

Newsletter No.

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Swiss IP News we will provide you with updates on new decisions, the relevant legislative process and other trends in the fields of intellectual property and unfair competition law from a Swiss perspective.

easyJet vs. easyBet – Hosting provider ordered to take down trademark infringing website

In a decision of 2 December 2019, the Commercial Court of Argovia, Switzerland, held that the website at easybet.com infringed easyJet's famous trademark and ordered the Swiss hosting provider to take down the website. This is the first reported case in Switzerland in which a hosting provider was ordered to cease and desist from hosting a website on the basis of trademark infringement.



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Background

A Curaçao company operated a portal for online betting games under the domain easybet.com. The website contained numerous references to "easyBet" and had previously imitated the appearance of the easyJet brand. A Swiss company acted as hosting provider for the website.

In August 2019, easyJet filed an action against the Swiss hosting provider with the Commercial Court of Argovia, Switzerland, requesting that the hosting provider cease and desist from hosting a website at easybet.com, to the extent that this website is accessible from Switzerland and uses the "easyBet" sign. Among other things, easyJet argued that the website at easybet.com infringed its famous "EASYJET" trademark and that the hosting provider took part in this infringement.

Decision

In its decision of 2 December 2019, the Commercial Court holds that during the proceedings it had remained undisputed that the "EASYJET" trademark enjoys an outstanding recognition, uniqueness and a general positive reputation. Accordingly, "EASYJET" qualifies as a famous trademark under Swiss trademark law. As such, the "EASYJET" trademark enjoys protection against the use of a third party trademark for any type of goods or services if such use threatens its distinctiveness or exploits or damages its reputation.

The court further found that the "EASYJET" trademark and the "easyBet" sign are very similar, which may lead the public to believe, wrongly, that the "easyBet" sign is a brand of the group of companies to which easyJet belongs. Consequently, the "easyBet" sign dilutes and thus threatens the distinctiveness of the famous "EASYJET" trademark.

Moreover, the court held that an action for trademark infringement can be brought against any person taking part in the infringement. A hosting provider from whose servers infringing content can be retrieved contributes to the infringement. Accordingly, the Swiss hosting provider of the website at easybet.com is (also) responsible for the infringement of the famous "EASYJET" trademark.

The court thus orders the hosting provider to cease and desist from hosting the website at easybet.com, to the extent that the website uses the "easyBet" sign and is accessible from Switzerland. Further, the costs of the proceedings are to be borne by the hosting provider.

Comment

The decision by the Commercial Court is the first reported Swiss case in which a hosting provider was ordered by a court to take down a website because of trademark infringement. It illustrates the broad interpretation applied by the Swiss courts as to who is responsible and may be sued for the online infringement of a trademark.

Who is responsible for online infringements is often a tricky question. The decision by the Commercial Court clarifies that rights holders may also act against hosting providers who host a website with infringing content. This is in line with a decision of the Federal Supreme Court of 2013, in which the court had found that a media undertaking that hosts a blog for its readers is liable for violations of personality rights committed on such blog. By contrast, in 2019, the Federal Supreme Court held that an internet access provider who merely allows its customers to use their infrastructure is not liable if it does not prevent its customers from accessing websites with copyright infringing content.

Taking action against the hosting provider of an infringing website may be an interesting route if the website operator and/or the domain owner are located in jurisdictions where enforcement is notoriously burdensome. Not adding the domain owner and the website operator to the claim may further allow avoiding lengthy service of court documents abroad. Moreover, the hosting provider may not be particularly eager to fend off an action brought against it. However, acting against the hosting provider alone includes the risk that the hosting may be transferred to another hosting provider, as the decision is only binding on the parties to the proceedings.

easyJet has been represented by Markus Frick and Manuel Bigler.