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Providers' liability under civil law

Essential results of the Federal Council report of 11 December 2015

1 Introduction

When approving the report on the “Legal Basis for Social Media”[1] on 9 October 2013, the Federal Council commissioned the Federal Department of Justice and Police (FDJP), or more particularly the Federal Office of Justice (FOJ), to examine the civil liability of platform operators and providers and, if there is a need for further legislation, to draft a bill for consultation by the end of 2015. On 6 June 2014, the Federal Council also commissioned the FDJP, or in this case the Federal Institute for Intellectual Property (IPI), to implement the proposals of the working group on optimising the collective exploitation of copyrights and related rights (AGUR12) and to draft a bill for consultation by the end of 2015. Work on the two projects must be coordinated.[2]

In order to fulfil the first task, an interdepartmental working group led by the FOJ was set up, with members from the Federal Office of Communications (OFCOM), the IPI and the State Secretariat for Economic Affairs (SECO).

In line with the working group’s findings, the Federal Council has decided that a legislative project covering several legal fields on providers’ liability under civil law is not appropriate at present. The report "Providers’ liability under civil law"[3] sets out the reasons for this in detail, taking account of the technical and legal complexity of the matter. The present paper is intended to complement the report and provide a summary of the essential findings and the considerations that led to the Federal Council’s decision.

2 Structure and subject of the report

The report has the aim of establishing whether there is any need for new legislation on providers’ liability under civil law. It sets out the current legal position in Switzerland, based on (and limited by) the current expert opinion and case law.[4] This is followed by an appraisal of the current legal position and a forecast of future legal developments.[5] This leads finally to the Federal Council’s conclusion, which is that there is no need for general legislative action beyond the changes required to copyright law. The Federal Council has therefore included provisions on providers’ liability under civil law exclusively in the bill for consultation on the modernisation of copyright law. In the report on providers’ liability under civil law, a comparison is also made with the legal position in Europe and in the USA. A detailed expert opinion on the comparative law position was provided by the Swiss Institute of Comparative Law (SIR) and is being published at the same time as the report.

The report investigates providers’ liability under *civil law*. The *criminal law* aspects of providers’ liability, if any, are not examined in any detail. The criminal law position is only considered where it helps in understanding the civil law position.

The report is based on a broad definition of civil liability. Specifically, this includes breaches of privacy, unfair conduct and violations of intellectual property rights (copyrights, trademark rights). What was investigated was both actions to eliminate or terminate an infringement of rights (*injunctive claims*) and claims for damages or satisfaction (*reparatory claims*). Rights to information (e.g. the disclosure of holders of IP addresses) were also investigated. For the sake of simplicity, these aspects have been considered together and are termed “providers’

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1 Federal Council report in response to the Amherd postulate 11.3912 of 29. September 2011 “Legal Basis for Social Media” from autumn 2013, available at: www.bakom.admin.ch > Themen > Informationsgesellschaft > Berichte und Publikationen.
2 See Federal Council media release of 6 June 2014 “Federal Council looks to modernise copyright”, available at: https://www.news.admin.ch/message/index.html?lang=de&msg-id=53259.
3 Federal Council report of 11 December 2015 (referred to as “the report”), available at: www.ejpd.admin.ch/ejpd/en/home/aktuell/news.html.
4 Report (Footnote 3) Point 3 ff.
5 Report (Footnote 3) Point 7.

liability". What is not considered are claims based on a breach of contract by providers, as these – as far as can be seen – do not give rise to any special problems.[6]

Scenarios:

- A person feels that a contribution to an online blog is a breach of their privacy and would like to make the blog operator delete the entry.
- Misleading and unfair information about a company is posted on a website. The company wants to block access to the website.
- Music files can be downloaded from unlicensed sources via a file sharing platform. The names of the persons who have uploaded the files are unknown, only their IP addresses are available. The copyright holders want to find out who is behind the IP addresses so that they can take court action against them.

3 Definitions

When regulating obligations in online communication, a key issue is the role that a party plays in the sequence of communication. Swiss law has yet to provide a binding, generally applicable definition of the possible categories. However various approaches have been taken to the abstract definition of the roles in official reports, draft legislation, international enactments, court judgments and legal doctrine. The following three basic categories are generally recognised and used:

- **Content providers**: offer content on a technical infrastructure.

