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Introduction to the Problem

1.1 A SOCIETAL PROBLEM

The following collection of stories best encapsulates the problems that this book tries to resolve.

The website blocking story. In autumn 2010, in-house lawyers of British Telecommunications (BT) received an unusual request. The Motion Picture Association was asking whether it would agree to block access to a copyright-infringing website. The company replied that it would require a court order to block a service; otherwise, it would face business exposures, including potential legal liabilities. A week before Christmas of the same year, a notification of the lawsuit arrived. BT decided to oppose.

Justice Arnold, the judge hearing the case, had an important task before him. Although the legislator already created a legal basis for injunctions against intermediaries, it still had to decide on many open issues. How effective must such an injunction be to justify its grant? How should such orders look? Should they be flexible to allow for their re-updating? What technology is appropriate? Can someone challenge them ex post? What happens in case of abuse? And who shall bear the costs of what?

These questions weren't answered at once. It took the brilliant judge and his other esteemed colleagues several years and hundreds of hours of hard work on dozen of decisions until most of the principles materialized into settled practice. How much did the rightholders benefit? It is hard to say, as the evidence seems conflicting.[1]

[1] Ofcom, "Site Blocking to Reduce Online Copyright Infringement: A Review of Sections 17 and 18 of the Digital Economy Act" (2010), 48, http://stakeholders.ofcom.org.uk/binaries/internet/site-blocking.pdf, accessed 13 January 2015 (comparing costs and benefits of various techniques); Brett Danaher and others, "The Effect of Piracy Website Blocking on Consumer Behavior" (SSRN, 2015), http://ssrn.com/abstract=2612063, accessed 1 July 2015 (blocking 19 different major piracy sites caused a meaningful reduction in total piracy and subsequently led former users of the blocked sites to increase their usage of paid legal streaming sites, such as Netflix, by 12 percent on average); Luis Aguiar and others, "Online Copyright Enforcement, Consumer Behavior, and Market Structure" (European Commission, 2015),

But given that they still keep applying for the new injunctions, they must at least believe that they benefit beyond their own (limited) expenses. How much did it cost society? At least several hundred thousand euros of direct expenses.[2] And was the money well spent? We don't know. It depends on whether the overall costs are offset by the obtained benefits, and those remain unknown. Will we ever know? In addition, what happens if measures become ineffective after some time? Will they be discontinued?

The password-locking story. In autumn 2006, rightholders of the song "Sommer unseres Lebens" (Summer of our life) detected that the Internet connection of a private person was used for filesharing. They decided to sue. In the course of the proceedings, it was found that the owner of the connection didn't commit any infringement himself and that the infringement was likely committed by an unknown third party using his open WiFi. The question thus arose: should the owner of the connection have done something about it prior to any notification? And with what tools?

Four years later, the German Federal Supreme Court provided its answers. It held that a private operator of an open WiFi network should assist rightholders in enforcing their rights by sufficiently password locking the network's connectivity in order to prevent possible misuse. The court undertook a balancing exercise by comparing the costs and benefits to private users and rightholders. It observed that password locking is very cheap and easy for a user to implement and that it might even increase the user's security and arguably reduce the opportunities for potential infringers to hide their identities. Unlike in the English story, the costs and benefits thus seemed to have been clear. But were they?

After the ruling, password-protected WiFi connections became the de facto standard in Germany. Because even prelitigation efforts are financially compensated, citizens generally comply prior to any lawsuit. Two years after the judgment, the reputed magazine *Der Spiegel* summarized the state of affairs in the article "Silence on the Sidewalk," which criticized the fact that, in the aftermath of the decision,[3] citizens can hardly find public Internet access. According to a study conducted in 2014, there were only 1.87 open hotspots per 10,000 inhabitants in Germany, while in Sweden, the number is 9.94, in the United Kingdom, it is 28.67, and in South Korea, it is 37.35.[4]

https://ec.europa.eu/jrc/sites/default/files/JRC93492_Online_Copyright.pdf, accessed 1 July 2015 (finding the relative effectiveness of blocking led to limited substitution for legal sources of consumption); Joost Poort and others, "Baywatch: Two Approaches to Measure the Effects of Blocking Access to The Pirate Bay" (2014) 38 Telecommunications Policy, 383–392 (no lasting net impact is found on the percentage of the Dutch population downloading from illegal sources).

