



**Promoting Intellectual
Property Rights in the
ASEAN Region**

Best Practices when Dealing with IP-Crime

Two Case Studies on Pharmaceutical Crime and Audio Visual Piracy

Dr. Constantin Rehaag, M.A. | Frankfurt | 21st April 2022



Funded by the European Union



This Project is funded by the European Union and implemented by the European Union Intellectual Property Office (EUIPO)

Overview

I. Pharma Crime – “Der Pillendienst”

- Introduction to the Roman Imperial Count of Wagner and his Travels
- The Structure of the Gang
- Ingredients of Success

II. Audiovisual Piracy - “Key-TV”

- The Technology
- The Law
- Cooperation with the Right Owner

The Killer and the Potency Pills – the Roman Imperial Count von Wagner

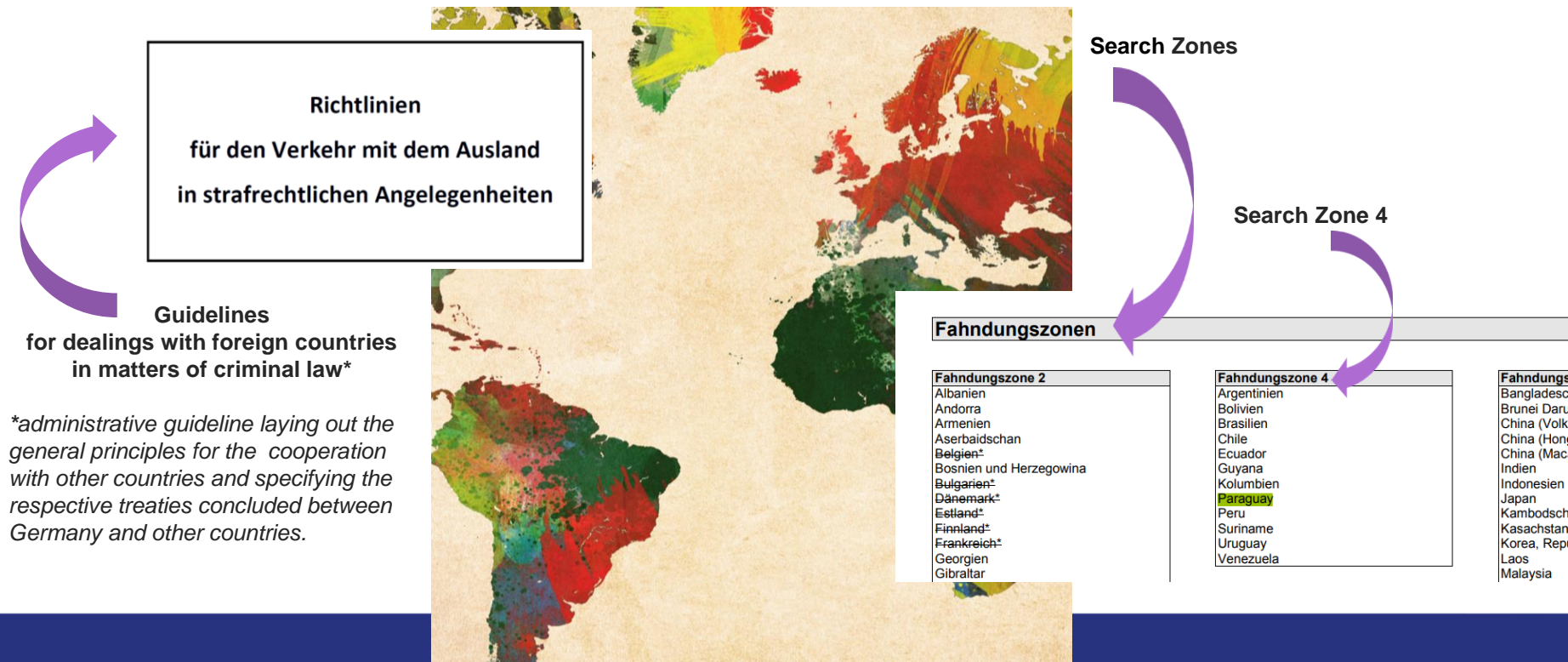
“In Potsdam, a man is on trial who is said to have made many millions with fake Viagra. His gang worked like a normal mail order business.

When the Roman Imperial Count von Wagner enters the hall of the Potsdam Regional Court, you have to search for insignia of the nobility for a long time: The man squeezes himself into the dock in a flabby knitted sweater, his beard shimmers reddish, handcuffs tie up his wrists. The count of the empire is called Matthias Mönch in real life. He is not a nobleman, he is a defendant, but he preferred to appear on the Internet under the protection of imaginative aliases. So the 45-year-old wanted to remain undiscovered and prevent what finally happened on this foggy Friday morning: that he would be led before his judge by three strong officials.