- **Hosting providers**: provide, for a fee, technical infrastructure (storage space, processing capacity and transmission capacity) for the automated uploading of data. Generally they have no editorial responsibility of their own, but, depending on the scenario[7], they are technically able to delete content stored on their computers if it is regarded as undesirable.

- **Access provider**: they do not offer infrastructure for storing data, providing only the technical link to hosting providers' servers (or even only part of this connection). In contrast to hosting providers, access providers are suppliers of telecommunications services as defined in the Telecommunications Act[8], as they transmit information between a minimum of two other parties (Art. 3 let. b TCA). Access providers are normally unable to delete undesirable content (as it is not stored on their servers). It is however conceivable that they could block the access to certain content. Blocking access in this way is however only effective against the clients of the access provider concerned.

Due to rapid technical advances and the wide range of services they may provide, it is difficult to categorise providers consistently. The legal classification of the various parties should therefore be as technologically neutral as possible. The Federal Council takes the view that the crucial criterion in deciding on the categories and the associated rights and obligations of providers should be proximity to content: how close is a party to the content that is accessible online? What opportunity does it have to influence, change, remove or block this content? To what extent is it desirable as a matter of legal policy for it to use or extend its use of such powers?

[6] Limitation: The working group considered contractual claims that could result from other non-contractual claims (e.g.: a provider that removes content in response to a complaint from a third party who has suffered harm will under certain circumstances breach its contract with its clients).

[7] Occasionally the hosting provider is unable to delete specific content on a server that it is renting out, but can only only shut down the server completely.

[8] Telecommunications Act; SR 784.10.

For the sake of simplicity, it makes sense to use the three basic categories described above, if only as a starting point. They are also used in the case law and the literature.

In general, where the report simply uses the term "provider" in German or “fournisseur” in French, this means only access and hosting providers. It is important to make the fundamental difference in proximity to the communicated content clear: hosting and access providers provide a *largely automated service* to content providers and their customers (and other parties). In contrast to content providers, hosting providers do not concern themselves with uploading content that they have produced or selected themselves and this holds even more true for access providers. There are also content providers who generate their content automatically. They are certainly less close to the content than other content providers, but are nonetheless closer than hosting and access providers, which only make access to third party information possible. One should therefore be aware that the categories overlap fluidly and that there are numerous mixed or special forms (e.g. social media platforms and search engines). Furthermore, there are certain providers who are rather difficult to categorise. They include link providers or agencies acting for advertisers which place advertising with content providers.

In particular, legal experts and the courts have categorised a variety of providers as *hosting providers* even when they supply services that go beyond conventional hosting. Conventional hosting providers make technical infrastructure available for the automated uploading of data, but have only indirect contact with the data itself and must therefore be regarded as distant from the content. Social media platforms such as Facebook, Twitter or even YouTube are closer to the content, as they provide users with a framework within which they can exchange content that they have created or acquired themselves. They decide on the opportunities that are given for interaction and disseminating content, but do not normally check proactively on the vast volumes of data that their users upload round the clock.[9] Auction platforms behave similarly in relation to the items offered by their users. The operators of blog platforms are closer to the content on their sites, as they can influence the choice of authors, as are opinion forums, which often have registered users. The uploaded content is normally more readily manageable and the opportunities to exert influence over the content are extensive. Forums are also regularly edited. Finally, news sites or blog sites have close control over the comments posted by their readers. This very broad spectrum of opportunities to exert editorial influence must always be taken into account when assessing the rights and obligations of hosting providers.

4 Rights to the removal or injunction of unlawful content

Rights to have unlawful content removed or injuncted (*negatory rights*) are very important in the context of the internet. For example, anyone whose reputation is attacked on a social media platform has an interest in having the relevant posting removed as quickly as possible; right holders whose copyright-protected works are offered for download without permission want to prevent this from happening. Despite the practical relevance, so far the Federal Supreme Court has issued only one judgment on the civil liability of a provider, which has not even been included in the official collection of Federal Supreme Court decisions;[10] it is therefore questionable whether the Federal Supreme Court regards the judgment as a landmark decision. In the decision concerned, “Tribune de Genève”, the Federal Supreme Court concluded that a blog host can be required to remove a blog post that breaches a person’s privacy even if it had no prior knowledge of the content of the blog. In justifying its decision, the Federal Supreme Court cited Article 28 paragraph 1 of the Swiss Civil Code[11], which states that action can be taken against any person involved in causing an infringement

[9] See also the Federal Council report “Legal Basis for Social Media” (Footnote 1). YouTube for example claims that 300 hours of video material is uploaded every minute (https://www.youtube.com/yt/press/de/statistics.html, see also on this example, Fountoulakis/Francey, medialex 2014, 182).
[10] Federal Supreme Court decision 5A_792/2011 of 14 January 2013.
[11] Civil Code; SR 210.

of rights. Furthermore, as is usual in the case of claims for removal or injunction, *no fault is required* on the part of the provider. In addition, the court held that it was a matter for parliament to correct any inequity in the application of the law to internet and blog hosting providers.

