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IP Newsletter Switzerland

Federal Supreme Court Establishes Liability of Hosting Providers for Unlawful Content

In a recent decision[1], the Swiss Federal Supreme Court established for the first time that blog platform providers are liable for unlawful content of third parties. According to the decision, a blog platform provider can be ordered to eliminate content which violates personal rights as well as to make sure that such content is not again published and distributed using the blog platform provider's website.

In particular, the Court argued that the provision of the technical infrastructure of a blog platform was a sufficient contribution to the violation of personal rights through a post published on that platform to constitute a liability of the platform provider. Since this reasoning of the Supreme Court could principally also be applied to any unlawful content that is hosted and/or transmitted by an internet service provider, e.g. content that infringes intellectual property rights, it deserves a closer examination.

1 The facts of the case and the Supreme Court's decision

The case before the Supreme Court concerned a post that was published on the website of the newspaper *Tribune de Genève*. The newspaper allows its website users to create their own blogs and to upload their own posts which are hosted on the newspaper's servers and published on the newspaper's website blog section.

In one such blog a politician from Geneva commented on a rival politician and former director of a local bank alleging his involvement in the collapse of the said local bank. The former director claimed that his personality rights were violated by the comments made in the blog and initiated interim relief proceedings against the author of the blog post and the newspaper. Thereby, he requested the court to order both defendants to remove the post from the newspaper's website, and to order the author of the post to refrain from publishing the infringing comments again. The first instance court approved the claimant's requests for interim relief and issued the requested orders against the author and the newspaper.

In the ensuing proceedings for confirmation of the interim court order, the claimant requested that the orders issued against the author and the newspaper shall be confirmed, and that the comments posted in the blog be declared unlawful. Moreover, the claimant claimed compensation for personal suffering from the author. Apart from the claim for compensation for personal suffering, the courts of first and, on appeal, second instance sustained the claim. They declared the comments posted in the blog to violate the personal rights of the claimant and, consequently, they confirmed the interim relief. The courts of the Canton of Geneva concluded that both the author and the newspaper had violated the claimant's personal rights, and that they had been rightfully ordered to remove the post and, to the extent the author was concerned, to refrain from publishing the comments again.

The newspaper appealed this decision to the Federal Supreme Court arguing that it merely provided a technical infrastructure and - other than with regard to traditional media - had no influence on the content of the posts published on its platform. It concluded that it did not participate in the infringement committed by the author of the post. Deciding to the contrary would trigger unreasonable and impractical consequences. Finally, the newspaper also referred to foreign legislation that it said would shield blog providers from such liability.

The Federal Supreme Court rejected these arguments. It reasoned that Swiss law knows no special

[1] Decision 5A_792/2011 of 14 January 2013.

rules and legislations on the liability of blog platform providers or other sorts of hosting providers. Consequently, the providers' liability was to be determined on the basis of the same provisions and rules that also apply to traditional media and "offline" cases concerning the infringement of personal rights (such as, for example, the publishing of letters to the editor in a newspaper, where it is an established principle that the newspaper may be liable - together with the author and possibly other persons - for unlawful content).

Under Swiss laws on personality rights, a person whose personal rights are infringed may act against all those 'participating' in the infringement. 'Participation' includes the primary infringement, but also any other form or degree of participation that causes, makes possible or furthers the infringement, even in an insignificant way. It is not even required that the person participating in the infringement is aware, or could have been aware, of the infringement and its participation therein. All that is required is the abettor's facilitation of the infringement through any sort of supporting behaviour. In the context of media, this means that transmitting intermediaries may become liable for unlawful content of third parties without being at fault and without even being aware of the unlawful content. Such liability of the provider, however, is limited to its duty to remove infringing content or otherwise to cease an existing infringement, and to refrain from participating anew in the transmission and publication of the unlawful content. As to the provider's liability for damages and compensation, fault (wilful intent or negligence) on the part of the provider would be required, which means that the provider would either have to be aware, or negligently unaware, of the infringing content.

Applied to the case at hand, the Federal Supreme Court found that the newspaper enabled the author to create the blog and to publish the comments on the web, and it thereby facilitated and participated in the infringement. The Court considered the fact that the newspaper allegedly was not in a position to control and examine every blog and blog post to be irrelevant. The newspaper's duty (if any) to control and examine the blog posts was a question of fault and negligence and therefore not relevant in the present case because the claimant did not claim compensation and/or damages from the newspaper. Accordingly, the Federal Supreme Court rejected the appeal, mentioning in passing that it would be for the lawmakers to amend the legal situation, if need be.

2 What the Supreme Court forgets to keep in mind

The decision of the Supreme Court applies the generally accepted principles of participation in the infringement of personal rights, and therefore the Supreme Court's findings do not come as a great surprise. Moreover, the decision of the Supreme Court seems to be appropriate in that particular case since it merely confirms that both the author and the newspaper had participated in the violation of the claimant's personal rights, and that they had been rightfully ordered to remove the post. Since the newspaper never contested to have the means to remove the blog post from the webserver hosting the website and the blog, nothing is wrong with the court order and the Supreme Court's decision in that respect.

The Federal Supreme Court is however wrong in stating that the question of whether or not the provider is in a position to control and examine every blog and blog post is only relevant in the context of claims for damages and compensation (where fault - wilful intent or negligence - is required). In its reasoning, the Supreme Court disregards that injunctive relief may not be issued against a party who is not in a position to prevent the violation from recurring. Where the Supreme Court finds in general terms that any form of participation is sufficient for a defendant to be ordered to remove the unlawful content *and* to refrain from publishing the same content again, and where it finds that the issue of whether or not the defendant is in a position to control and examine the contents is not relevant for such injunctive relief, the Court forgets about the legal principle that no defendant should be subject to unreasonable orders which he cannot comply with.

The Federal Supreme Court is wrong in lumping together the claimant's right to request removal of unlawful content and his right to request injunctive relief, namely to order the hosting provider to refrain from hosting the unlawful content again. To the extent such injunctive relief is concerned, the issue of what kinds of control measures can be implemented by the hosting provider with reasonable effort is certainly decisive. The hosting provider's duty (if any) to control and examine the content of third parties is therefore

not merely a question of fault and negligence that arises when damages and compensation are claimed, but it is a question to be answered as well in cases where the claimant requests an order for injunctive relief against the hosting provider. It remains to be seen whether Swiss courts keep recognizing this general principle notwithstanding the recent decision of the Federal Supreme Court.

3 Implication to IP infringement cases

The consequence of this decision for blog platform providers is that, in principle, they are forced to actively monitor the posts on their platforms in order to avoid claims for removal of unlawful content and injunctive relief. However, as platform providers are, as a rule, notified of unlawful content and requested to take it down prior to the launching of any court proceedings, the *de facto* consequences of this decision are not likely to be enormous. Because the principles of participation in the infringement of personal rights are the same as the principles applied in connection with the infringement of IP rights, the impact of the decision however goes beyond libel and extends to IP infringement cases.

Of much importance for internet providers is that even though the Federal Supreme Court confirmed that the liability of a provider for damages and/or compensation would require fault (wilful intent or negligence) on the part of the provider, the Court gave no indication in what circumstances it would consider an internet provider to have acted in fault. Consequently, the Federal Supreme Court's decision has no implication on the question of civil liability of internet providers for damages and/or compensations claims. It has also no implication on a possible criminal liability of internet providers. Even though Swiss courts have not yet established a practice in that regard, prevailing doctrine as well as the Code of Conduct published by the Swiss Internet Industry Association considers the implementation of a functioning notice-and-takedown procedure as a sufficient mean to prevent further liability of providers.

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