



## IT Law Newsletter Switzerland

# Site Blocking and Liability of Access Providers

### 1 The Decision of the Federal Supreme Court

According to the latest decision of the Federal Supreme Court (4A\_433/2018) Swisscom has no obligation to block websites with content infringing third party copyrights and is not liable for providing access to such websites.

The decision is based on following facts: Websites, such as <http://www.cineblog-01.net>, offering to users to download or stream films; the claimant is exclusive licensor of such films in Switzerland. Therefore, the claimant requested Swisscom to block access to such websites, respectively to block the corresponding domains, what Swisscom refused. The claimant introduced action with the Commercial Court in Bern arguing that Swisscom was participating in the infringement as it allowed the access to such websites by not blocking the corresponding domains. The claim was dismissed and the claimant appealed the decision to the Federal Supreme Court. The Federal Supreme Court confirmed the decision of the Commercial Court. The main considerations are the following:

The claimant and Swisscom agreed that the content of certain websites was infringing the claimant's copyrights. They also agreed that Swisscom, as internet access provider, allows its clients to access the internet and transmits data.

The question that the Federal Supreme Court had to decide was whether Swisscom had to be considered as participating to the infringement as Swisscom allows the connexion to the (infringing) websites and transmits the infringing content.

In order to assess whether Swisscom was participating in a copyright violation, the Federal Supreme Court logically first examined if a violation occurred.

It first examined if the users (Swisscom's clients) were infringing (the claimant's) copyrights when downloading or streaming films. As the Swiss Copyright Act allows users to download or stream for their own private use ("Eigengebrauch") even infringing content, no infringement occurred. The Swiss Federal Court concluded in this regard Swisscom cannot be qualified as a participant to a non-existing infringement.

Then, the Federal Supreme Court examined whether Swisscom participates in the infringement of the content or hosting providers uploading or offering the infringing content (note: the parties agreed that the content of certain websites was infringing the claimant's copyrights).

The Federal Supreme Court then reviews under what conditions a person can be qualified as a participant to an infringement and states that the action or omission of the participant must be in a legally causal relationship to the infringing result. This means that according to the general life experience, the action or omission must be suitable to cause or favour the infringing result. Not any cause following the laws of nature will be considered as causal, but only the cause that allows legal accountability.

Concretely, the Federal Supreme Court examined whether the omission of Swisscom to block the websites could be considered to be in a causal relationship to the infringement of the content or hosting providers uploading or offering the infringing content.

The content or hosting providers were not clients of Swisscom, rather Swisscom provided to its clients (the users) access to the internet. This led the Federal Supreme Court to the conclusion that, if Swisscom was considered as participant to the infringement, all other internet access providers would also. The Fed-



eral Supreme Court considered that such a "system liability" obliging to verify the content and block domains was not in a causal relationship to the infringement by the content or hosting providers uploading or offering the infringing content. If such an obligation were to be introduced, it would need to be done by way of passing or amending a formal act. Thus, the Federal Supreme Court considered that Swisscom was not a participant in the infringement of the content or hosting providers and has no obligation to block certain domains. If one goes one-step ahead, this means that Swisscom cannot be held liable for the infringing content.

## 2 Conclusion

Internet access providers, such as Swisscom, cannot be held liable for copyrights infringements. The decision of the Federal Supreme Court must be welcomed for several reasons:

- introducing a liability for internet access providers would lead to private censorship, as internet access providers would have to block a considerable

amount of websites over the world on notice of third parties alleging infringements;

- the decision aligns the liability of internet access providers to the regime of the European Union, therewith reducing their business risks and fostering the Swiss location;
- the decision goes in the direction of the current revision of the Copyright Act, in which site blocking is not foreseen;
- the decision avoids an increase of costs for the users, as the internet access provider would have to pass over their costs to implement blocking requests to their client, i.e. the users.

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