[2] See *Cartier International AG & Ors v. British Sky Broadcasting Ltd & Ors* [2016] EWCA Civ 658 [18], [19].

[3] Rosenbach Marcel and Schmundt Hilmar, "Funkstille auf dem Bürgersteig" *Der Spiegel* (1 July 2013), 128–130.

[4] Eco, "Verbreitung und Nutzbarkeit von WLAN, WLAN-Zugangspunkten Sowie öffentliche Hotspots in Deutschland" (2014), www.eco.de/wp-content/blogs.dir/eco-microresearch_verbreitung-

It appears that the court failed to foresee one particular type of cost – wireless technologies as a source of new innovation and competition. The judges were too influenced by their perception of WLAN as a carrier of private, community, or corporate local networks. Although, in the past, it might have seemed that 3G and WiFi address completely different needs, in distinct, nonoverlapping markets, the opposite is nowadays true.[5] WiFi access has become an alternative to substantially slower, limited, and more expensive mobile access. This has motivated some foreign carriers, such as RepublicWireless, to start offering subscription plans where public WiFi is the primary channel for phone calls and cellular technology only serves as a backup in its absence. Low barriers to entry, no rights over the spectrum, and wide diffusion of technology make it inherently very competitive.[6] Moreover, the ease of sharing of Internet access over WiFi, facilitated by cheap router equipment, with its scalability and speed of implementation, has made it a more viable alternative to Internet distribution in places where fixed-line access would be expensive to establish.[7] The court failed to see the full innovative potential. Unwittingly, it silenced WiFi on the German sidewalk, thinking that it was doing the right thing.

The social value of open WiFi has also become apparent in emergency situations. For instance, during the 2012 earthquake in northern Italy, local authorities requested the general public to remove passwords from their private WiFi networks in order to allow the widest possible emergency access to communications networks.[8] Similarly, in 2007, when a 40-year-old bridge in Minneapolis collapsed into the river, WiFi played an important role in managing the response and recovery efforts.[9] The untapped potential of WiFi technology is greater still. Its user-centric, decentralized approach is more conducive to innovation – the development of the

und-nutzung-von-wlan1.pdf. See also the recent consumer survey from Bitkom, "Öffentliche WLAN-Zugänge fristen Nischendasein" (2015), www.bitkom.org/de/presse/8477_82493.aspx, accessed 1 July 2015 ("Trotz einer insgesamt guten Versorgung mit mobilen Internetzugängen *bremst die geringe WLAN-Nutzung die digitale Entwicklung. Ein Grund dafür sind die restriktiven gesetzlichen Haftungsregeln*, die viele potenzielle Hotspot-Betreiber, zum Beispiel Café- oder Restaurant-Besitzer, abschrecken").

5 William Lehra and Lee W. McKnight, "Wireless Internet Access: 3G vs. WiFi?" (2003) 27 Telecommunications Policy 356; also Paul S. Henry and Hui Luo, "WiFi: What's Next?" [2002] IEEE Telecommunications Magazine 66–72 ("Extension of WiFi from the Office Environment to Wide-Area Coverage Opens New Vistas for WiFi Technology and Will Likely be a Key Driver of Its Future Growth").

6 William Lehra and Lee W. McKnight, 'Wireless Internet Access: 3G vs. WiFi?' (2003) 27 Telecommunications Policy 365.

7 Ibid.; Eric Schmidt and Jared Cohen, *The New Digital Age: Reshaping the Future of People, Nations and Business* (Knopf 2013), 4.

8 Editorial, "Authorities Call for WiFi to Be Open after Deadly Italy Quake" *Famagusta Gazette* (29 May 2012), http://famagusta-gazette.com/authorities-call-for-wifi-to-be-open-after-deadly-italy-quake-p15591–69.htm, accessed 27 November 2014.

9 US Fire Administration, "Technical Report Series, I-35W Bridge Collapse and Response" (2007), 45, http://berec.europa.eu/doc/publications/consult_add_cable_netw_chapter/dt.pdf, accessed 27 November 2014.

unknown.[10] The opportunities of peer-to-peer communication, such as between autonomous cars and pedestrians in order to avoid car accidents, or between drones and their operators, are endless.

