements the operative part of the order obtained by the plaintiff by responding to a DNS query for the disputed domain names with "SERVFAIL". This means that a DNS query is no longer answered correctly with the consequence that no more IP addresses are returned.

- Evidence:**
1. private expert opinion of [ ] as **Annex B2**.
  2. testimony of [ ], to summon on the defendant.
  3. Submission "affidavit" of [ ] as **Annex B3**.
  4. testimony of [ ], to be summoned via the defendant.
  5. obtaining a written technical DNS  
Expert opinion.

The block command "SERVFAIL" indicates that the processing of the query cannot be completed by the defendant's system. However, this does not block the request entirely, but passes it on to another recursive DNS resolver. Typically, users' network settings are configured in such a way that, after receiving a "SERVFAIL" response, they then search for a DNS resolver that can correctly answer the specific query.

- Evidence:**
1. private expert opinion of [ ] as **Annex B2**.
  2. testimony of [ ], to summon on the defendant.
  3. Submission "affidavit" of [ ] as **Annex B3**.
  4. testimony of [ ], to be summoned via the defendant.
  5. obtaining a written technical DNS  
Expert opinion.

In this respect, the implementation of DNS blocking results in requestors being redirected to recursive DNS resolvers that do not offer the protection against IT security threats that is provided by the Defendant's service.



- Evidence:**
1. private expert opinion of [ ] as **Annex B2.**
  2. testimony of [ ], to summon on the defendant.
  3. Submission "affidavit" of [ ] as **Annex B3.**
  4. testimony of [ ], to be summoned via the defendant.
  5. obtaining a written technical DNS Expert opinion.

The Respondent uses the "NXDOMAIN" blocking command for filtering IT security threats. Answering with "NXDOMAIN" means that the domain name does not exist, so the request is completely aborted. In this case, the DNS resolver gives a technically incorrect response, with the result that all services and protocols under the domain name are no longer accessible.

- Evidence:**
1. private expert opinion of [ ] as **Annex B2.**
  2. testimony of [ ], to summon on the defendant.
  3. Submission "affidavit" of [ ] as **Annex B3.**
  4. testimony of [ ], to be summoned via the defendant.
  5. obtaining a written technical DNS Expert opinion.

The defendant therefore uses the "NXDOMAIN" blocking command exclusively for IT security threats, as this is the only way to effectively contain them. This also corresponds to the expectations of the requesters for a neutral and secure service. Implementing the requested DNS blocking by means of a technically incorrect command would erode the confidence of the requesting parties in the service of the defendant.

- Evidence:**
1. private expert opinion of [ ] as **Annex B2.**
  2. testimony of [ ], to summon on the defendant.
  3. Submission "affidavit" of [ ] as **Annex B3.**
  4. testimony of [ ], to be summoned via the defendant.
  5. obtaining a written technical DNS Expert opinion.

As a result, the Respondent has to answer DNS queries about the disputed domain names with the command "SERVFAIL", combined with the risk that inquirers are redirected to another recursive DNS resolver that does not block IT security threats and does not prevent access to the disputed domain names.

## **7. effects on the defendant**

The implementation of DNS blocking has a significant impact on the Defendant's system architecture and its performance. The private expert and witness [ ], who already accompanied the conversion of a globally uniform to a geographically differentiated system in a project, describes this step as complexity of a new order of magnitude.



- Proof:** 1. Private expert opinion of [ ] as **Annex B2**.  
2. testimony of [ ], to summon on the defendant.

**a) Financial impact**

**aa) Server-side costs**

On the one hand, the defendant can no longer offer a globally uniform technical system. It is forced to create and permanently maintain an additional system for requests from within Germany, which must be equipped differently from systems outside Germany due to increased system requirements. As described above, unlike an access provider, which knows from where its customers dial into its infrastructure, the defendant does not know the inquirers and their location.

A multi-stage technical procedure is required to effect the blocking for inquirers from Germany. In the first step, the systems operated in Germany must check each DNS query to see whether it relates to one of the disputed domain names. If this is not the case, the queries are answered "normally". If this is the case, the DNS queries are separated out and examined further. In the second step, the system checks whether the queries originate from an IP address from around 25,300 IP address ranges listed by a commercial third-party provider in Germany. If this is the case, the "SERVFAIL" command is issued in response. If this is not the case, the request is then answered "normally". This leads to a multiplication of the arithmetic operations required to answer a query.

- Proof:** 1. Private expert opinion of [ ] as **Annex B2**.  
2. testimony of [ ], to summon on the defendant.  
3. obtaining a written technical DNS Expert opinion.

As the private expert and witness [ ] states in his written private expert opinion, from a technical point of view a doubling of the server capacities is required for the implementation of the requested DNS blocking.

- Proof:** 1. Private expert opinion of [ ] as **Annex B2**.  
2. testimony of [ ], to summon on the defendant.  
3. obtaining a written technical DNS Expert opinion.

One of the reasons for this is that in operation without DNS locks, queries and their responses are stored in a cache, so that if another query is made for the same domain name, the associated IP address does not have to be queried again via the DNS, but can be answered from the cache. Such a system can now also no longer be operated globally; it must be implemented in a territorially differentiated manner. Requests must then be routed to the appropriate cache, which also leads to additional complexity in troubleshooting, since this can no longer be done globally but must be performed on a country-specific basis.



- Evidence:**
1. private expert opinion of [ ] as **Annex B2**.
  2. testimony of [ ], to summon on the defendant.
  3. Submission "affidavit" of [ ] as **Annex B3**.
  4. testimony of [ ], to be summoned via the defendant.
  5. obtaining a written technical DNS Expert opinion.

The defendant currently has a minimal solution in place, but it is not sustainable.

The Defendant operates the following ten server locations in Germany, with the leading number describing the number of servers:

[ ]

Investments are required at each of these sites for a high-performance implementation of DNS blocking. Even independently of the implementation of the DNS lock, the defendant is expanding its computer capacities as the number of queries to the system increases. However, the additional computer capacity required for this purpose is now being consumed by the implementation of the requested DNS blocking, including the geographical allocation of queries, so that the expansion of the server environment is required sooner than expected. In the expansion of the server environment, 20% of the costs are accounted for by the additional requirements due to the establishment of the DNS lock obtained alone.

The associated investments can be broken down as follows (with 20% each for setting up DNS blocking):

One-off acquisition, delivery, installation, configuration and data center costs of around EUR [ ] are to be estimated per system, followed by ongoing costs of EUR [ ] per month. For the sake of completeness, it should be noted that some of the costs, in particular the operating costs, are also incurred if the hardware is provided by a "donor" and system components that are not affected by the implementation of the resolution, such as routers or switches, are not taken into account in the calculation.

- Evidence:**
1. Interrogation of the managing director of the defendant .
  2. Obtaining a written technical DNS Expert opinion.

In total, this means [ ] EUR acquisition costs and then [ ] EUR per year in operating costs. 20% of these costs are for processing the DNS locks. With a conservatively estimated growth of 1.5% per week, an increase to 30 servers is required within 2022, i.e. a net growth of 16 servers, which corresponds to investments of [ ] EUR ([ ] EUR x 16), of which 20% is [ ] EUR. The proportional operational costs amount to [ ] EUR ([ ] EUR x 12 x 16 = [ ] x 20%).



Thus, the cost of implementing DNS blocking in 2022 is EUR [ ] for technical operations only (EUR [ ] + EUR [ ]).

- Evidence:**
1. Interrogation of the managing director of the defendant.
  2. Testimony of [ ], to be summoned through the Respondent.
  3. Obtaining a written technical DNS Expert opinion.

#### **bb) Development expenses / administrative expenses**

In addition to the aforementioned costs of operation on the hardware side, there are also the costs of programming the DNS locks, which are not currently provided for on the software side either.

In order to convert the system to a high-performance implementation of DNS blocking, the software must be further developed in the front and back ends. The development and maintenance of the system, as well as the completion of administrative tasks, requires the hiring of an additional developer and system administrator. Support staff must also be trained on the new technology. Furthermore, processes and standards have to be introduced that are not technical but legal in nature. This is estimated to cost at least [ ] EUR in the first year and then [ ] EUR - [ ] EUR per subsequent year.

- Evidence:**
1. Interrogation of the managing director of the defendant.
  2. Obtaining a written technical DNS Expert opinion.

#### **b) Performance losses**

In addition to the financial losses, there are also performance losses, since the response time behavior of the system deteriorates with each additional computing operation. However, with DNS resolvers in particular, speed is a decisive factor for their acceptance and use.

- Evidence:**
1. private expert opinion of [ ] as **Annex B2**.
  2. testimony of [ ], to summon on the defendant.
  3. Submission "affidavit" of [ ] as **Annex B3**.
  4. testimony of [ ], to be summoned via the defendant.
  5. obtaining a written technical DNS Expert opinion.

The implementation of DNS blocking requires considerable computing capacity, so that the response to queries slows down accordingly. During a one-hour comparative performance test, disabling the DNS lock set up to implement the resolution order for a single server resulted in an immediate increase from an average of 2700 to 3300 responses per second. At the same time, the CPU load decreased by 10-15% during the test period compared to an equivalent load in the hour before. This shows that it consumes about 10-15% of the processing power



of a representative server and results in a lower number of responses per server, which can lead to aborted requests during high load.

In the course of regular operation, process restarts are also frequently necessary to restore a server in the event of faults. The implementation of DNS blocking has resulted in the time for a process restart roughly tripling. By the time the restart is complete, the server in question is unable to serve ("drop") between 12.5% and 33% of the total traffic. For a representative server with the implemented lock in place, the inclusion of DNS lock increases the time to validate the configuration and restart the process from 0.203 seconds to 0.605 seconds. This resulted in a tripling of aborted requests during troubleshooting, which can negatively impact the perception of service reliability for active servers.