The decision has been criticised by legal experts. Although various authors agreed that the Tribune de Genève should be made to remove the posting, they criticised the Federal Supreme Court for deciding that an action was possible against anyone involved in any respect in a breach of privacy, therefore failing to set potential limits. There was also criticism of the decision to impose a share of the costs on the blog host, as it had not had any prior warning and thus had no opportunity to settle the claim voluntarily. The scope of this decision and its implications for other legal fields are still unclear. However the indication is that, when it comes to both unfair conduct and intellectual property law, the group of persons who may face a removal or injunction action could be as broad as it is in privacy and data protection cases.[12]

Liability to be sued, i.e. the group of persons against whom removal or injunction actions may in principle be upheld, should however not be unlimited: as a matter of legal policy, some requirements as to the impact of a contribution made to a wrongful act should be set. For example, it would be unjust to uphold actions against companies supplying electricity to providers, although it may be argued that in supplying energy, they are involved in bringing about an infringement of legal rights. The law as it currently stands already allows this to be taken into account. The principle of proportionality must be observed. The courts are therefore required to weigh up the various interests and must consider whether enforcing the court order may have an adverse effect on other interests that the defendant or third parties may have. The costs of a measure should also be taken into account, as well as the question of whether a provider might incur liability vis-à-vis clients if it complies with the demand for removal. The fundamental guarantees of freedom of expression (Art. 16 Federal Constitution[13] and Art. 10 ECHR[14]) and economic freedom (Art. 27 Federal Constitution) must also be observed. Even if a quite minor contribution to the wrongful act is enough to uphold a claim for removal or injunction, the contribution is only of legal relevance if there is an adequate causal connection. This means that the cause in question must in the normal course of events and according to general experience of life be likely in itself to bring about the relevant breach of legal rights. The breach of legal rights must in other words appear to have generally been facilitated by the provider's conduct. Where the connection to the breach of legal rights is negligible or where the provider cannot reasonably prevent or remedy the breach, a removal or injunction order must be refused.

On the issue of liability for content on the internet, the Federal Council takes the view that the criterion of the *proximity* of the provider concerned *to the content* should be decisive. In order to guarantee legal protection for the persons concerned, it is desirable that providers who are close to the content, such as *platform operators*, can be made to remove unlawful content – provided due consideration is always given to the principle of proportionality. Genuine *access providers,* on the other hand, offer services that are largely automated and which facilitate access to the internet. It is unreasonable to expect them to have any direct influence over the stored content. Claims against access providers, therefore, should normally be rejected in the absence of an adequate causal link to a breach of legal rights. It should also be noted that access providers can basically only prevent access to unlawful content by blocking access (IP or DNS blocking), and that the proportionality of the technical measures must be assessed very carefully in each individual case. When doing so, it is also essential to ensure, if at all possible, that blocking unlawful conduct does not also result in lawful content being blocked (what is known as *overblocking*).

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12 This is not uncontroversial in intellectual property law, see Point 3.2.5 a) of the report (Footnote 3).
13 Federal Constitution of the Swiss Confederation; SR 101.
14 Convention for the Protection of Human Rights and Fundamental Freedoms; SR 0.101.

In the case of injunction actions, the question also arises of the extent to which providers can be required not merely to remove unlawful content, but also to prevent the content from being uploaded again (known as *stay down*). This would entail the supervision of the uploaded content. This question is normally only relevant to the case of *hosting providers*, as access providers are unable or only able at disproportionate expense to monitor all the content they have transmitted. Legal experts, however, also reject such *stay down arrangements* even in the case of hosting providers. In injunction actions, the courts are clearly required to examine the proportionality of measures in each individual case. It must be assumed that under the current law, a court will at most prohibit (renewed) involvement in a specific and imminent breach of legal rights. As this is appropriate, the Federal Council sees no need to introduce general legal regulations on injunction actions against providers.