So was the German Court wrong in its analysis after all? It depends on your reference point. Password locking of WiFi hotspots may really have made all the parties better off, however, only back then, with the existing state of technology and its uses. In the meantime, WiFi has grown from a local personal network into an important competitive technology for delivering "last mile" Internet access. It has turned into a blossoming source of numerous innovations – benefits that cannot be fully reaped when everybody has to engage in password locking. The advances in the use of the technology over recent years have gradually mounted the evidence that the ruling might actually be a break on social progress. It is very plausible that it costs society more than it benefits rightholders.

So how can the rule change? The public outcry in Germany went so far that the Bundestag, the German Parliament, tried to step in to correct the decision of the court.[11] This begs the following question: is this a new model of technological governance, when the legislator has to step when the courts get their standard setting wrong? Is this approach sufficiently fast and institutionally future-proof? Do judges ever have enough information to be entrusted with such activity? Can we expect them to predict use of technology that the markets cannot predict?

The graduated-response stories. In 2009, the French Parliament, after lengthy political discussions, enacted a so-called graduated copyright enforcement regime and entrusted it to a newly minted authority – HADOPI. The rationale of the law was that access providers could notify their users who are found to be infringing on copyright, and after some escalation, further steps could be taken to fine or even temporarily disconnect those subscribers.[12] In 2013, the system was redesigned. Although it was found to improve the behavior of consumers,[13] the change in their use was probably not substantial enough to offset the system's maintenance costs. The

[10] William Lehra and Lee W. McKnight, "Wireless Internet Access: 3G vs. WiFi?" (2003) 27 Telecommunications Policy 359.

[11] Bundesministerium für Wirtschaft und Energie (BMWi), "Entwurf eines Zweiten Gesetzes zur Änderung des Telemediengesetzes (Zweites Telemedienänderungsgesetz – 2. TMG ÄndG)" (2015), www.bmwi.de/, then adopted as Zweites Gesetz zur Änderung des Telemediengesetzes (2016) Teil I Nr. 36, 1766.

[12] See generally about the French experiment Eldar Haber, "The French Revolution 2.0: Copyright and the Three Strikes Policy" (2011) 2(2) Harvard Journal of Sports & Entertainment Law 297.

[13] Brett Danaher and others, "The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France" (2014) 62(3) Journal of Industrial Economics 541–553 (meta-study of various studies); Brett Danaher, Michael D. Smith, and Rahul Telang, "Government-sanctioned and market-based anti-piracy measures can both mitigate economic harm from piracy" (2017) 60(2) ACM 68–75 (finding positive changes following HADOPI); Alexis Koster, "Fighting Internet Piracy: The French Experience with the HADOPI Law" (2012) 16(4) International Journal of Management & Information Systems 327 (reports show some modest positive changes in the behavior of French Internet users).

government admitted to having spent 12 million euros and the time of 60 civil servants to generate 1 million e-mail-first notifications, 99,000 second notifications, and only 134 prosecution cases.[14] French culture minister Aurélie Filippetti described the system as "unwieldy, uneconomic and ultimately ineffective."[15]

In 2015, a judge of the Irish Commercial Court created a similar scheme with the stroke of a pen.[16] The legal basis for injunctions against intermediaries was used to impose an entire three-strikes notification scheme upon Internet access providers. The cost was divided among the parties. The rightholders have to cover 20 percent of the capital expenditure, capped at 940,000 euros, and the number of notices to be processed is limited at 2,500 per month.[17] Upon sending a third notification, the plaintiffs can seek identity disclosure concerning the subscribers and also an order to terminate their access. Such applications will not be opposed by access providers, and no costs will be sought. Although the scheme has not yet entered into force, as the case is still pending before the Irish Court of Appeal, it is striking that what requires a lot of political debate in one country is created by a single judge in another without any public discussion. Are injunctions against intermediaries really so limitless? And if so, can they so easily circumvent the political process? What else can they impose?