Matthias Mönch is facing a long prison sentence. Once again, because Mönch looks back on one of the most bizarre criminal careers in the country. At the end of the 1980s, the man from Frankfurt had to go to prison for several years for murdering his parents. This time he is said to have been the head of an international gang who sold potency and slimming pills on a grand scale. The booty: a two-digit million amount. On websites such as Pillendienst, Männerapotheke and Eds Apotheke, Mönch and several co-defendants are said to have sold counterfeit medicines, including the potency drug Viagra in particular. The pills apparently came from secret laboratories in India and China. The public prosecutor's office accuses Mönch and a good dozen other defendants of gang and commercial fraud, smuggling, numerous violations of the Medicines Act and criminal trademark infringement.”



From Paraguay to Germany



The Starting Position – Structure of the Pill Service (“Pillendienst”)



Aims of the Infringed Party – *Cooperation for the Benefit of the Investigations*



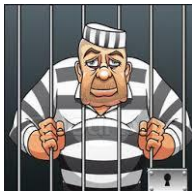
Protection of customers

IP owners normally have applications for customs border detention in place – in many instances seizures are the first hint to IP crime. First contact to the infringed party



Support the proceedings – close cooperation between the court, the prosecution service and the right holder

*What are the facts:
Are the goods counterfeit – why?
Expert witnesses!
IT-Forensics! Integrity of the evidence!*



Safeguard an appropriate punishment

Legal expertise in very special areas of the law! (intellectual property, pharmaceutical, regulatory etc.)



IT –Forensics Supporting further criminal and civil proceedings

Own investigations by the right owner can lead to information about further perpetrators, accomplices etc:



Dealing with the civil claims en passant

*Establish the damage done and the seriousness of the crime
What is the value of the goods?
What would a license cost
Follow the money, seizure of assets*



Don't mess with us – send the right message to the market

Deterrence of others as an important aim of law enforcement by the state

They earned over 3.4 Million Euros because everyone wants to watch Sky cheaper



Dresden - Fraud with pay-TV!

According to the indictment, a criminal gang offered manipulated Sky connections at bargain prices. The alleged perpetrators collected a total of 3.4 million euros. The case has been on trial at the Dresden Regional Court since Friday.

Bundesliga, Champions League, the latest blockbusters, films without commercial breaks. If you want to watch exclusive TV, you have to pay. Up to almost 30 euros a month are due. It is clear that viewers look for "bargains" on the net.

And according to the indictment, Anton O. (30), Thomas K. (46), Hans W. (56), Alexey P. (34) and Anton P. (43) offered such bargains: Via the internet portal "key-tv", the Russian-German gang offered Sky connections for a low price of eight to 15 euros per month.

Between November 2011 and November 2015, 19,570 paying users registered there!

They used a complicated system and offered the bargain subscriptions on fake websites. Alexey P. allegedly created programmes that looked like payment portals, e.g. Paysafe, but served to divert the money paid to the alleged gang. The customers did not notice anything, but the company suffered millions in damages.

Preliminary considerations

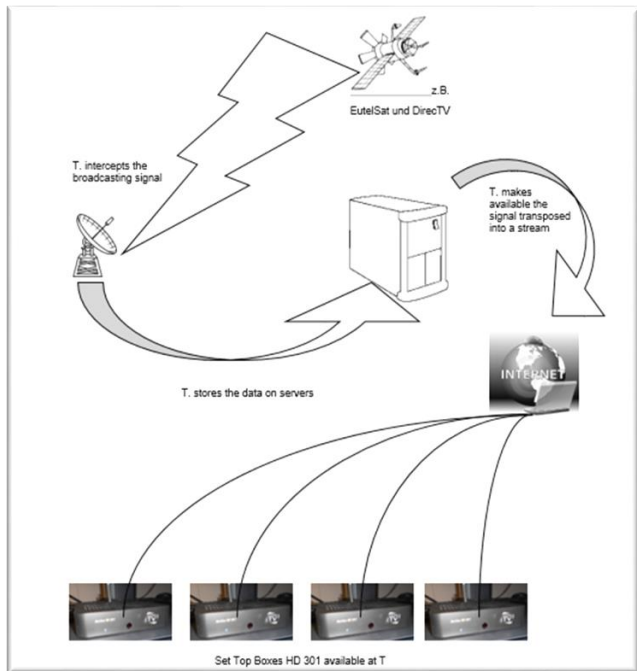
Notice and takedowns?

- When?
- Effective and sustainable?

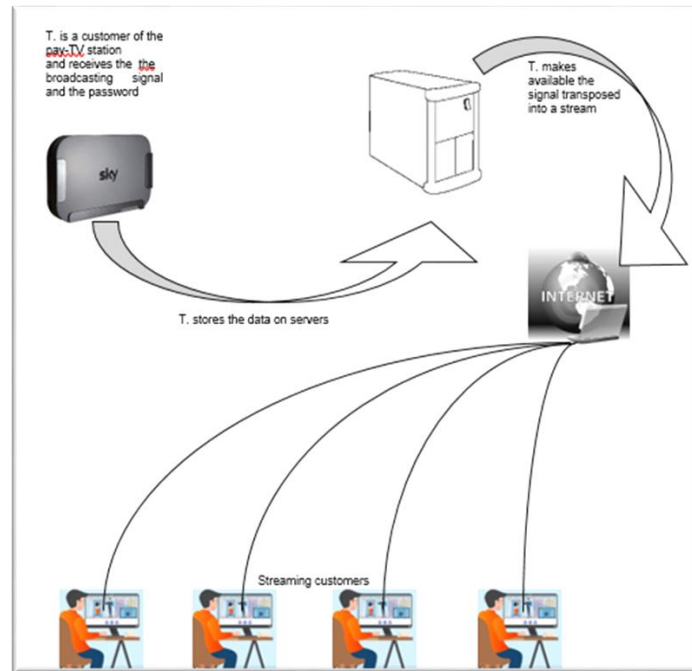
Cooperation with Intermediaries?