**Evidence:** Testimony of [ ], to be called on the defendant.

This can be illustrated by the fact that the system in Frankfurt am Main experienced a deterioration in system performance and capacity bottlenecks after the implementation of the resolution order and the resulting additional load on the system not designed for this purpose. Server capacities had to be withdrawn from other locations. This shows that the implementation of the DNS block is already associated with considerable expense and a loss of stability for the defendant, which impairs the attractiveness of the defendant's service and thus threatens its competitiveness.

In this respect, the implementation of the order leads to a considerable burden for the defendant, which endangers its competitiveness and thus its existence. Globally active companies must therefore take care not to apply court orders across the board.

**Proof:** 1. Private expert opinion of [ ] as **Annex B2**.  
2. testimony of [ ], to summon on the defendant.  
3. obtaining a written technical DNS Expert opinion.

## **II. Regarding the domains "[ ]" and "[ ]"**

### **1. to the website under the "[ ]" domain**

The plaintiff alleges that a website is operated under the domain "[ ]" on which music and radio play albums are offered for download without the consent of the rightholders via hyperlinks that refer to sharehosting services. The defendant declares itself ignorant of the content of the website and of the question of whether content is made available for download by sharehosting providers without the consent of the rights holders. The Defendant operates a public DNS resolver that can be used by any Internet user worldwide. The Defendant has no knowledge of the websites or their content operated under the domain names that are resolved into IP addresses by means of its DNS resolver.

**Evidence:** 1. private expert opinion of [ ] as **Annex B2**.



2. testimony of [ ], to summon on the defendant.
3. Submission "affidavit" of [ ] as **Annex B3**.
4. testimony of [ ], to be summoned via the defendant.
5. obtaining a written technical DNS Expert opinion.

Nor can the defendant take note of this content in the normal course of business; its service processes queries about the more than 350 million domains in the DNS, regardless of the websites offered under the domain names.

**Evidence:** Testimony of [ ], to be called on the defendant.

The expert opinion of proMedia GmbH submitted by the plaintiff (Annex K5) does not allow the conclusion that the contents of the websites "are almost exclusively unauthorized publications of protected audio and video recordings" (contrary to the statement of claim, p. 7). The expert opinion does not contain any statement about the legal situation of the examined contents. The subject of the expert opinion is the relationship of copyrightable content to public domain or unknown works (K5, p. 3). Accordingly, the result of the expert opinion does not refer to an allegedly non-authorized publication of this content, but solely to its potential protectability (K5, p.9). In addition, the expert opinion does not explain the methodology used to select the sample and does not take into account that the website in dispute also contains other content, such as a discussion forum, in addition to links to sharehosters.

We further clarify that the infringement alleged by the plaintiff relates solely to URLs concerning the domain name "[ ]". The plaintiff does not present any infringements under the domain name "[ ]".

The defendant denies with ignorance that the share host "[ ]" is known for not reacting to blocking requests. The defendant also denies with ignorance that the service "shareplace.org" was requested to delete the disputed sound recordings. The plaintiff does not have documentation of this deletion request.

## **2. on the recommendation of the Clearing House for Copyright on the Internet (CUII)**

The recommendation of the Review Board of the Clearing House for Copyright on the Internet (CUII) on the implementation of a DNS blocking with regard to the domain [ ] also only came to the attention of the defendant after the decision order was issued. The Respondent disputes the statement of the Review Panel that there is a clear infringement by the provision of links by the operators of the disputed website.

In order to upload information to the [ ] website, it is necessary for the user to set up an account - with a user name and password - and provide an e-mail address. A download link uploaded by a user is then placed online. According to the [ ] website's registration terms, users are prohibited from committing copyright infringements via the website.



### 3. to the registry of ".to" domains

Domains ending in ". to", the country code extension for Tonga, are administered by Tonic Domain Corporation, which is based in the USA. According to their website, the registry can be reached at the following address: Tonic Domains Corp, P.O. Box 42, Pt San Quentin, CA 94964, U.S.A.

**Evidence:** Screenshot from the Tonic registry website, as **Exhibit B8**, available at: <https://www.tonic.to/faq.htm>

Registry Tonic writes on its website:

"...any activities deemed by Tonic to be inappropriate or illegal may be removed from the .TO zonefile without notice to the registrant."

The registry thus reserves the right to prevent the termination of an infringing domain.

**Evidence:** Screenshot from the Tonic registry website as **Exhibit B8**, available at: <https://www.tonic.to/faq.htm>

Tonic maintains a contractual relationship with the domain owner of "[ ]" and, in this respect, can also implement contractual sanctions "at the source" and thus globally prevent the functionality of the domain name.

Tonic maintains a web-based facility that lists domain name information similar to Whois, without disclosing the customer's name. With the entry into force of the GDPR, a large number of registries worldwide have changed their practice and no longer publish personal data in the publicly viewable Whois database. However, the owner data can be requested via separate inquiries in case of provable legal disputes.

When registering a domain name, Tonic collects contact and payment information about its customers.

**Evidence:** Screenshot from the Tonic registry website as **Exhibit B8**, available at: <https://www.tonic.to/faq.htm>

The "FAQs," the registry's frequently asked questions and answers, also state:

*"When you attempt to register a name that is already registered, the web page that is returned has a link that sends your contact email address to the registrant. Whether they choose to reply to your email or not is up to them."*

**Evidence:** Screenshot from the Tonic registry website as **Exhibit B8**, available at: <https://www.tonic.to/faq.htm>



If an attempt is made to register a domain name that has already been registered, the e-mail address via which the inquirer can be contacted will be sent to the domain owner upon request, with the request to be contacted. For the fact that the plaintiff has made use of this possibility, nothing has been proven either.

That contacting registries and registrars can be quite promising is shown by the case regarding the domain names "serienstream.sx" and "serien.sx", which were suspended by the responsible registrar and thus became unreachable.

**Evidence:** Testimony of the undersigned.

### **III. on pre-litigation correspondence**

Neither the letter of advice from the plaintiff's legal representative dated March 23, 2021 (Exhibit K6) nor the warning letters dated March 26, 2021 (Exhibit K9) and April 8, 2021 (Exhibit K11) were transmitted to the defendant in such a way that the defendant was able to take note of them.

The plaintiff's attorney sent the letter dated 03/26/2021 as an email attachment in PDF format with the file name "pa8953241leergeg.pdf." to the e-mail address support@quad9.net. The e-mail itself contained, in addition to a footer, only the text "For your immediate attention, Attention deadline matter!"

**Evidence:** E-mail of 26.03.2021 in copy as **attachment B9**.

The fact that the e-mails were signed by the plaintiff's attorney is not disputed.

[support@quad9.net](mailto:support@quad9.net) is an e-mail address set up exclusively for technical inquiries about the Defendant's service. Emails to this address are sent to a ticket system from the manufacturer Zendesk. The Zendesk product uses spam filters that cannot be configured or turned off by users. For cases with legal implications, the Defendant operates an industry-standard e-mail address (RFC2142) at abuse@quad9.net, which is specifically set up for abuse reports, i.e., also for notices of illegal conduct. In the e-mail inbox provided by the defendant for Abuse cases, there is no significant spam filtering, so that the knowledge of the mail via this channel is to be assumed as safe. The Defendant takes Abuse reports seriously and messages received via this channel are forwarded directly to management for processing.

**Proof:**

1. Screenshots from the Whois-RWS, ipinfo and ipasn websites as **Exhibit B10**, available at: <https://www.peeringdb.com/net/17212EPAq>
2. Testimony of [ ], to be summoned through the Respondent.
3. Obtaining a written technical DNS Expert opinion.



The responsible employees are also trained not to open e-mail attachments from unknown senders. This procedure is part of recognized security certifications (IT-Grundschutz, ISO 27001) and corresponds to the general recommendations of experts, such as the German Federal Office for Information Security or Heise Security:

"The BSI therefore strongly advises against opening the attachment of emails from unknown senders."

**Proof:** Screenshot of the BSI website on the subject of infected systems as **Annex B11**,

available at: [https://www.bsi.bund.de/DE/Themen/Verbraucherinnen-und-Verbraucher/Informationen-und-Empfehlungen/Cyber-Sicherheitsempfehlungen/Infizierte-Systeme-bereinigen/infizierte-systeme-bereinigen\\_node.html](https://www.bsi.bund.de/DE/Themen/Verbraucherinnen-und-Verbraucher/Informationen-und-Empfehlungen/Cyber-Sicherheitsempfehlungen/Infizierte-Systeme-bereinigen/infizierte-systeme-bereinigen_node.html)

"Therefore, the most important principle for safe email use is to never open a file attachment that you haven't requested."

**Proof:** Screenshot website Heise Security about file attachments

as **Exhibit B12**, available at:

<https://www.heise.de/security/dienste/Dateianhaenge-472901.html>

The defendant denies that the e-mails dated 03/23/2021 and 03/26/2021 were provided with a signature that clearly identifies the attorney of record as the sender. This is not evident from the defendant's documentation.

The plaintiff also provides no evidence that it sent the warning letter dated March 26, 2021 to the defendant by mail. The defendant did not receive such a letter by mail.

**Proof:**

1. Testimony of [ ], to be summoned via the defendant.
2. Testimony of [ ], to be summoned through the Respondent.

The defendant first became aware of the asserted infringement of rights through service of the order.

There can be no question of the defendant thwarting access. Finally, the plaintiff succeeded in having the action served at the defendant's registered office.