The report also considers whether provisions should be introduced – to improve legal certainty – to regulate the categories of internet operators against which removal and injunction actions may be raised and, conversely, against which such actions are incompetent. In view of the constantly developing scenarios, which are almost impossible to legislate against, it was decided not to pursue this form of statutory regulation. In addition, the Federal Council believes that the current law provides adequate instruments that allow the courts to prevent an excessive level of responsibility from being imposed.

5 Claims for damages

A provider is only liable to pay damages in a non-contractual context (Art. 41 Swiss Code of Obligations[15]) if it has acted wilfully or negligently. In contrast to the actions for removal or injunction considered above, it must be proven that the provider is *at fault*. As cases in which the provider acts wilfully should be rare, the key question relates to the *duties of care* that providers must fulfil so as not to act negligently. At present, there are no statutory provisions or authoritative court decisions in Switzerland that specify what constitute providers' duties of care.

On the issue of what care is required, various scenarios should be distinguished. Was the provider advised of the infringement of rights? Could or should it have expected an infringement of rights to occur in the specific circumstances? Or should providers be generally required to check the content posted by their users for infringements of rights?

In the case of *access providers*, in the opinion of some legal experts a duty to pay damages must be out of the question because simply providing access to the internet or providing the required infrastructure is a subordinate contribution to the wrongful act. There is a lack of causal connection between the contribution and the act.[16] A general duty for *access providers* to monitor and check is rejected – as is the case in the corresponding EU directive[17].

In relation to *hosting providers* (including platform operators), the majority of legal experts take the view that there is an adequate causal connection, as providing computer memory or communications infrastructure can reasonably be said to facilitate the infringement of rights. However, experts do not believe that hosting providers have a general obligation to check for unlawful content. Instead they are of the opinion that hosting providers can only be accused of a lack of care if they fail to take reasonable measures after receiving specific *indications* of an *obvious* breach of legal rights.[18] The Federal Council shares this view. Only in the case of an obvious infringement of rights should providers have to remove content on their own

[15] Code of Obligations; SR 220.
[16] See the report (Footnote 3), Point 4.1.1., c) and the summary on negatory claims above, Point 4.
[17] Art. 15 of Directive 2000/31/EC (E-Commerce).
[18] See the report (Footnote 3), Point 4.1.1., d).

initiative in order to avoid liability to pay damages. If providers were made to remove content in more dubious rights infringement cases, this would lead to a risk of private censorship and the deletion of lawful content.

The *Code of Conduct Hosting (CCH)* of the Swiss Internet Association (Simsa) promotes a notice and takedown procedure as a form of self-regulation. As the CCH was devised by leading industry representatives, a certain degree of acceptance within the industry may be assumed. Under the Code, hosting providers need not find out what content their clients are storing, processing or making accessible. They are also not required to actively monitor the content. Hosting providers should however accept reports of infringements of rights, check them and act appropriately. Hosting providers may block access to a website if they receive adequate notice that satisfies them that it is highly probable that the site contains unlawful content. Social media sites like Facebook and Twitter also provide for a notice and takedown procedures in their general terms of business. The Federal Council welcomes these self-regulation measures.

The Federal Council supports grading the duties of care according to the providers' proximity to the content. The following criteria should apply in cases where providers have not received adequate notice from outside their organisation of an infringement of legal rights:

- A duty to prevent or remove infringements of rights on their own initiative may only be upheld if as a result of the *special circumstances* in the individual case infringements of rights are to be expected. In particular, this may be the case due to earlier infringements of rights, but in the case of news sites and blogs it can also arise when an article is posted that is expected to generate controversial comments from readers.

- A duty of this type should furthermore only ever apply to categories of providers that are close to the content. *Access providers*, which cannot monitor the content they transmit or can only do at disproportionate expense, should be excluded from the outset. Traditional *hosting providers*, which provide largely automated services, should not have to make preventive checks on the content that they upload, as this would lead to delays in uploading legitimate content. The Federal Council takes the view that a duty to uncover and remove infringements of rights in the absence of specific allegations of anything untoward should only apply to providers who are close to the content, such as news sites and forum and blog hosts, as it can be assumed that they can reasonably keep track of and check on the online content posted on their sites.

