

TECH-LITIGATION

by Taylor Wessing

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Our Practice Group “Technology, Media and Telecoms” has always had a strong focus on tech litigation. This area has gained considerable momentum in recent years. This applies not just to “classic” IT disputes arising as a result of failed IT projects, but also to proceedings and litigation in data protection matters, for example in the case of orders from the authorities imposing fines or defending against claims for damages.

The outcome of all these proceedings and legal disputes is determined to a considerable extent by the presentation of the facts. This is particularly true in disputes with a technological focus, when the crucial details are often only immediately familiar to the experts involved. Our colleagues have built up a wealth of experience as “tech litigators” through years of specialisation in their respective fields. With their extensive industry know-how, they swiftly and precisely pinpoint the relevant facts with their clients. They add background information to assist the courts or authorities, which may not be familiar with the particularities of the respective industry, with understanding the dispute and focussing on the facts pertinent to the decision.

On the following pages, we would like to present some insights into this exciting legal field.



Dr. Christian Frank,
Licencié en droit (Paris II/Panthéon-Assas)
Senior Partner and Tech Litigator, Munich

1. Privacy-Litigation

Data Protection Law

Our advice in proceedings and litigation in data protection matters comes under the category of "privacy litigation". The cases here are diverse and range from official orders to fine proceedings to defending against claims for damages. **Our expertise in the area of privacy litigation lies in strategic advice and defence across jurisdictions.** Depending on the constellation, we advise on administrative, criminal and civil law. The following three cases give an overview of how differently our legal advice in this area can be structured.

Our Expertise: Typical Cases

Enquiries and measures by data protection authorities: In the case of official procedures (eg questionnaire from the authority on the use of IT in the company, warning or ban on data processing), the provisions of administrative law apply. We provide support in responding to official enquiries, communicating with the supervisory authority and requesting legal protection against any measures issued.

Fines: Proceedings to impose fines for data protection violation begin with a hearing by the authority and end with either a discontinuation or a fine notice. The provisions of the law of criminal procedure and the law of administrative offences are decisive here. We provide you with support from the application to inspect the files, through negotiations with the authorities, to legal action against an administrative order imposing a fine. Since fine proceedings often attract high media attention, the public positioning of the company is of great importance as well as the legal aspects when determining the strategy.

Damages: Claims for damages by affected parties based on alleged data protection violations is governed by the provisions of the German Code of Civil Procedure. We defend our clients in court and deal with all data protection law issues. The most recent development in this area is the EU Representative Actions Directive, which was adopted at the end of 2020. According to this Directive, representative actions are also possible in the case of claims for damages under the GDPR. It now remains to be seen how the legislator will implement this into German law.



Expert opinion of Dr. Carolin Monsees, Taylor Wessing

Privacy litigation will become increasingly important in data protection law. The law in this area is just beginning to develop, and questions of attribution and the amount of fines will only be determined by the courts in forthcoming years. In the case of claims for damages, it is now up to the German legislator to implement the possibility of collective actions on the basis of the EU Representative Actions Directive.



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2. Tech-Litigation: Copyright Law

Copyright has become a central area of law and an aspect of daily life for businesses. In the context of internet-based business models, digitalised work processes or social participation and communication via the internet, copyright issues lead to **technologically and legally complex disputes** and have triggered comprehensive legislative projects at EU and Member State level. Rules for the information society and the EU copyright reform for a digital single market provide an increasingly intricate web of copyright harmonisation. They are flanked by EU-wide harmonised sector-specific liability privileges for internet service providers and the case law of the Court of Justice of the European Union, which has become the authoritative instance for the interpretation of copyright law.

With many years of experience and a deep understanding of complex technological and legal contexts, we advise our clients strategically on the legally secure structure of their business models and represent their interests assertively in court. Questions relating to copyright responsibility for the communication to the public of content on the internet, text and data mining, the rules on exemptions and limitations and new intellectual property rights such as the law on the protection of press publishers are just a small part of our complex advisory and litigation practice. On behalf of our clients, we have won a large number of industry-leading lawsuits both before the courts of instance and the Supreme Court, **and help shape the interpretation and further development of copyright law**, including liability privileges, by national courts and the Court of Justice of the European Union. In this way, we ensure the necessary legal certainty so that our clients can operate successfully today and in the future in an environment that is constantly evolving both technologically and legally.



Expert evaluation of Dr. Malek Barudi, M.Jur. (Oxford)

The EU Directive on Copyright in the Digital Single Market and its implementation in national law, including the Copyright Service Providers Act (UrhDaG), are evidence of the far-reaching harmonisation efforts in copyright law. Existing and newly emerging business models will have to align themselves with the increasingly harmonised rules. Legal disputes about the correct interpretation of these provisions are only a question of time.



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3. Tech-Litigation: Software

Today, software is used in practically all areas of a company. At the same time, the number of IT and software disputes has increased dramatically in the last years. From our experience, this mainly concerns the following areas:

1. IT projects: These have a reputation for being completed successfully very rarely. In the event of failure, there is a risk of enormous loss of time and damages often run into the millions.

2. Non-licensed use of software: This usually only becomes apparent in the course of licence audits or inspection proceedings initiated by the licensor.