#### **IV. No sufficient recourse to parties closer to the offence**

The plaintiff makes a claim against the defendant without first having made sufficient efforts to end the asserted infringement against parties closer to the act.

##### **1. Failure to make sufficient efforts to identify the operators of the website**



The plaintiff claims that it cannot determine the identity of the operator of th[ ] website because there is no imprint and no Whois entry. A blocking request via the "board administrator" of "board.[ ]" and requests for information to the services "PopMyAds" and "Buy Me a Coffee" were unsuccessful.

The defendant declares itself ignorant of the question of whether the "board administrator" is capable of blocking. It is undisputed that the plaintiff did not attempt to determine the identity of the operators of the website via the "Board Administrator". The defendant does not deny with knowledge that the letters were sent to the services "PopMyAds" and "Buy Me a Coffee". The plaintiff does not state the communication channel by which it attempted to send the letters.

The attempts described by the plaintiff to contact the operators of the website and the services mentioned are obviously not serious. According to the statement of claim, it was not the plaintiff but proMedia Gesellschaft zum Schutz geistigen Eigentums mbH that requested the "board administrator" of the forum under the disputed domain names to delete infringing content on March 23, 2021. The plaintiff itself did not make a priority claim against the operators. The proMedia GmbH sent the letter of notice to the "board administrator" of "[ ]" on the same day as the plaintiff's legal representative sent the letter of notice to the defendant. The claim against the defendant and the perpetrator of the asserted infringement thus occurred simultaneously. In this context, as a precautionary measure, the far too short deadline between the notice and the warning is criticized.

The plaintiff has other options available to it for determining the identity of the operators of the website in dispute, which it indisputably did not take. It is undisputed that the plaintiff did not involve state investigative authorities or private investigators to uncover the identity of the operators of the website. It is also undisputed that the plaintiff itself did not contact the website operators or the "board administrator." Furthermore, it is undisputed that the plaintiff did not request information from the registry of the domains, although the registry stores the data of its customers and opens a possibility to contact them by mail.

The plaintiff's actions suggest that its primary goal was and is to claim damages from the defendant. At the very least, it must be assumed that any letters of notification sent to the other parties involved were merely pro forma and not issued in a serious effort to remedy the situation or to give the allegedly contacted parties sufficient opportunity to remedy the situation.

## **2. No sufficient efforts to terminate the infringement by parties closer to the offence**

The host provider of the website in dispute can effectively and completely terminate the claimed infringement by deleting the website. The defendant denies with ignorance that the host provider Infinium UAB is a "bulletproof hoster". The link to the website of the "Darknet Forum", which the plaintiff cites as evidence, does not exist. The defendant denies with ignorance that the lawyer's letter (K15) was received by the host provider.



According to the applicant's submission, the host provider's place of business is in Vilnius, i.e. in the EU Member State Lithuania. According to Art. 3 of the Enforcement Directive, Lithuanian law requires an effective legal remedy to enforce intellectual property rights against a host provider. It is undisputed that the plaintiff made no attempt to take legal action against the host provider.

It is also undisputed that the plaintiff did not contact the registry Tonic, neither in order to obtain information about the identity of the operators of the disputed website, nor in order to have them de-connect the disputed domain names. It is further undisputed that the Complainant did not attempt to identify the registrar of the disputed domain. A registrar is a service that performs registrations of domain names. Many registries allow the registration of domain names exclusively through registrars. The Complainant does not submit whether in the present case the domain names were registered via a registrar and whether a registrar was contacted in order to prevent the domain names from being dissolved, if necessary, or to have the domain names deleted.

## **B. Legal assessment**

The action is inadmissible for lack of specificity of the claims and otherwise unfounded.

### **I. Action inadmissible**

#### **1. pleas in law unspecified**

The applications for injunctive relief are inadmissible for lack of sufficient specificity insofar as the plaintiff is seeking injunctive relief with respect to unspecified domain names, which the plaintiff reserves the right to specify.

Pursuant to Section 253 (2) no. 2 of the German Code of Civil Procedure (ZPO), an application for an injunction must be worded in such a specific manner that the subject matter of the dispute and the scope of the court's power of review and decision are clearly outlined and the defendant can identify what it is intended to defend against and which obligations to cease and desist result from a judgment following the application for an injunction; the decision as to what the defendant is prohibited from doing may not, in the final analysis, be left to the enforcement court (st. Rspr.; cf. BGH ZUM-RD 2008, 225, 227).

The main and auxiliary requests do not meet these requirements. In both its main and auxiliary requests, the plaintiff demands the blocking of domain names that are not further individualized and are to be determined by the plaintiff in the future, under which the currently named Internet service "[ ]" can be accessed. The defendant cannot be expected to be exposed to enforcement measures from a title, the scope and range of which depend on the changing design of a complex Internet service and the concretization of which is left to the discretion of the plaintiff. The decision as to what the defendant is prohibited from doing would not result from the operative part of the judgment; it would be incumbent upon the plaintiff. In the present proceedings, the defendant has no possibility of defending itself exhaustively against this,



since it cannot examine the prerequisites of the asserted claim for injunctive relief with regard to the domain names to be determined by the plaintiff. This is always necessary for the blocking of a domain, since the assessment of the reasonableness of the blocking measure requires, according to the case law of the Federal Court of Justice, an overall consideration of all the content that can be accessed under the domain name and an unsuccessful action against parties closer to the offence. Both the content and the parties involved, e.g. the host provider, the registry and the registrar, may differ from website to website (BGH, GRUR 2016, 258 - Störerhaftung des Access Providers, marginal no. 55). Unsuccessful action against parties closer to the offence in one case does not mean that action against other parties closer to the offence in the case of other domain names lacks the prospect of success from the outset. On the contrary: The successful action against the registrar of the domain names "serienstream.sx" and "serien.sx" shows that the recourse to parties closer to the infringement in the case of another domain name could effectively end the infringement.

The main and auxiliary requests are also vague because they go beyond the scope of the substantive claim for injunctive relief. The plaintiff cannot assert a claim for injunctive relief based on the defendant's "Stoererhaftung" (Breach of Duty of Care) for domain names that are not specified in more detail, since such a claim for injunctive relief requires the violation of verification obligations that depend on the circumstances in the individual case. This is not possible with the abstract naming of all domain names under which a service may be hosted in the future. Any "Stoererhaftung" (Breach of Duty of Care) on the part of the defendant does not arise at the moment when the plaintiff "informs" it of a domain name. The domain-related injunctive relief has further prerequisites that must be examined in each individual case, such as the presentation of unsuccessful claims against parties closer to the act, e.g. the host provider of the respective website (BGH, judgment of October 15, 2020, I ZR 13/19, marginal no. 35).

The main claim is also vague, as the request for injunctive relief formulated by the plaintiff misses the asserted form of infringement (BGH, GRUR 2013, 370 marginal no. 43 - Alone in the Dark). The application refers to the perpetration of a public disclosure by the defendant; the grounds for the action are based exclusively on liability as a "Stoerer" (interferer).

Insofar as the plaintiff is seeking the blocking of the domain name "[ ]," the action is inconclusive. This is because the plaintiff is exclusively claiming infringements under the domain name "[ ]".

## **2. no need for legal protection with regard to the domain "[ ] .sx**

The plaintiff is seeking, among other things, injunctive relief and a ban on the use of the domain "[ ] .sx". In this respect, the plaintiff lacks the legal protection requirement. The plaintiff claims to have obtained the disconnection of this domain name by taking legal action against the registrar (statement of claim, p. 14). Due to the disconnection, the DNS resolver of the defendant cannot resolve the domain name into an IP address.



## **II. action unfounded**

The action is unfounded. The plaintiff is not entitled to the asserted injunctive relief and blocking claims against the defendant.

### **1. no right of action**

The copy submitted as Annex K21 is not sufficient to establish a presumption pursuant to Sections 85 (4), 10 (1) UrhG. It is not recognizable that the photograph is the back cover of the music album in dispute. Neither the name of the artist nor the name of the album are evident from the photograph, so that it is not possible to infer ownership of the rights to the disputed music album from the P notice visible there, especially since the issue in this case is not the physical distribution of the sound carrier, but an alleged infringement of the right to make the disputed sound recordings available to the public.

### **2. service of the defendant is subject to liability privilege pursuant to Section 8 (1) TMG**

Liability of the defendant for injunctive relief is excluded pursuant to Section 8 (1) sentence 2 TMG. The defendant is a service provider within the meaning of Section 2 No. 1 TMG and can invoke the liability privilege pursuant to Section 8 (1) TMG, alternatively in analogous application.

#### **a) Service provider, § 2 No. 1 TMG**

The respondent is a service provider within the meaning of Section 2 No. 1 TMG. This follows from the wording of the provision, the relevant provisions of EU law and the case law of the Federal Court of Justice.

According to Section 2 No. 1 of the German Telemedia Act (TMG), a service provider is any natural person or legal entity that makes its own or third-party telemedia available for use or provides access to such use. The provider's function of enabling the customer to use telemedia alone is sufficient for classification as a service provider (Spindler/Schuster/Ricke, 4th ed. 2019, TMG § 2 no. 2). The defendant provides access to the use of telemedia and is therefore already to be classified as a service provider according to the wording.

The term "service provider" in Section 2 No. 1 of the German Telemedia Act (TMG) is based on the E-Commerce Directive (Directive 2000/31/EC, hereinafter referred to as ECD) and is to be interpreted uniformly as an autonomous term under European Union law. In Art. 2 lit. b of the EC Directive, the term "service provider" is defined as any natural or legal person offering an information society service. The term "information society service" is in turn legally defined in Art. 1(1)(b) of Directive (EU) 2015/1535 as "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient". According to the relevant provisions of EU law, the classification as a "service provider" is therefore not dependent on the technical design of the service, the only decisive factor is that the provider provides a service on individual demand. This applies to the service of the defendant. The defendant provides a service on individual request of its users, which consists of the resolution



of the domain into a numeric IP address and its transmission. The fact that the service is free of charge is irrelevant for this (ECJ, judgment of September 15, 2016, Case C-484/14 - McFadden, paras. 41, 43). The service is also not comparable to any of the services included in the list of examples of services that are not information society services in Annex 1 to Directive (EU) 2015/1535.