Consider yet another case. Just a few days before Christmas 2013, it was decided that Juan Carlos,[18] an unknown citizen, must be cut off from the Internet. Juan wasn't a terrorist or a dangerous offender, nor did he stop paying his broadband bill. An IP address assigned to Juan was, however, found to have fileshared some copyright-protected materials. Juan never received any prior notice warning him that this might happen. In fact, Juan might have read about his case in the newspapers. He could have learned that a local association of Spanish music producers had brought a private copyright action against his Internet access provider in court, demanding that he be *forever* disconnected from the Web – at least, with this particular provider.

The court proceedings before the Barcelona court were very Kafkaesque. In Juan's absence, without his provider raising a single objection, the court readily issued an injunction ordering his provider to disconnect him from the World Wide Web. Nobody asked Juan or gave him the opportunity to defend himself against the allegation of copyright infringement, to dispute the admissibility and veracity of the antipiracy firm's evidence, or to prove that he could not use the filesharing client

[14] Music Updates, "French Count the cost of HADOPI" (2012), www.musiclawupdates.com/?p=5092.
[15] Ibid.; *Le Nouvel Observateur*, "Aurélie Filippetti: 'Je vais réduire les crédits de l'Hadopi'" (2012), http://obsession.nouvelobs.com/high-tech/20120801.OBS8587/aurelie-filippetti-je-vais-reduire-les-credits-de-l-hadopi.html.
[16] *Sony Music Entertainment (Ireland) Limited v. UPC Communicaitons Ireland Limited (No 1)* [2015] IEHC 317.
[17] Gerard Kelly, "A Court-Ordered Graduated Response System I Ireland: The Beginning of the End?" (2016) 11(3) Journal of Intellectual Property Law and Practice 183, 184.
[18] Audiencia Provincial Barcelona *Promusicae v. X* (2013) 470/2013 (the name is a fictional one).

or explain that his Internet access was probably misused. Nobody even asked him if he considered disconnection to be a proportionate measure, given the needs of his professional and private life. And nobody gave him a chance to defend against a disconnection without any expiration period.[19]

Shouldn't individuals have a say in copyright enforcement measures directed against them? Who will respect their right to a fair trial if only their providers are sued? And how is it possible that while the French graduated-response scheme only foresaw a temporary disconnection for a maximum of one month, the Spanish court–granted injunction terminates access without limitation in time? Where are the bounds of rule of law?

The Irish and Spanish cases show that injunctions against intermediaries grant rightholders unprecedented powers. They allow them to propose solutions that would otherwise have to be legislated in a tedious and costly political process. Where are the limits of such injunctions? And where is the guarantee that they will be abandoned by rightholders when they become wasteful enforcement practices? The French example shows that government-funded enforcement schemes will be reevaluated if they don't constitute the bang for the buck. The US example of the voluntary graduated-response scheme, the Copyright Alert System, shows that even private ordering schemes will be reevaluated.[20] Can we say the same about court-imposed systems? If not, aren't we at risk of indefinitely wasting society's resources on ineffective enforcement?

All these stories have one thing in common – their legal basis. The European legal basis for these enforcement measures is set out in several provisions (Article 8(3) of the InfoSoc Directive, Article 11(III) of the Enforcement Directive) that are very brief in their wording but, as can be seen, potentially far-reaching in their consequences. They address intermediaries of different kinds who are "best placed" to prevent the infringing activities of third parties. It is believed that the intermediaries can most cheaply prevent the wrongs of others. Hence they should be obliged by injunctions to assist the rightholders, irrespective of their own liability. These injunctions make individuals and companies *accountable* and oblige them to some acts of cooperation, even if they are *not* liable for damages. Hence they are *accountable but not liable*. This research looks into the history, economics, and application of such "forced cooperation" in order to answer the social problems that were mentioned earlier.

At the time when Article 8(3) of the InfoSoc Directive and Article 11(III) of the Enforcement Directive were enacted, only a few would have predicted their

[19] Fortunately, the user will probably never be disconnected from the Internet, as the Spanish ISP could not match the IP address with a particular subscriber. It is also perfectly possible that he changed his ISP before this decision was even issued. Moreover, the court applied the measure to only one of many Spanish ISPs named by the plaintiff. This, however, does not reduce the worrisome picture painted by the case.