- What is the role of the intermediary, e.g. CDN?
- *“In 2018, C. was identified by the European Union's Counterfeit and Piracy Watch List as a "notorious market" which engages in, facilitates or benefits from counterfeiting and piracy. ”*
- Data protection issues

What is the modus operandi? Understand the technology...



versus



...or you won't understand what crime has been committed...

Section 265a German Criminal Code Obtaining benefits by deception

(1) Whoever obtains the output of a machine or the services of a telecommunications network which serves public purposes or uses a means of transportation or obtains entrance to an event or facility by deception with the intention of not paying the fee therefor incurs **a penalty of imprisonment for a term not exceeding one year or a fine, unless the offence is subject to a more severe penalty under other provisions...**

Section 100a German Criminal Procedural Order Telecommunications surveillance

(1) **Telecommunications may be intercepted and recorded** even without the knowledge of the persons concerned if certain facts give rise to the suspicion that a person has, either as an offender or participant, **committed a serious crime** of the kind referred to in subsection (2) ...

(2) Serious crimes for the purposes of subsection (1) no. 1 shall be ... computer fraud under the conditions of section 263 (3) sentence 2 and in the case under section 263 (5), in each case also in conjunction with section 263a (2) ...

Section 263a German Criminal Code Computer fraud

(1) Whoever, with the intention of obtaining an unlawful pecuniary benefit for themselves or a third party, damages the property of another by influencing the result of a data processing operation by incorrectly configuring the computer program, using incorrect or incomplete data, making unauthorised use of data or taking other unauthorised influence on the processing operation incurs **a penalty of imprisonment for a term not exceeding five years or a fine.**

(2) Section 263 (2) to (6) applies accordingly ...

... BUT NOT SECTION 265a!

Involvement of the IP Owner



On the Punishability of „Cardsharing“

„Journal for Economic and Fiscal Criminal Law“

The damage done – how serious is the crime?

Three ways of calculating damages in German IP Law

- Under German IP law, there are **three methods** of calculating damages caused by an IP infringement. Those apply to any sort of IP right (patents, designs, trademarks, copyright, unfair competition, business secrets etc.).
- If the infringer acted intentionally or negligently he will be liable for actual damages sustained by the right holder.
- As a consequence, the right holder may claim at his option damages in the amount of:
 - His **concrete damage**, in particular lost profits due to the infringement; or
 - Surrender of the actual profits** generated by the infringer (the plaintiff has a claim for information);
 - Reasonable royalty fees** that the infringer would have had to pay if he had licensed the infringed usage rights.
 - Exception: 100% surcharge for the collection society GEMA
 - Exception: on a case-by-case basis, it can be necessary to award an amount that exceeds the license fee
 - criteria: legal fees, market confusion and reputational damage suffered, interest

Three ways of calculating damages in German IP Law – Example

- Applying the different calculation methods, the potential damage of B is as follows:
 - Lost profits of B:** 100 x EUR 50 = EUR 5,000.
 - Generated actual profit of A:** 100 x EUR 30 = EUR 3,000, respectively the amount that actually surrenders.
 - Reasonable royalties:** **At least** 100 x EUR 50 = EUR 5,000, since a commercial broadcasting license arguably implies higher royalties.
- As a result, B should rely on the third method and claim damages in the amount of reasonable royalties.

- What if the claims for damages of B are time barred?
 - Delivery up of the unjustified enrichment (both license fee and infringer's profit)**

Your Key Contact



Dr. Constantin Rehaag, M.A.
Partner

T: + 49 69 45 00 12 248

E: constantin.rehaag@dentons.com

Dr. Constantin Rehaag, MA, is a partner in Dentons' Frankfurt office. He is Co-Head of the Dentons' German as well as of Dentons' European IP/T Practice Group. Since 2005 he specialises in intellectual property and unfair competition law, in particular trademarks, designs and copyright law. Constantin has comprehensive experience in IP litigation including patent litigation, in registration and in anti-counterfeiting work as well as related criminal law.

Constantin regularly publishes articles on intellectual property law and is a lecturer-in-law at the University of Passau. He gives training courses for judges and public prosecutors at the German Judicial Academy ("Deutsche Richter Akademie") and is frequent speaker at international conferences.



Promoting Intellectual Property Rights in the ASEAN Region

THANK YOU



Funded by the European Union



This Project is funded by the European Union and implemented by the European Union Intellectual Property Office (EUIPO)