This result is consistent with the case law of the Federal Court of Justice on the interpretation of the term "service provider". According to this case law, the service provider must enable the dissemination or storage of information by means of his instructions or power over computers and communication channels and must appear to the outside world as the provider of services (BGH, judgment of October 15, 2020 - I ZR 13/19, marginal no. 16 with reference to Spindler in Spindler/Schmitz, TMG, 2nd ed. § 2 marginal no. 28). Although the plaintiff correctly cites this standard, it does not subsume under this standard. This obviously applies to the service of the defendant: The defendant operates computers in its dominion and disseminates information by passing on DNS queries. For its users, the defendant acts as a provider of services to the outside world.

From the aforementioned Union law requirements (provision of an individual service on demand) and the interpretation of the BGH, the difference between the service of the defendant and those of a registrar or the Admin-C becomes clear. The BGH does not classify these as service providers, as they are not involved in the technical provision of access itself, but only once, through the administrative processing of the domain registration, in the creation of the accessibility of a website (BGH, judgment of 15.10.2020 - I ZR 13/19, para. 16 f., 28). This is precisely not the case with the defendant, which provides an individual service each time a website is called up and is thus continuously involved in providing access.

Insofar as the defendant refers to the decision of the Cologne Higher Regional Court (OLG), GRUR 2021, 70 para. 99, we clarify that the passage cited by the plaintiff does not refer to the interpretation of the term "service provider" within the meaning of Section 2 no. 1 of the German Telemedia Act (TMG), but to the interpretation of the liability privilege of Section 8 of the TMG. This in turn presupposes the applicability of the TMG and a classification of the DNS resolver service of the defendant in the proceedings there.

#### **b) Defendant is according to § 8 Abs.1 2. alt. TMG liability privileged**

The DNS resolver service of the defendant falls under the liability privilege pursuant to § 8 para. 1 2nd alt. TMG.

##### **aa) Access switching by the DNS resolver service of the defendant**

Pursuant to Section 8 (1) sentence 1 of the German Telemedia Act (TMG), service providers are not responsible for third-party information which they transmit in a communications network or to which they provide access, subject to the conditions set out in Sections 1 - 3 below. The service of the defendant fulfills the requirements according to § 8 para. 1 sentence 1 2nd alt TMG. The resolution of domain names into IP addresses by the service of the defendant constitutes an access mediation in the aforementioned sense. As an independent DNS



resolver, the Respondent provides a service which gives its users access to the information held under the domain names queried in each case.

It is not demonstrated or evident that the term "provision of access" within the meaning of Section 8 (1) sentence 1 2nd alternative of the German Telemedia Act (TMG) must be understood narrowly. TMG must be understood narrowly in the sense that it only covers the direct opening of access to certain information. The term "mediation" expresses linguistically already that also such contributions, which do not open the access directly, but make possible by mediation, are to be privileged. This also results from the systematics of the alternatives "transmitting information" (Section 8 (1) sentence 1 1st alt. TMG) and "providing access" (Section 8 (1) sentence 1 2nd alt. TMG). The alternative of providing access does not therefore require the physical transmission of information, otherwise it would not have an independent scope of application alongside the alternative of transmitting information. If, as in the present case, a chain of service providers is used to provide access to information, in which each service provider automatically provides access to the next service provider, all service providers in this chain are privileged under Section 8 of the German Telemedia Act (MüKo StGB, 3rd ed. 2019, Vorbem. Zu § 7 TMG Rn. 49).

In addition, Section 8 (1) 2nd alt. TMG, which implements Art. 12 EC Directive, must be interpreted in conformity with the Directive to the effect that the provision of access to a communications network is sufficient for the liability privilege to apply. According to Art. 12 (1) EC Directive, services that "transmit information in a communications network [...] or provide **access to a communications network** [...]" are subject to the liability privilege. The EU law provision thus clarifies that the provision of access to a third-party communications network, and not the provision of access to the information itself, triggers the liability privilege for access mediation services. Thus, it is not only the provision of access to information that is privileged, but also the provision of access to the communications networks upstream of the information (also Spindler, CR 2022, 319 para. 2). This is the case with the defendant, which is indisputably involved in providing access to the DNS.

The sense and purpose of the exclusion of liability pursuant to Art. 12 ECommerce Directive and Section 8 (1) TMG also require the application of the exclusion of liability to the defendant's service. Pursuant to recital 42 of the E-Commerce Directive, the exclusion of liability under Article 12 of the EC Directive serves to protect service providers who merely provide a technical infrastructure but have no control over the information they transmit or to which they provide access. This is intended to ensure that service providers who are basically approved and technologically neutral are not threatened by excessive liability risks. These teleological considerations apply to DNS resolvers whose business model consists of providing a technical service central to the functioning of the Internet and who have no control over the information to which they provide access.

**bb) European legislator confirms applicability of liability privilege for "pure pass-through" to DNS resolvers**



With the adoption of the Digital Services Act (DSA), the European legislator has now expressly confirmed its legal opinion that DNS resolvers fall under the liability privilege for pure transit services. The European legislator has incorporated the liability privileges of the E-Commerce Directive into the DSA. In the recitals, the legislator clarifies that DNS resolvers fall under the liability privilege for pure transit services. The corresponding recital 27a states:

"(27a) Intermediary services span a wide range of economic activities which take place online and that develop continually to provide for transmission of information that is swift, safe and secure, and to ensure convenience of all participants of the online ecosystem. For example, 'mere conduit' intermediary services include generic categories of services, such as internet exchange points, wireless access points, virtual private networks, domain name system (DNS) services and resolvers, top-level domain name registries, registrars, certificate authorities that issue digital certificates, voice over IP and other interpersonal communication services, while generic examples of 'caching' intermediary services include the sole provision of content delivery networks, reverse proxies or content adaptation proxies. Such services are crucial to ensure the smooth and efficient transmission of information delivered on the internet. [...] Intermediary services may be provided in isolation, as a part of another type of intermediary service, or simultaneously with other intermediary services. Whether a specific service constitutes a mere conduit, caching or hosting service depends solely on its technical functionalities, that might evolve in time, and should be assessed on a case-by-case basis." (emphasis added by the undersigned, available at: <https://data.consilium.europa.eu/doc/document/ST-9342-2022-INIT/x/pdf>).

According to the intention of the European legislator, this is not a constitutive legal change, but a clarification of the liability privileges of the E-Commerce Directive. Accordingly, the introductory recital 27 states that it "**should be recalled** that all services, including technical support functions for the simplification of the logical architecture underlying the Internet, including DNS services, may benefit from a liability privilege. " (emphasis added by the undersigned).

### **cc) Use of filter lists does not lead to loss of liability privilege**

The privilege under Section 8 (1) of the German Telemedia Act does not cease to apply because the defendant uses filter lists (contrary to the statement of claim, p. 17). The defendant's service also meets the other requirements of Section 8 (1) sentence 1 nos. 1 - 3 TMG, namely that it does not initiate the transmission, does not select the addressee of the transmitted information and does not select or modify the transmitted information.

The ECJ has ruled that the use of voluntary measures to combat infringements by service providers may not lead to the loss of the liability privileges of the E-Commerce Directive (ECJ, judgment of 22.6.2021, C-682/18 and C-683/18 - Youtube/Cyando, para. 109). The ECJ has clarified that the voluntary application of technical measures by the service provider to combat infringements does not mean that the service provider would be excluded from the liability privilege pursuant to Article 14 of the E-Commerce Directive (ECJ loc. cit.). Accordingly,



voluntary technical measures to avert dangers by service providers pursuant to Section 8 of the German Telemedia Act (TMG) cannot lead to a loss of the liability privilege.

**dd) Alternatively: Analogous Application of Section 8 TMG to DNS Resolvers**

Assuming that Section 8 of the German Telemedia Act is not directly applicable to DNS resolvers, an analogous application of Section 8 of the German Telemedia Act to DNS resolvers is required. This follows from the comparison with the treatment of operators of domain name servers, which according to the prevailing opinion fall within the scope of § 8 TMG or Art. 12 E-Commerce Directive (Spindler, CR 2022, 319, para. 11; BeckOK IT-Recht/Sesing, 5th ed. Jan. 1, 2022, § 8 TMG para. 18; Hoeren/Sieber/Holznel, Handbuch Multimediarecht, 57th ed. 2021, part 18.1. marginal no. 65). Domain name servers resolve the domain names requested via the DNS resolver into the associated IP address, which the DNS resolver in turn transmits to the requester.

This process is purely an intermediary service that is subject to the liability privilege pursuant to Section 8 (1) TMG (Spindler, loc. cit., para. 11). DNS resolvers must participate in this privilege as technically necessary auxiliary services. The purpose of Section 8 of the German Telemedia Act is to exempt service providers from liability who merely provide a technical infrastructure but have no control over the information they transmit or provide access to. According to this telos, auxiliary services as part of the access mediation must also be privileged from liability according to § 8 TMG or Art. 12 ECRL. By mediating between requesters and domain name servers, DNS resolvers fulfill an essential function in the DNS, enabling requesters to find websites and thus to use the Internet in a socially appropriate manner, without having control over the information conveyed in the process.