[20] EFF, "It's the End of the Copyright Alert System (as We Know It)" (2017), www.eff.org/deeplinks/2017/02/its-end-copyright-alert-system-we-know-it.

present-day consequences. A single sentence prescribing the Members States to legislate "an injunction against intermediaries whose services are used by a third party to infringe" developed into a full-fledged concept reaching its protective hand far beyond regular concepts of liability. As of now, the provision "obliges Member States to ensure that an intermediary whose services are used by a third party in order to infringe an intellectual property right may, regardless of any liability of its own in relation to the facts at issue, be ordered to take measures aimed at bringing those infringements to an end and measures seeking to prevent further infringements."[21]

Its expansive reach didn't go unnoticed in the industry. Yahoo! commented on the state of affairs during a debate about an amendment to the Enforcement Directive, arguing that "for online intermediaries, legal liability per se is not key, but rather the effect of injunctions on their business."[22] This is a remarkable statement for the "old world" of intermediary liability, which concerned telling who is a good and who is a bad actor. The reassurance of being a good actor seems of no comfort when imposed orders of assistance lead to significant costs. Increasing accountability of innocent third parties thus should not be of lesser concern than liability as such. It has an economic impact, and, although by different means, it affects the allocation of responsibility. We should question when and how it advances the goals of exclusive rights.

This book argues that the policy of intermediary liability is becoming increasingly multifaceted. Instead of simplistically answering when actors turn bad, today's map of interactions is more complex. It calls upon good actors as much as on those who misbehave. In European Union (EU) intellectual property law, by far the biggest development has been injunctions against intermediaries. This book unpacks the phenomenon and explains that we are witnessing an entirely separate type of policy intervention.

1.2 FROM LIABLE "INFRINGERS" TO ACCOUNTABLE "INNOCENT THIRD PARTIES"

The Internet makes social interactions easier, but also more complex. The usual e-spoken word has to involve dozens of intermediaries to carry it to its recipient. As in the physical world, the spoken word can sometimes hurt and infringe somebody else's rights. However, because the Internet is, by default, anonymous and global, enforcing otherwise ordinary torts becomes less straightforward. The rightholder often needs to engage not only the speakers of the words, but also some by-standing intermediaries that could assist him in enforcing his right.

[21] Case C-494/15 *Tommy Hilfiger Licensing and Others* [2016] ECLI:EU:C:2016:528, para. 22.

[22] See European Commission, "Public Hearing on Directive 2004/48/EC and the Challenges Posed by the Digital Environment" (7 June 2011), http://ec.europa.eu/internal_market/iprenforcement/docs/conference20110607/hearing-report_en.pdf, accessed 1 March 2015.

In a democratic society, individuals are born equal. This means that one individual may never force others with self-help to do things they do not want to. Even if a legal title exists for some conduct (e.g., a claim for contractual performance), one still needs to go to court to force the other party to fulfill its obligation. If somebody commits a tort, an enforceable legal obligation is created, which entitles its creditor (victim) to ask for specific acts from a debtor (injurer). Without someone being a debtor in this sense, the victim is released to his mercy. Such by-stander can provide voluntary help, but also might not. The victims can invoke morals or social responsibility or leverage its market power, but have no legally enforceable way how to hold the person to account.

For most of the 1990s and early 2000s, the legal debates and court cases in intellectual property law focused on answering the question when someone becomes an infringer. The infringer, whether primary or secondary, was seen as the only way how to become legally indebted to a victim. All big cases of the period, *Amstrad*, *Napster*, *Grokster*, and *Viacom v. YouTube*, were of this kind.[23] They all focused on the conditions of attribution of user's actions with full consequences of joint and several liability. This book analyzes a different response of the European law. Partly because of the institutional setup,[24] the attention in the last few years was shifted from delineating the wrongful conduct and its full attribution to platforms, to a discussion of possibilities that by-standers have in helping out the rightholders. This accountability without liability, as I call it, became a main driver of the modern online enforcement in Europe.

