

[PARAPHRASED SUMMARY]

**Hit Bit Software GmbH vs. AOL Bertelsmann Online GmbH & Co. KG**

Grounds of Judgment of the Decision  
of the District Court Munich I  
taken on March 30, 2000

The Court has ruled that, pursuant to Section 5, para. 2 of the German Teleservices Act (TDG), the defendant AOL is liable to the plaintiff Hit Bit Software GmbH for making available and permitting the download of MIDI files infringing Hit Bit's copyrights.

Section 5 TDG is relevant and applicable as AOL provides teleservices within the meaning of Section 2, para. 1 TDG.

Section 2, para. 1 TDG reads as follows:

**§ 2 Scope of Application. (1) The following provisions apply to all electronic information and communication services which are intended for the individual use of combinable data such as characters, pictures, or sounds, and which are based on a telecommunications transmission (teleservices).**

Section 5 TDG reads as follows:

**§ 5 Responsibility. (1) Service providers are responsible under the general laws for their own content which they make available for use.**

**(2) Service providers are only responsible for third-party content which they make available for use if they have knowledge of such content and blocking its use is both technically possible and can be reasonably expected.**

**(3) Service providers are not responsible for third-party content to which they merely provide access for use. The automatic and temporary storage of third-party content due to a user's access is deemed to be the provision of access.**

**(4) Any duties to block the use of illegal content according to the general laws remains unaffected, insofar as the service provider gains knowledge of such content while complying with the obligation of telecommunications secrecy under § 85 of the Telecommunications Act, and blocking is both technically possible and can be reasonably expected.**

As the infringing MIDI files were not provided by AOL itself, but by unknown third parties, Section 5, para. 2 TDG which defines the provider's liability for third-party content is applicable.

The major question was what are the requirements to assume that an ISP has "knowledge" of such content.

The MIDI files are content in the meaning of Section 5, para. 2 TDG.

Pursuant to Section 5 TDG an ISP shall only be liable for knowingly making available infringing third-party content. However, as the copyright protection only expires after 70 years from the author's death, it has to be assumed that pop hits are copyright protected. Therefore, the making available of such music titles and allowing their download in any case constitutes a violation of the author's copyrights and distribution rights.

To have "knowledge" pursuant to Section 5, para. 2 TDG constructive knowledge is sufficient. In other words, the ISP does not need to have actual knowledge that the content is infringing. It is sufficient that the ISP knew or should have known, if it had applied proper care and attention, that the content was infringing.

Given the fact that it is unlikely that high quality MIDI files are legally offered free of charge on the Internet, a copyright violation was so obvious that AOL would have been obliged to examine whether or not the content was infringing and block its further use.