Excluding ancillary services such as DNS resolvers from the liability privilege under Art. 8 TMG or Art. 12 (1) ECRL would also lead to inconsistencies in interpretation. As already explained, access providers also regularly operate recursive DNS resolvers. If the operation of the DNS resolver were excluded from the technical facts of life of access provision, the privileged liability for access providers under Article 8 (1) of the Telemedia Act would come to nothing. This is because access providers would then not be liable in their capacity as access providers, but they would be liable in their capacity as providers of a DNS resolver for legal infringements by third parties.

In the decision cited by the plaintiff, the Cologne Higher Regional Court rejects the application of Section 8 of the German Telemedia Act to a DNS resolver service because this provision cannot be interpreted "extensively" as an "exceptional privilege" (statement of claim, p. 16). In doing so, the Cologne Higher Regional Court firstly fails to recognize that there is no need for an "expansive" interpretation, since DNS services already fall under Section 8 of the German Telemedia Act according to the wording and the systematics. Second, there is no general interpretation guideline that liability privileges of the E-Commerce Directive are to be interpreted narrowly. Rather, as *Spindler* correctly points out, the distinction between active and passive, purely technically active service providers developed by the ECJ for host providing also argues in favor of subsuming technical support functions under Section 8 of the German Telemedia Act in the area of access providing (Spindler. CR 2022, 319, marginal no.



15). This corresponds to the technical openness of the liability exemptions of the E-Commerce Directive and the clarification of the European legislator in recital 27 to the DSA that technical support services are also covered by the liability privileges.

### **ee) Scope of the liability privilege**

Nor can the defendant be held liable on the basis of Section 7 (3) sentence 1 of the German Telemedia Act (TMG) (contrary to the statement of claim, p. 17). § Section 7 (3) sentence 1 of the German Telemedia Act (TMG) does not constitute a breach of the liability privilege pursuant to Section 8 TMG and does not contain an independent blocking claim. The provision clarifies that even in the case of non-liability pursuant to Sections 8 - 10 TMG, blocking obligations under general laws or on the basis of judicial or official orders remain unaffected. In the course of the 3rd TMG Amendment Act, the legislator clarified with the introduction of Section 8 (1) sentence 2 TMG that the liability privilege for service providers within the meaning of Section 8 TMG also includes removal and injunction claims and that "Stoererhaftung" (Breach of Duty of Care) is abolished in this respect. The plaintiff can only assert blocking claims against the defendant under the positive legal requirements of Section 7 (4) of the German Telemedia Act. These are not given in the present case (see below, B.II. 5.).

### **3. no interferer liability**

Moreover, the prerequisites for the defendant's liability as a "Stoererhaftung" (Breach of Duty of Care) are not met.

#### **a) No adequate-causal contribution by the defendant to making infringing content available to the public**

The provision of the defendant's service does not constitute an adequate-causal contribution to the making available to the public of the sound recordings in dispute (contrary to the statement of claim p. 17 et seq.). In the present case, the making available to the public has been completed even without a contribution by the defendant. The relevant act of exploitation is the making available of an object of protection for retrieval, which in the case of Internet matters is realized, among other things, as soon as the object of protection can be retrieved on a website. The actual retrieval of the work is irrelevant (Wandtke/Bullinger, Urheberrecht, 5th ed. 2019, § 19a marginal no. 10). The act of making the work available to the public pursuant to Section 19a UrhG is thus fulfilled at the moment when the protected object is made available for retrieval on a website on the Internet. In the present case, the public disclosure already occurs by setting hyperlinks on the website in question or by making it available for download on the third-party website.

This occurs independently of the use of the DNS resolver of the defendant. The "concrete form of commission" (statement of claim, p. 18) is not the retrieval of the sound recordings, but their provision. For the realization of making available to the public, it is not necessary that a specific DNS resolver is used to resolve the domain name.



Nor is the retrievability without the use of the Defendant's service an irrelevant hypothetical causal event. First, the defendant's contribution is not the event giving rise to liability. This lies in the making available on the disputed website and occurs without a contribution by the defendant. The operation of its DNS resolver can be ignored without the accessibility being removed. Secondly, even if one focuses on the retrieval with the help of the resolution of the domain name by the service of the defendant, not every hypothetical causal course is irrelevant. The Federal Court of Justice clarifies in the decision to which it refers in the judgment "*Stoererhaftung des Registrars*" (*Breach of Duty of Care of the Registrar*) that the relevance of hypothetical causal sequences is a question of assessment that is answered differently in different constellations:

"Whether the reserve cause is noteworthy and leads to an exoneration of the tortfeasor, is an evaluation question, **which is quite differently answered for different groups of cases** (see BGHZ 29, 207, 215; Staudinger/Medicus, BGB 12th ed. § 249 Rdnr. 99ff; Larenz, Schuldrecht I 13th ed. § 30 I in each case m.w.N.). [...]. (BGH, Urt. v. 07.06. 1988, IX ZR 144/87, juris marginal no. 12)" (emphasis by the undersigned).

Accordingly, the BGH ruled that in the case of the registrar, the hypothetical accessibility of a website by entering the IP address instead of the domain name was irrelevant due to the "high relevance" of the accessibility via the domain name, which the registrar establishes through the connection:

"The domain name has a high relevance for the accessibility of the content, because hardly any user would access the website directly via the IP address instead (see LG Frankfurt a. M. CR 2016, CR Year 2016, page 461 [CR Year 2016 463] = BeckRS 2016, BECKRS Year 3897; Emanuel, FS Büscher, 459 [465])." (BGH, Urt. v. 15.10.2020 - I ZR 13/19, - Störerhaftung des Registrars - GRUR 2021, 63, para. 19).

The question of the value of the defendant's service must be answered differently. Compared to the central role of the registrar, the defendant's service plays a subordinate role in making a website accessible. The defendant operates one of several thousand arbitrarily interchangeable DNS resolvers in Germany with a market share of approximately 0.1% (see above, A.I.3.). For the criterion of relevance of the retrieval path, which is decisive according to the Federal Court of Justice, this means that the hypothetical retrievability via DNS resolvers other than the defendant's accounts for over 99.9% of the retrievals. In this respect, the relevance of the retrieval paths is proportionally exactly the opposite of the case of the registrar: In the present case, the importance of the alternative retrieval paths outweighs the defendant's contribution to the crime in such a way that not the hypothetical retrieval via other DNS resolvers, but the retrieval using exclusively the defendant's DNS resolver is irrelevant for the making available to the public.

Finally, no adequate-causal contribution by the defendant can be derived from the case law of the Federal Court of Justice on the "*Stoererhaftung*" (Breach of Duty of Care) of access providers (contrary to the statement of claim, p. 18 f.). In its decision on the "*Stoererhaftung des Access Providers*" (*Breach of Duty of Care*), the Federal Court of Justice clarifies that the



contribution of the access provider was adequate-causal because the access provider is necessarily involved in the transmission of illegal content in its network:

"Since the provider of Internet access services, by granting network access, makes possible the transmission of such an infringement on the Internet between its customer and a third party, the service provider is necessarily involved in any transmission, so that its access services are used to infringe copyright within the meaning of Art. 8 III RL 2001/29/EC (cf. ECJ, GRUR 2014, 468 nos. 32, 40 - UPC Telekabel)." (BGH GRUR 2016, 268 marginal no. 25 - Access Provider's Breach of Duty of Care).

This is not the case with the service of the defendant. The defendant is not, a fortiori not necessarily, involved in the transmission of illegal information. The making available to the public through the setting of hyperlinks or the creation of retrievability is completed independently of the use of the defendant's service (see above). The defendant does not operate its own networks and does not transfer the sound recordings thus made publicly accessible to third parties. Its service consists merely of answering the DNS queries.

Finally, it is contradictory for the plaintiff to state, on the one hand, that the defendant's contribution - like that of an access provider - consists in the fact that it provides access to a communications network that enables transmission and, on the other hand, to deny the defendant the privilege of liability under Section 8 (1) sentence 2 of the German Telemedia Act (TMG), which is linked to that very act.

#### **b) No violation of reasonable inspection obligations**

The defendant does not meet the requirements for "Stoererhaftung" (Breach of Duty of Care), as it did not breach any reasonable duties of care. According to the case law of the Federal Court of Justice, "Stoererhaftung" (Breach of Duty of Care) for infringing content on the Internet is subject to different requirements depending on the function and activity of the party making the claim (BGH, judgment of October 15, 2020, I ZR 13/19, marginal no. 21).

In principle, the defendant is not subject to any testing and monitoring obligations with regard to the information to which it provides access. According to the case law of the Federal Court of Justice (BGH), testing and monitoring obligations for the operators of technically neutral Internet services regularly arise only after an indication of a specific infringement (in summary for registries, Admin-C, host providers, access providers and registrars: BGH, loc. cit., para. 22 ff.). The substantiation and specificity of the reference to the infringement is again subject to graduated requirements, which depend, among other things, on whether the activity of the respective service provider is in the general interest, whether it is provided with the intention of making a profit, whether it is connected with the storage of the illegal information, whether the efficient fulfillment of the tasks is impaired by the legal examination of the reference and whether there are parties closer to the offence (BGH, loc. cit., paras. 22 ff., 29). In the case of the registry DENIC, the Federal Court of Justice ruled that DENIC had only a limited duty to examine a notice of infringement. Only in the case of infringements that are easily recognizable, either because they have been proven by a final court decision or because the



infringement is so clear that it must be obvious without any investigation, DENIC has concrete obligations to check. (BGH, loc. cit. para. 22).