Traditionally, wrongful conduct is determined by the system of rules known as tort law. It outlines when somebody is liable for his conduct or can be attributed that of others. The system provides for causes of actions, legal rights, against those who committed such a blameworthy act, a tort, or a wrong. These persons are then referred to as tortfeasors or wrongdoers, which include primary infringers as well as their accessories. Traditions of civil and common law, however, also recognize cases when a person who is not found to be a wrongdoer also needs to assist a rightholder in the enforcement of his right. These cases are about cooperation, not sanctions. This third party (nonwrongdoer) is herewith held accountable for some help, but not liable for the acts of the wrongdoer. Despite a successful lawsuit against it, it remains a lawful actor. In this work, I refer to this third party as an "innocent third

[23] *A & M Records, Inc. v. Napster, Inc.* 239 F.3d 1004, 1022 (9th Cir. 2001); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.*, 125 S. Ct. 2764 (2005); *CBS Songs Ltd v. Amstrad Consumer Electronics Plc* [1988] UKHL 15 (12 May 1988); *Viacom International Inc et. Seq. vs. Youtube*, 718 F. Supp. 2d 514 (SDNY 2010).

[24] Today, most noncontractual obligations are still an issue of the national civil laws of the Member States of the EU. Union law, thus so far, regulates only very specific sector issues such as unfair commercial practices, intellectual property rights, and their enforcement, without ambition to be comprehensive. Despite numerous academic projects, the European Civil Code is still far from reality. As a consequence, missing accessory liability is being dispersed among primary liability and accountability without liabity in order to avoid reference to nonharmonized piece of the puzzle.

party" or an "innocent intermediary." Alternatively, one could also use the term "noninfringer."

This is *not* meant to imply any judgment of fairness,[25] although undeniably for many civil law lawyers the term will likely sound this way.[26] I have taken the term from its common usage in the English case-law.[27] As early as 1871 in *Upmann v. Elkan*, the English courts would talk about an "innocent" party that was "mixed up with the transaction" when describing the position of a forwarding agent who unknowingly forwarded a case of trademark-infringing cigars and was then ordered by the court to remove the signs from the goods.[28] This development continued[29] until a landmark case from 1974, in which the House of Lords held that a disclosure by a relief granted against the British Customs authority is possible, irrespective of the fact that authority's conduct was "entirely innocent."[30] In the recent case-law of the common law courts, the term "innocent third party" has become clearly settled in its meaning as referring to nonwrongdoers in the context of equitable injunctive relief.[31]

[25] Mark MacCarthy, "What Payment Intermediaries Are Doing about Online Liability and Why It Matters" (2010) 25 Berkeley Technology Law Journal 1037, 1056 (arguing that burdening innocent people is unfair).

[26] German scholars would not usually refer to a nonliable person serving such an injunction as "an innocent third party" or a "nonwrongdoer," despite the fact that historical examination shows that legal basis of injunctions was meant to address also those who did not act wrongfully. An additional reason might be that in the current German intellectual property jurisprudence, injunctions outside of tort law also serve cases which could be solved by a more developed the negligence rule. So it is counterintuitive to label these parties as innocent.

[27] Steven C. Bradford, "Shooting the Messenger: The Liability of Crowdfunding Intermediaries for the Fraud of Others" (2015) 83 University of Cincinnati Law Review 371, 379 (using the term "innocent intermediary" for a nonliable intermediary); Ronald J. Mann and Seth R. Belzley, "The Promise of Internet Intermediary Liability" (2005) 47 William & Mary Law Review 239, 276 (using the term "innocent third parties"); Mike Conradi, Liability of an ISP for allowing access to file sharing networks (2003) 19 Computer Law & Security Report 289, 292 (noting that "the Ashworth case shows that it is likely that an English court would be willing" to make an disclosure order against an innocent Internet access provider); European Observatory on Counterfeiting and Piracy, "Injunctions in Intellectual Property Right" 17, http://ec.europa.eu/internal_market/iprenforcement/docs/injunctions_en.pdf (uses the term "innocent intermediaries" in its questionnaire).

[28] *Upmann v. Elkan* [1871] 7 Ch App 130.

[29] Viscount Dilhorne in *Norwich Pharmacal Co. & Others v. Customs and Excise Commissioners* [1974] AC 133 [75] says: "In Orr v. Diaper Diapers were involved, so were Elkans in Upmann v. Elkan, L.R. 12 Eq. 140, so was the East India Company in Moodalay v. Morton, 1 Bro.C.C. 469 and it matters not that the involvement or participation was *innocent* and in ignorance of the wrongdoing."

