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April 5, 2016

# Internet Service Provider‘s liablil-ty for enabling access to copyrigth infrining content remeains uncle-ar

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# IT and Internet Newsletter Switzerland

## Internet Service Providers' liability for enabling access to copyright infringing content remains unclear

### 1. Introduction

Unlike in the EU, the internet service providers' liability for enabling access to or the storage of copyright infringing content is *not* regulated by Swiss statutory law. This brings uncertainties for internet service providers as to their liability in the case users of their services access or make available copyright infringing content. Likewise copyright owners face difficulties when seeking redress for copyright infringements.

This situation is being regularly reviewed and several recent initiatives have been taken in Switzerland, the main ones being summarized below.

### 2. Revision of the Copyright Act

The Federal Council sent the preliminary draft of the revised copyright act in consultation on December 11, 2015. With regard to copyright infringements over the internet, the draft mainly focuses on involving internet service providers, even if they are not the ones primarily infringing copyrights.

According to the draft copyright act, *hosting providers* must remove the infringing content from their servers upon notice and provide the identity of the content provider. The hosting provider has to notify the content provider thereof. *Access providers* must block access to infringing content upon the order of the Swiss Federal Institute of Intellectual Property if the content is hosted by a hosting provider located abroad or at an unknown location. The content provider has the possibility to oppose to the take down or to the access blocking, in which case the content must be reloaded or made accessible again.

In exchange for these new obligations, the draft foresees that internet service providers are exempted from liability for hosting copyright infringing content or for permitting access to such content.

### 3. Round Table

In order to enhance the protection of the authors until the revision of the copyright act enters in force, the Federal Council organized a round table, whereby the initiative came from the Swiss-US Cooperation Forum on Trade and Investment. The outcome of the roundtable is the acknowledgement of the self-regulation of the hosting providers and of the difficulties faced by access providers to block access without proper legal basis.

### 4. Federal Council's Report

On December 2015, the Federal Council published a report on liability under civil law, in which it came to the conclusion that new provisions on liability for Internet service providers were not necessary. Given the fast technological evolution in the field of digital communication, the Federal Council found it not proper to introduce exemptions for certain providers or to introduce a statutory take down on notice obligation, fearing that this may prompt smaller providers to quickly take down content or bar access without proper investigation which would be tantamount to a private censorship.

The main focus of the report is on the right to have infringing content removed. The Federal Council bases its findings mainly on the Federal Supreme Court's decision of January 2013, in which the Federal Supreme Court found that the editor of a newspaper had to remove the content of a blog it had published on its website. This decision was based on personality rights, which foresees that a court action can be introduced against anyone involved in the infringement, irrespective of whether such person is found to be at fault, to stop or prevent such infringement. The Federal Council recognizes that the decision has been criticized mainly because it remains very broad (if not too broad) on the persons against whom an action can be introduced.

Nevertheless, the Federal Council found that the courts must adhere to the principle of adequacy when issuing take down orders and that this principle will be sufficient to adequately contain the circle of potential defendants. Further the Federal Council also founds that a court will have to consider adequate causation, meaning that an action must be dismissed if the connection to the infringement is so remote and negligible or if the provider cannot reasonably prevent or stop the infringement. Thus, Federal Council came to the conclusion that no specific legal regulation is required.

The report then comes to the more difficult topic of liability for damages, where there is no guidance by a precedent of the Federal Supreme Court.

The Federal Council takes note of and welcomes the self-regulation measures of the Swiss Internet Association instituting a notice and take down procedure and of terms and conditions of the major social media sites, which also foresee such a notice and take down procedure.

In the absence of a notice, the Federal Council is of the view that a removal of infringing content upon the internet service providers' own initiative can only be expected if particular circumstances request it, such as the occurrence of an earlier infringement or if an infringement has to be expected, in analogy to the Delfi AS/Estland decision of the European Court of Human Rights.

As a whole, the Federal Council sees no compelling reason to introduce new legislation dealing with the liability of internet service providers or their exemption from liability... The Federal Council therefore defers to the courts, which will have to define the conditions triggering liability for internet service providers on a case by case basis by applying existing legal framework.

Although a case by case basis might have the advantage of being most adequate in the particular case, the legal uncertainty remains for the internet service providers. This uncertainty may put Switzerland at a competitive disadvantage for internet service providers compared to jurisdictions where there is more certainty. Further, the remaining uncertainty will likely prompt internet service providers to remain cautious and to immediately take down content upon receipt of a notice alleging infringement, thus leading to the private censorship the Federal Council was trying to avoid.

## 5. Conclusion

A regulation on liability of internet service providers is missing in Switzerland. When the revised copyright act will enter into force, which is still a long and time consuming process to go, it will constitute a step in the right direction. However, given that the Swiss legal framework for infringing content predates the digital revolution, one may ask, whether a more courageous approach of the Swiss legislator - albeit for which it is not known - might be better.

April 5, 2016

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