No less stringent standard can apply to the defendant than to the registry DENIC. The defendant, like DENIC eG, performs a purely technical, content-neutral task free of charge and without the intention of making a profit. This task is in the general interest, since the defendant thereby contributes to the smooth flow of DNS queries, to the minimization of IT security threats and to the observance of data protection and privacy. According to this standard, a violation of testing obligations by the defendant cannot be considered in the present case.

**aa) No access to the notice of the alleged infringement of rights**

The Respondent first became aware of the asserted infringement through the order. It responded within a reasonable period of time, without acknowledging any legal obligation, by blocking the domain.

The pre-litigation warning letters were not effectively received by the defendant. When sending by e-mail, the plaintiff bears the burden of proof for the proper receipt of both the notice letter and a warning letter. If an e-mail is already sorted out by the server's spam filter, this risk is borne by the sender (Wandtke/Bullinger, Urheberrecht, 5th ed. 2019, § 97a marginal no. 27). If the e-mail is received in the local spam folder, there is no obligation for the recipient to open attachments, as this may give rise to the suspicion that the attachments have been infected by a virus (Wandtke/Bullinger, loc. cit.). Alternatively, the sender has the option of including the content of the attached letter in the e-mail text itself. If the sender fails to do so, it bears the risk that the attachments will not be opened by the recipient due to the protection against a virus attack. The defendant cannot be expected, nor can it be required, to inspect every incoming e-mail without the use of technical aids to contain spam and malicious code.

According to the plaintiff's submission, the warning letter sent by ordinary mail was also not received by the defendant. If the plaintiff uses the postal service to transport the warning letter, the postal service acts as the plaintiff's vicarious agent in this respect, so that in such a case the plaintiff is responsible for fault on the part of the postal service pursuant to Section 278 Sentence 1 of the German Civil Code if mail is lost in transit (see BGH, judgment dated January 21, 2009 - VIII ZR 107/08).

**bb) No sufficiently substantiated reference**

Assuming that the defendant had effectively received the notice or the warning letter, they would not constitute a sufficiently substantiated indication of an infringement. An effective notice must contain all information that enables the defendant to understand the legality of the blocking request without further examination and beyond doubt. It is therefore not sufficient for the plaintiff to make a plausible case for an individual infringement; it must set out the requirements for the asserted blocking of the entire domain, in particular substantiated explanations of the overall relationship between lawful and unlawful content on the respective website as well as the unsuccessful recourse to parties closer to the offence, including



reasonable measures to uncover the identity of the operator of the website by involving state investigative authorities or private investigators (BGH GRUR 2016, 268, 275, marginal no. 87 - Stoererhaftung des Access Providers).

The information contained in the notice and warning letter (Annexes K6 and K9) does not meet these requirements:

- The warning letter of 23.03.2021 does not contain any information about the unsuccessful action of the plaintiff against parties closer to the offence and cannot contain this information, since the plaintiff, according to the warning letter, contacted the operators of the disputed domain names and their host provider for the first time at the same time as the warning letter was sent.
- The warning letter of March 26, 2021 does not contain sufficient information to claim closer parties. The defendant would have had to show that it had called in state investigating authorities or private investigators to uncover the identity of the operator of the website. It is undisputed that it did not do so.
- Neither the information letter nor the warning letter contained sufficiently substantiated information about the relationship between lawful and unlawful content. The expert opinion submitted by the plaintiff (Annex K5) is not meaningful in this respect. The subject of the expert opinion is the relationship between protected content and works in the public domain or unknown works (Annex K5, p. 3). The expert opinion does not answer whether the protected contents are infringements. In addition, the expert opinion does not take into account lawful content such as the contributions to the discussion forum in the sample and its weighting and therefore encounters considerable methodological doubts.
- It is undisputed that the letter of April 8, 2021 did not contain any information on the use of parties closer to the act or the fulfillment of further requirements of the "Stoererhaftung" (Breach of Duty of Care).

### **cc) Recourse to the defendant excluded on grounds of subsidiarity**

In the present case, recourse against the defendant is excluded under the aspect of subsidiarity. The plaintiff has not shown that it has made reasonable efforts to take action against the perpetrator of the infringement or other parties closer to the perpetrator. In particular, it would have been reasonable for the defendant to take further measures to identify the operators of the website, to delete the content by the host provider and to have the domain names de-registered by the registry/registrar (contrary to the statement of claim, p. 20).

Claims against the defendant as operator of a DNS resolver service under the aspect of "Stoererhaftung" (Breach of Duty of Care), as well as the "Stoererhaftung" (Breach of Duty of Care) of the access provider and registrar, can only be considered if the action against parties closer to the offence, who can effectively put an end to the infringement, lacks any prospect of success (see LG Hamburg, Urt. v. 30.11.2021, 310 O 99/21, BGH, GRUR 2016, 268 marginal no. 83 - Interference liability of the access provider; BGH, judgment of 15.10.2020, I ZR 13/19, marginal no. 31 - Interference liability of the registrar).



The plaintiff has not provided evidence that it took reasonable steps to engage the parties closer to the act.

**(1) Plaintiff has not exhausted reasonable measures to determine the identity of the website operator**

The plaintiff did not take all reasonable measures to determine the identity of the operators of the offending website.

According to the case law of the Federal Court of Justice, it would have been reasonable for the plaintiff in particular to involve state investigating authorities or private investigators (BGH, GRUR 2016, 268 marginal no. 87 - Störerhaftung des Access Providers). It is undisputed that the plaintiff did not do this. According to the plaintiff's submission, "the operators of the website have been trained for years (in the case of [ ] since 1999!) to conceal their identity" (statement of claim, p. 14). The plaintiff does not explain why the plaintiff has not taken any effective steps to uncover the identity of the operators of the website in question, for example by involving state investigative authorities. This should be obvious to a careful participant in economic life, since the plaintiff has apparently been aware of the website in question for years and the Federal Court of Justice ruled more than six years ago that the involvement of investigating authorities or private investigators is reasonable and necessary.

The plaintiff is also not released from the reasonable involvement of state or private investigators because it contacted the advertising marketer "PopMyAds" or the payment service provider "Buy me a Coffee" by e-mail. The BGH explicitly mentions the investigative approach via payment service providers as an independent measure in addition to the initiation of investigations (BGH loc. cit.).

Moreover, the requests for information that the plaintiff sent to the above-mentioned service providers (K12 and K13) do not constitute an appropriate effort to determine the identity of the operators of the offending website. The wording in the lawyer's letters is not sufficiently clear and in part contradictory. In both lawyer's letters, the plaintiff insinuates that the services are in business relations with the website "[ ]". However, only URLs under a different domain, "[ ]," are cited as evidence of the infringement of the plaintiff's rights. The plaintiff does not prove that it has the right to bring an action; not even a written power of attorney was attached to the letters. The full address of the plaintiff is not stated in the heading of the letters. In this respect alone, it was probably not possible for the services to verify the authenticity of the plaintiff's requests for information.

It is undisputed that Plaintiff did not contact the registry to determine the identity of the operators of the disputed website. Notwithstanding the fact that Tonic Corporation (like most European top-level domain registries) does not operate a public WHOIS record due to the privacy of its customers, there is no evidence that Tonic generally ignores requests for information. On the contrary, Tonic states on the FAQ of its website that it publishes the data of the respective customers in certain cases, e.g. when spam is sent from . to domains. When registering a domain, the registry, Tonic Corporation, collects, among other things, name,



address and payment data (cf. Annex B8). In addition, Tonic expressly states on its website that it offers inquirers the possibility of having their e-mail address transmitted to the owner of domains already registered (see A.III.3. above). This, too, would have been a reasonable way to obtain clues for uncovering the identity of the operators of the website in dispute.

In the letter to "PopMyAds" (Annex K12), the plaintiff also requests the service "PopMyAds" to stop placing advertisements under the domain name "[ ]". Not only does this contradict the previously listed infringements, which relate to a different domain name, this request also clearly goes beyond a request for information. The plaintiff does not explain on what legal basis it bases alleged claims for injunctive relief or information. The "PopMyAds" service cannot therefore understand the letter to mean that it should be obliged to hand over personal data on the basis of this sparse and contradictory information, let alone to terminate contractual relationships that could give rise to corresponding recourse claims. In the letter to "Buy me a Coffee", the plaintiff also does not set out a legal basis for its request for information. It relates its request for information solely to the domain name "[ ]". Without further information, however, the payment service provider cannot even assign this claim to a donation account. The claimant should at least have named the account to which the request for information relates. "Buy me a Coffee" cannot therefore seriously assume an obligation to provide information on the basis of this information letter either.

Both letters also provide for a deadline of three days to fulfill the claims asserted. In addition to the deficiencies in substantiation, contradictions and ambiguities in service already explained, the plaintiff's attorney at law is asserting the rights of other rights holders in numerous other works with the letters from the attorney. In this regard, the letters are contradictory in further aspects (some albums are stated more than once) and the deadline is also so short that the factual and legal verification within this period is factually impossible. After all this, the service providers could not assume to be obliged to provide information.

## **(2) Plaintiff has not exhausted reasonable measures to claim against the host provider**

The plaintiff has also not taken all reasonable measures to end the infringement by taking action against the host provider of the disputed domain names. In particular, it would have been reasonable for the plaintiff to take legal action against the EU-based host provider of the disputed domain names (BGH, judgment of October 15, 2020 - I ZR 13/19, marginal no. 31; Saarland Higher Regional Court, judgment of December 15, 2021 - 1 U 128/17, Munich Higher Regional Court, judgment of May 27, 2021 - 29 U 6933/19, GRUR-RS-2021, 19442, marginal no. 48 - Zumutbare Rechtsverfolgung im Ausland von DNS-Sperrungen). It is undisputed that it has not done so. Within the EU, within the framework of judicial cooperation in civil matters, it can be assumed that the jurisdiction in all Member States is equivalent due to the mutual trust that the Member States place in their legal systems and judicial organs. In addition, the European legislator has harmonized the right to third party information in Art. 8 Enforcement Directive (Directive 2004/48/EC) for all intellectual property rights and thus also for copyright. Accordingly, under Lithuanian law, an effective legal remedy must also be available to natural and legal persons to request information in order to obtain the names and addresses of



persons who demonstrably provide services used for infringing activities on a commercial scale, Art. 8 (1) (c), (2) Enforcement Directive.