[30] *Norwich Pharmacal Co. & Others v. Customs and Excise Commissioners* [1974] AC 133 [10].

[31] *JSC BTA Bank v. Ablyazov & 16 Ors* [2014] EWHC 2019 [72], [75] ("where the third party has become mixed up in the wrongdoing of the defendant, however innocently, he is under a duty to assist the claimant" and "the innocent third party"); *Ashworth Hospital Authority v. MGN Ltd* [2002] HRLR 41 House of Lords [36] ("innocent third parties"); *British Steel Corporation v. Granada Television Ltd* [1981] A.C. 1096 House of Lords 1183 ("These passages show that the House was unanimous in thinking that an action for discovery would lie against an innocent person involved in the tortious acts of another and that an order could properly be made requiring him to name the wrongdoers"); *Interbrew SA v. Financial Times Ltd* 2002 WL 237064 Court of Appeal [12] ("a person who, albeit innocently, facilitates

An injunction is usually understood as an order requiring the person to whom it is directed to perform a particular act or to refrain from carrying out a particular act. This conventional definition of injunction addresses a person who acts against the law – an infringer – and should be stopped from doing so. Such a person acts in a way that the rights of other people prohibit. Seeking an injunction is thus nothing but the request of a rightholder to an authority (court) for the individual compliance of a particular person with the abstract letter of the law. Injunctions against intermediaries, based on Article 8(3) of the InfoSoc Directive and Article 11(III) of the Enforcement Directive, however, do not target such persons. They address by-standers who (also) comply with the law. The basis for this kind of injunction is thus not an act of disrespect toward the rights of others, but the mere existence of circumstances giving hope to rightholders, that if they are assisted by such a person, they will be better off. Put differently, such injunctions against innocent third parties want to achieve better enforcement by seeking a help of intermediaries who can do more, but do not have to, as they did all the law required from them in order to avoid liability in tort. The ensuing responsibility to assist is what I call accountability without liability, which is also referred to as "injunctive liability" or "intermediary liability" stricto sensu.[32]

Because the term is repeatedly used in this work, I wish also to outline my own working definition of what is meant by such an entity here, in this book, focusing on its three elements: (1) an injunction, (2) innocence, and (3) a third party.

"An injunction" is understood as a court order by which an individual is required to perform, or is restrained from performing a particular act (for instance provide information, implement technical features, refrain from providing service to somebody). The term "injunction" in this work therefore refers to a separate cause of action in the *private law*, regardless of whether it is understood as material law, or as a procedural entitlement.[33]

the tortious act of another must co-operate in righting the wrong by disclosing the wrongdoer's identity to the wronged party, and can be made by the court to do so if no other expedient is available. The basis of the newly asserted jurisdiction being the old equitable bill of discovery, the power does not run against a mere witness; but it runs in respect of equitable as well as common law wrongs"); Irish case *EMI Records & Ors v. Eircom Ltd* [2010] IEHC 108 [35] ("Injunctions are granted by the court where it 'just and convenient.' That is the basis for all equitable relief formalised by the Supreme Court of Judicature (Ireland) Act 1875. I interpret the Copyright and Related Rights Act 2000 as extending to the making of an injunction against an innocent third party in order to block"); *Equustek Solutions Inc. v. Jack* [2014] BCSC 1063 [156] ("Google is an innocent by-stander but it is unwittingly facilitating the defendants' ongoing breaches of this Court's orders"); In the United States and Canada, these orders also take form of ancillary orders known as "innocent non-party injunctions" (*Equustek Solutions Inc. v. Google Inc.* [2015] BCCA 265); Cartier International AG & Ors *v.* British Sky Broadcasting Ltd & Ors [2016] EWCA Civ 658 [166] ("innocent third parties").

[32] Martin Husovec, "Is There Any Union Wide Secondary Liability?" (*Hut'ko's Technology Law Blog*, 2012), www.husovec.eu/2012/11/is-there-any-union-wide-secondary.html (speaking of intermediary liability); Jaani Riordan, *The Liability of Internet Intermediaries* (Oxford, 2016) (speaking of injunctive liability).

[33] For comparative work on nature of remedies – see Franz Hofmann, *Der Unterlassungsanspruch als Rechtsbehelf* (Mohr Siebeck 2017).