As a whole, the Federal Council sees no reason to introduce new legislation in relation to claims for damages either. In particular, the general codification of a notice and takedown system tied to exemptions from liability could provide false incentives: (smaller) providers do not normally have the legal expertise to carry out the legal assessment required (is there a breach of legal rights or not?). The fear is that providers might remove an excess of content in response to a complaint, which would compromise users' freedom of expression. The codification of a notice and take down system is therefore another move that is being planned only for combating copyright piracy.

The issue of the degree of care required must be assessed by the courts case-by-case and does not lend itself to statutory regulation. The principles set out above may be useful when assessing individual cases.

6 Right to information from providers

The key issue in relation to rights to information is whether and subject to what requirements a person whose rights have been infringed may demand that the provider disclose the name of the person whose internet connection (i.e. IP address) was used to commit the unlawful

acts and who otherwise has remained anonymous. In the absence of a civil "action against persons unknown", disclosure is essential if court proceedings are to be taken against the miscreant. Currently, no such right to information exists under civil law. Accordingly, the criminal proceedings become of crucial importance, as they – in contrast to civil proceedings – can also be brought against persons unknown. At present, conduct must amount to a criminal offence in order to justify the lifting of telecommunications secrecy or online anonymity. In the opinion of the Federal Council, this weighing-up of interests should, as a rule, continue. For the specific situation of copyright, however, identification should be possible, although only in a very limited number of cases of serious breaches of copyright where investigations have proved unsuccessful.

In addition, a right to information of this type requires the necessary data to be stored for a certain time. The issue of data retention and the duration of retention of IP addresses for the purpose of identifying the connection subscriber is delicate from the standpoint of *data protection law*. For this reason, it has been decided not to introduce a general right to information under civil law.

7 Enforcement (procedural law)

Claims for removal or injunction are not based on establishing fault. This may lead to a situation where a defendant that is not at fault in any respect loses a court action and has to pay *costs* (court costs and the plaintiff's legal fees) under the general rules on allocation of costs in civil proceedings[19]. In individual cases – in particular where the defendant would have settled the claim voluntarily without court proceedings – this may be unfair and was criticised by legal experts in the abovementioned Federal Supreme Court "Tribune de Genève" judgment.[20] However, this is a side issue that affects all non-fault-based claims and is not a problem specific to providers' liability. For the claim to be upheld, only an unlawful act or omission is required. Any person who fulfils this requirement may be exposed to court proceedings without forewarning, in other branches of the civil law as well.

Under the current law, the courts already have the discretion to allocate costs in individual cases as they see fit and thus to impose costs even on successful plaintiffs who have failed to warn the defendant before raising an action.[21] However, it should also be pointed out that the plaintiff cannot reasonably be expected to warn the defendant in every case. Indeed in some cases there will be justification for resorting to the courts immediately. Various factors come into play here: the nature of the legal interest that has been damaged, the seriousness of the infringement and the likelihood that the defendant will settle the claim voluntarily. The Federal Council takes the view that the arrangements set out in Article 107 of the Civil Procedure Code allow the particularities of each case to be taken into account suitably. In contrast, it seems unnecessary to introduce a special new arrangement in which the plaintiff is made to bear the procedural costs if the provider is not warned in advance and immediately recognises the claim. The issue of regulating procedural costs will however have to be considered in a broader context as part of the forthcoming review of the entire Civil Procedure Code[22].

The Swiss provisions on jurisdiction and the applicable law in *international contexts* are also examined in the report. The Federal Council believes that these provisions are sufficient and appropriate. Although enforcing the law abroad is often difficult, the problem is general in its nature and can hardly be solved unilaterally by Swiss lawmakers. Mutual assistance agreements are more productive, for example by allowing direct postal service of court

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[19] Art. 106 Civil Procedure Code (CPC); SR 272.
[20] See above Point 4.
[21] See Article 107 paragraph 1 letters b, e and f CPC.
[22] See Po. Vogler 14.3804 "Zivilprozessordnung. Erste Erfahrungen and Verbesserungen" dated 24 September 2014 and Motion RK-S 14.4008 "Amendment of the Civil Procedure Code" of 17 November 2014.

documents, thus speeding up civil proceedings considerably. These agreements already exist with numerous important countries.

8 Conclusion

For all the reasons outlined above, a general (i.e. covering a wide range of legal fields) statutory regulation of providers' liability under civil law does not currently appear to be appropriate. However, by considering and evaluating the current legal position and case law, the Federal Council's report should make a valuable contribution to the development of the law and thus to improving legal certainty.