In actual terms, too, action against host providers abroad by no means lacks any prospect of success, as the annual reports of the Federal Ministry of the Interior (BMI) on the deletion of depictions of sexual violence against children show. For the years 2018 - 2021, the BMI reported that in each case between 80 and 91% of the content hosted abroad was deleted within four weeks (BMI report "Löschen statt Sperren" ("Deleting instead of blocking"), available at:

<https://www.bmi.bund.de/SharedDocs/pressemitteilungen/DE/2021/07/loeschung-kinderpornographischer-inhalte.html>).

In addition, the plaintiff's lawyer's letters submitted as Annexes K15 and K16 were also not sufficiently substantiated, so that the host provider also did not have to assume an obligation to delete. Here, too, the plaintiff has not demonstrated its right to bring an action. The complete address of the plaintiff and the power of attorney of the legal representative are also missing from the heading of this lawyer's letter. Taken as a whole, the letter does not appear to an objective recipient to be an effective request to terminate a contractual relationship with the operators of the offending website. In addition to the deficiencies in substantiation, there are again contradictions which call into question the impression of seriousness. The letter does not state any legal basis for the alleged claims. Several albums are listed twice for no apparent reason. The letter also contains translation errors, e.g. the representation of Warner Music Group Germany Holding GmbH is formulated in German. Without further information on the part of the plaintiff, the host provider cannot assume that it is obligated to terminate its service to the operators of the disputed website.

### **(3) No identification of a registrar**

It is undisputed that the plaintiff did not attempt to identify a registrar of the disputed domain and make a claim against it. Registrars are closer to the infringement than the defendant because of their contractual relationship with the operators of the website. In addition, the registrar can put an end to the infringement completely by de-connecting the website. This is incomparably more effective than the establishment of a DNS block by the defendant, which in most cases is ineffective due to the automated use of alternative DNS resolvers and can be easily circumvented (see 4.b. below). Also against the background that the registry Tonic offers domain registrations directly to its customers, the plaintiff would have had to show that the domain names were registered without the intervention of a registrar and that a claim against the registrar was therefore out of the question.

### **(4) No recourse to the registry**

Just like the registrar, the registry can effectively end the infringement by disconnecting the domain. Action against the registry also does not lack any prospect of success; in particular, the registry of the ".to" domain holds customer data and itself states that it disconnects domains in the event of infringements (contrary to the application p. 21).



In its terms and conditions, Tonic expressly reserves the right to disconnect infringing domains, for example because they contain illegal or inappropriate content (see above p. A.III.3.). Tonic Corporation has its registered office in the USA and is subject to the jurisdiction there, so that it is also not evident why Tonic should not implement a justified disconnection request.

#### **4. fault-based liability excluded due to disproportionality**

According to the case law of the ECJ, when assessing whether court orders against access providers are in compliance with Union law, compatibility with the relevant fundamental rights of the EU Charter of Fundamental Rights (GrCh) must be examined (ECJ, GRUR 2014, 468 marginal no. 45 f. - UPC Telekabel). National law must therefore be applied in compliance with the fundamental rights of the Charter and the principle of proportionality (BGH, GRUR 2016, 268 marginal no. 31 - Störerhaftung des Access Providers).

##### **a) No judicial remedies**

According to the case law of the ECJ, the lawfulness of a website blocking order from the perspective of freedom of information requires that the national procedural rules enable Internet users to assert their rights in court after the blocking measures taken by the provider have become known (ECJ, GRUR 2014, 468 para. 56 - UPC Telekabel). The Federal Court of Justice (BGH) has followed suit and clarified with regard to website blocking by the access provider that national law must enable the affected Internet users to seek legal protection in court (BGH GRUR 2016, 268, marginal no. 57 - Access Provider's Breach of Duty of Care). In the present case, the affected Internet users have no legal protection against the installation of the block by the defendant (contrary to the statement of claim, p. 23 f.). With regard to DNS blocks by the access provider, the Federal Court of Justice ruled that this requirement could be met by allowing Internet users to assert their rights against the access provider in court on the basis of the contractual relationship existing between them (BGH loc. cit.). The form of these contractual claims remains in the dark, so that it is doubtful whether they even enable an effective legal defense in court. Unlike between access providers and their customers, however, there are no contractual claims in the present case.

There are no contractual claims that would enable the Defendant's users to have the DNS blocking reviewed in court. There is no contractual relationship between the defendant and its users. By entering the DNS server of the defendant in the network settings, anyone can use its service free of charge. This is not dependent on the acceptance of contractual terms. Even if and to the extent that one assumes an implied conclusion of a contract through the provision of the service by the defendant and the making of the network settings by the users, this does not establish any contractual claims by the users which they could assert against the defendant in court. In the relationship between access provider and customer, a contractual claim for performance by the users is the most that can be considered (cf. on the criticism of the effectiveness of such a claim: Spindler, GRUR 2014, 826, 833). In contrast, an implied contract between the defendant and its inquirers cannot convey such a claim. By providing the DNS resolver, the defendant does not obligate itself to its requesters to provide contractual services



that go beyond the mere provision of the service. Mirror image, the requestors are not entitled to any contractual primary or secondary claims on the basis of which they can demand the provision of the service or certain modalities of the service provision from the defendant. In this respect, the legal relationships in this case differ from those between access providers and customers, which are characterized by the provision of a paid service and the recognition of potentially enforceable contractual terms.

#### **b) Lack of purposefulness**

DNS blocking constitutes a disproportionate interference with the freedom of information of the defendant's inquirers. In this respect, the ECJ and the Federal Court of Justice require that blocking measures be strictly goal-oriented, in that they put an end to copyright infringement without depriving Internet users of the possibility of lawfully accessing information (BGH GRUR 2016, 268 marginal no. 53 - Stoererhaftung des Access Providers). The DNS block imposed on the defendant does not meet these requirements.

To the extent that the plaintiff argues that it is "known in court" that the use of "DNS filters" is an "effective measure" that is common practice (Application, p. 22), it must be clarified that this concerns a different technical issue, the implementation of DNS blocks by access providers. Unlike open DNS resolvers, access providers operate their own networks and merely answer the queries of their contract customers (see above). The legal and technical principles of setting up DNS blocks by access providers cannot be applied to the facts of the present case. Blocking orders against DNS resolvers have remained isolated cases worldwide. Incidentally, a study by the University of Zurich already found in 2016 that DNS blocks by the access provider are also "factually ineffective", as even technically unsophisticated users can circumvent them without effort ([https://www.grea.ch/sites/default/files/gutachten\\_der\\_universitat\\_zurich.pdf](https://www.grea.ch/sites/default/files/gutachten_der_universitat_zurich.pdf), p. 18). It should also be noted in the present case that the users of the defendant's service were able to swap the DNS resolver preset on their device for that of the defendant. Thus, there is nothing to prevent them from also being able to reverse this swap or to configure another provider that does not maintain DNS locks. Accordingly, the suitability of a "DNS lock" to prevent access to an Internet presence due to circumvention possibilities, for example by registering another name server, is only limited (see LG Kiel, [MMR 2008, 123](#), 124; Gehrke, MMR 2008, 291). The defendant's inquirers configure the defendant's DNS resolver for themselves, which is why they will not be deterred by a DNS block, and will therefore find another way to retrieve the content. A chamber of the Hamburg Regional Court succeeded in finding an Internet page with instructions on how to circumvent the DNS blocking using the available name servers in just a few minutes (Hamburg Regional Court, judgment of November 12, 2008, Case No. 308 O 548/08).

The suitability of the DNS blocking by the defendant meets with far-reaching concerns. Measures to prevent unauthorized access to protected subject matter do not have to stop the infringement completely, but they must at least prevent unauthorized access or at least make it more difficult and reliably prevent Internet users from accessing it (BGH loc. cit. para. 48). DNS blocking by the defendant does not satisfy even these minor requirements. As described



above, a DNS query is answered by an alternative DNS resolver after the defendant has blocked the DNS. This means that technical circumvention possibilities are irrelevant, since a recursive resolver other than that of the defendant automatically resolves the domain name on the normal retrieval path via the browser.

Secondly, the blocking effect is not sufficiently targeted, since it affects all content of the disputed domain beyond the asserted infringement of the sound recordings. Case law has ruled on the criterion of targeting from the point of view of "overblocking", i.e. the blocking of affected, lawful information, that it depends on the overall ratio of lawful to unlawful content on the blocked website and that it must be asked whether the amount of lawful content is insignificant (see, for example, BGH loc.cit. para. 55). The expert opinion submitted by the plaintiff (Annex K 5) is not meaningful in this respect (see above).

Finally, the service can never implement selective DNS blocks only for inquirers in Germany. The plaintiff's statement that a worldwide blocking of the domain is legally irrelevant cannot be followed.