If court or arbitration proceedings are unavoidable or advisable for other reasons, we navigate the dispute for our clients: We prepare the facts for the (arbitration) court in a clear way. Technical complexity and project history must be determined, but presented in a simple and compact way. Legal interests must be presented in a comprehensible manner and then pursued with a determined and assertive approach. In recent years, we have conducted a large number of proceedings for our clients before national and European courts as well as arbitral tribunals and have represented them in subsequent annulment or acceptance and enforcement proceedings. In addition, we have found ways for our clients to settle disputes out of court through conciliation or mediation. Our years of experience and expertise mean that we do not lose sight of the big picture, even in turbulent times, and that we can steer our clients towards successful enforcement or defence of their rights.



Expert evaluation of Dr. Jonathan Kropp

As software continues its triumphant advance, the importance of careful contract drafting and comprehensive IT compliance will continue to increase in the future. Nevertheless, it will not always be possible to avoid legal disputes, either to enforce claims or to ward off unjustified attacks. Then it is necessary to assess the situation pragmatically, making full use of the available legal and procedural options. We can assist our clients drawing on our significant expertise in the field of IT litigation.



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4. Media-Litigation: Media Law

The internet has created seemingly endless possibilities for communication. Due to the low concentration of laws up until now (although greatly increasing), courts have primarily created framework conditions for the players on the internet through their case law, eg the liability standards for various providers of online services such as access, hosting or search engine providers for third party information. The products and business models that are constantly being developed by our clients give rise to questions for which existing laws have no solution or for which the requirements are unclear. Especially in the case of third-party information and statements, it is not easy to put together the regulatory and judicially developed pieces of the puzzle and to find standards that are in line with the interests of the parties. The multitude of new legal regulations on the protection of minors, audio-visual media, telemedia services, video-sharing platforms and social networks makes this area increasingly complex. Not only this fact, but also the attempt of the providers of online services themselves to create regulations, eg through behavioural guidelines for their users, leads to tensions between freedom of expression, private autonomy and (public) information interest. These are often the cause of disputes.

We advise on court proceedings in the field of media and expression law at all instances and have won landmark decisions before the Federal Supreme Court on behalf of our clients. Having participated in these proceedings for many years, we can reliably anticipate the views of the important press senates and chambers. We also represent clients in ongoing proceedings before the European Court of Justice, the outcome of which will further define the relationship between data protection and freedom of expression. Our practice is successful because we not only understand our clients' products, but also provide courts with the technical background and ideas behind those products. Our precise, technical legal reasoning not only reflects case law, but also shapes it.



Expert evaluation of Dr. Johanna Spiegel

The role of online service providers in the dissemination of third-party information is playing an increasingly important role. This was recently shown by discussions concerning misinformation about the Corona virus or calls for hatred and violence in social networks. It is important to repeatedly show the courts the dilemma in which online service providers find themselves. On the one hand, they are supposed to be "neutral" and help freedom of expression to prevail as much as possible; on the other hand, they are expected to protect users on the internet. All too often, private autonomy and the interests of the provider in the design of its service are forgotten in this constellation.



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5. Tech-Litigation: Gambling

One of the fastest growing areas of the entertainment industry is the offer of gambling via the internet. Online poker, online sports betting and virtual slot machine games are extremely popular among German gamblers and have been given an additional boost by the restrictions in the pandemic. However, current market developments are encountering a highly complex regulatory environment that is only hesitantly adapting to the new reality. This field of conflict leads to a multitude of legal disputes that can only be handled with the greatest professional expertise and comprehensive know-how regarding the special features of this.

For many years, we have represented German and international clients in legal disputes in the gambling sector in Germany up to the highest federal courts. We have many years of litigation and market experience including the following:

Fundamental disputes regarding German regulation, which is disputed under constitutional and European law, administrative court proceedings regarding the enforcement of licence claims, against ancillary conditions in licences and against official prohibition orders, disputes under competition law regarding products and marketing of competitors, disputes under civil law regarding the defence of reimbursement claims of individual players as well as disputes under tax law against unlawful tax assessments.



Expert evaluation of Jan Feuerhake, LL.M. (Melbourne)

The federal regulatory structure and political inertia have led to a regulatory framework in recent years that partially thwarts the achievement of the regulatory goals of youth protection, player protection and channelling effect. In addition, there are European and constitutional concerns regarding this regulatory framework. In this dynamic regulatory environment, which is also a highly competitive market environment, it is important to successfully defend legal positions for our clients. Equally, in the face of increasing liberalisation and licensing, we must maintain good relations with the authorities as important contact partners.



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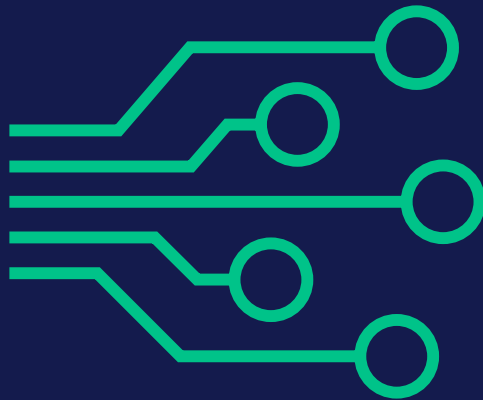
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We understand the law
of the digital future

**The economy is digitising at
breakneck speed.**

Under the term 'digital transformation', every industry is grappling with the new, technical possibilities. Do our current legal principles fit in with this and ensure a binding framework – or is digitalisation just overtaking the law?

In **Plugin** our experts regularly write first-hand about the law of the digital future. We provide impetus for current discussions, away from legal commentary.



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