Due to the worldwide blocking effect, there is an increased risk that access to information that is not prohibited in other jurisdictions is prevented. Irrespective of whether the infringing content accessible via the disputed domain is also illegal in the legal systems of the TRIPS member states, the question to be assessed is whether the respective legal systems would have permitted a claim against the defendant. Court orders against DNS resolvers have so far remained isolated cases internationally (see Schwemer, Copyright Content Moderation at Non-Content Layers, in: Rosati, Handbook of European Copyright Law (2021), p. 11). The use of DNS resolvers is not possible in other jurisdictions, for example, due to the proportionality and subsidiarity considerations outlined above under other legal systems. Even in Switzerland, where the defendant is domiciled, the present action would not succeed. The Swiss Federal Supreme Court has ruled that under Swiss law, access providers cannot be held liable for setting up DNS blocks based on copyright infringements for lack of their own contribution to the crime (Federal Supreme Court, ruling of February 4, 2019, 4A\_433/2018). This must apply a fortiori to DNS resolvers whose act contribution is even lower than that of the access provider. The worldwide blocking effect can therefore lead to a legal consequence occurring that is not provided for under other legal systems or, as in the case of Switzerland, is expressly excluded. This would mean that a court order in one legal system would have the effect of nullifying legal regulations in another legal system. For precisely this reason, the ECJ has also ruled that search engines are not obliged to delete search results worldwide on the basis of a court order, as

*"numerous third countries do not know of a right to delist or take a different approach to this right" and that "the balance between the right to respect for private life and to protection of personal data, on the one hand, and the freedom of information of Internet users, on the other, may vary widely around the world"* (ECJ, judgment of 24 September 2019, C-507/17, para. 59f.).

The plaintiff's argument about the worldwide blocking effect cannot justify its reasonableness. The plaintiff first points out that the notice-and-takedown procedure also has a worldwide



effect. This is incorrect, as host providers regularly react to notice-and-takedown not with deletion, but with a geographically limited rejection of requests (geoblocking). However, even if content is deleted in the notice-and-takedown procedure, this is not comparable to setting up a DNS block. This is because the notice-and-takedown procedure leads to the targeted removal of a single piece of illegal content, while setting up a DNS block leads to the inaccessibility of an entire domain. These procedures are not legally comparable and are accordingly treated in legal literature as opposing, not complementary approaches ("deletion instead of blocking," see for example MMR Aktuell, 303415).

To the extent that the applicant relies on the decision of the ECJ in *Glawischnig-Piesczek v. Facebook Ireland Ltd*, it must be clarified that the ECJ merely ruled that Directive 2000/31/EC does not preclude a court from issuing blocking orders with international effect to the extent that this is permissible under international law (ECJ, judgment of January 3, 2019, C-18/18 - *Glawischnig-Piesczek*, para.51). With regard to the extraterritorial reach of injunctions by Member State courts, the decision is limited to the terse statement that the E-Commerce Directive does not provide for a territorial limitation of the reach of the measures. However, the Member States must ensure that the measures they issue are compatible with international law (loc. cit. para. 52). Accordingly, whether an order with extraterritorial effect is permissible under international law must first be determined in each individual case. However, the admissibility of extraterritorial orders under international law is generally to be denied outside the scope of special permits (in particular international treaties) (cf. Krämer, *EuR* 2021, 137, 138). However, the plaintiff does not submit any arguments on the admissibility of the order with worldwide effect under international law.

### **c) Disproportionate interference with the defendant's professional freedom**

The obligation to implement the DNS blocking disproportionately impairs the defendant's right to entrepreneurial freedom pursuant to Art. 16 GrCh and Art. 12 (1) GG. According to the established case law of the Federal Court of Justice, service providers may not be required to take measures that endanger their business model or make their activities disproportionately difficult (Federal Court of Justice GRUR 2007, 890 = *NJW* 2008, 758 - *Jugendgefährdende Medien bei eBay*). The administrative, technical and financial effort that the defendant must incur to implement the DNS block must therefore also be taken into account when weighing up fundamental rights (BGH GRUR 2016, 268 marginal no. 37 - *Access Provider's Breach of Duty of Care*).

The plaintiff's reference to the discussion paper "DNS over HTTPs" of *eco - Verband der Internetwirtschaft e.V.* (Annex K 22), cannot justify the reasonableness of the installation of a DNS block by the defendant. According to the quote on p. 22 of the application, the discussion paper refers to the installation of DNS blocks by Internet service providers who know their customers and know who dials into their infrastructure. This is a technically different situation, from which no conclusions can be drawn about the effect of the implementation of a DNS lock on the DNS resolver of the defendant.



In the case of the defendant, it must be taken into account that it acts without the intention of making a profit and merely provides an automatic procedure that gives its inquirers access to the disputed domain. Its passively neutral, automatic contribution is not comparable to that of a platform operator, such as that on which the BGH decisions on Internet auction houses were based (also OLG Frankfurt a.M., judgment of January 22, 2008 - 6 W 10/08, GRUR-RR 2008, 93, 94 - Access Provider, there on claims under competition law). There, the court based the question of the reasonableness of obligations on the fact that the operators of the platforms and forums themselves had set the sources of risk for infringements, that it was precisely the content that was important to them, and that there were completely different possibilities for better influencing and controlling the content. In contrast, the defendant itself did not set any new source of danger and, as a neutral technical intermediary, has nothing to do with the content to which it provides access and has no influence on it. It thus has a significantly greater distance to the infringing content, which also narrows the limits of reasonableness (see OLG Hamburg, judgment of December 22, 2010 - 5 U 36/09).

Furthermore, it must be taken into account that the defendant basically offers its service globally and uniformly. Internet users worldwide can use the defendant's service by configuring the defendant's service with the IP address 9.9.9.9. as DNS resolver in their network settings. This distinguishes the present situation from blocking orders against access providers, which form the basis of court decisions on the access provider's liability for interference. The DNS resolvers of the access providers only process requests from their contract customers. Access providers can therefore only implement DNS blocks on a geographically limited basis, as they only process queries from the territory of their contract customers. The defendant's system does not provide for geographical differentiation between users' queries. It can implement DNS blocking only by setting up, configuring, and maintaining, either at considerable expense through manual costly configuration or through programming, a previously non-existent functionality to enable the system to implement blocking commands on a geographic basis. As explained above, Defendant is a non-profit foundation that has not yet received any requests to deploy DNS blocking for copyright infringement. The cost of setting up such a system alone could be stifling to the defendant.

The establishment of DNS blocks leads to considerable losses in the performance of the Defendant's DNS resolver. These losses jeopardize the Defendant's business model. The quality of a DNS resolver is largely determined by its performance, i.e., how quickly the DNS resolver resolves DNS queries. The quality of DNS resolvers is indicated on various Internet portals in each case on the basis of the performance of the resolvers, i.e. the speed with which the queries are answered (see for example: <https://www.dnsperf.com/#!dns-resolvers>; DNS resolvers are not even listed here if they take longer than one second to resolve a query). The implementation of DNS blocking for queries from Internet users from the territory of the Federal Republic of Germany leads to a noticeable slowdown of the defendant's service for these requesters (cf. above A. I.7.b.). The assignment of requests to a specific IP address and its geographical assignment to the territory of the Federal Republic of Germany involves considerable technical effort, since each request to the defendant's service must be checked to determine whether the requesting IP address can be assigned to the territory of the Federal Republic of Germany and must be answered with appropriate blocking commands. If the



performance of the defendant's service falls significantly behind the performance of other public DNS resolvers, it is to be expected that the requesting parties will choose another DNS resolver. It must be taken into account that only those requesters will use the service of the defendant who explicitly choose to do so by changing the default network settings and entering the service of the defendant instead of the default DNS resolver. These requestors have the technical understanding and interest in choosing a particular DNS resolver, so that on the one hand they are able to configure an alternative DNS resolver in the network settings and on the other hand, if there is a corresponding loss of performance, there is a high probability that they will switch to another DNS resolver.

Finally, the defendant has neither the budget nor the personnel or technical resources to carry out legal checks on the content objected to. This is all the more true because the service is provided globally. It follows that the defendant, which cannot limit the group of inquirers like other providers of Internet services that enter into a contractual relationship with their customers, is not in a position to do so. It is potentially exposed to verification obligations regarding infringements of rights from a wide variety of legal systems. It is de facto impossible for it to investigate and verify in a well-founded manner information letters whose substantiation corresponds to that of the letters submitted by the plaintiff. This applies in particular if, as in the present case, the court would still consider the poorly substantiated information provided by the plaintiff to be sufficient.

The defendant will not be able to provide its service if it is confronted with a large number of blocking requests in the future - also in view of the aspect or risk of core violations. The defendant cannot check and implement these due to the lack of staff capacity. If the recipient of a notice does not implement a DNS block because he considers the factual situation to be too thin or cannot comprehend it, there is a risk of costly warnings or a possibly costly and resource-intensive legal dispute.

The encroachment on the defendant's entrepreneurial freedom outweighs the encroachment on the plaintiff's fundamental right to property. The legal interests of the plaintiff are only insignificantly impaired by the retrieval of the disputed domain via the service of the defendant. When assessing the severity of the impairment, it must be taken into account that the plaintiff has not enforced a blocking order with any of the larger commercial companies that continue to resolve the domain, whose user base and representation on the German market is many times larger than that of the defendant. The specific retrieval path via the defendant's service is only of minor importance in relation to the actual retrievals of the disputed domain. The at most marginal economic importance of the retrieval path via the Respondent's service does not justify endangering its existence.

## **5. auxiliary request unfounded**

The alternatively asserted claim pursuant to Section 7 (4) TMG is also unfounded. The requirements of reasonableness, proportionality and subsidiarity are expressly set out in Section 7 (4) of the German Telemedia Act. These requirements are not met in the present



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case; in this respect, reference is made to the comments on "Stoererhaftung" (Breach of Duty of Care).

A handwritten signature in black ink that reads "Rickert".

Thomas Rickert, Attorney at Law