

Information Technology - Switzerland

Swiss Internet Industry Association adopts hosting code of conduct

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Introduction

The Swiss Internet Industry Association (simsa) recently adopted a hosting code of conduct, which aims to clarify the role of the hosting provider in relation to illegal content online.⁽¹⁾

The code has applied since February 1 2013 and was designed jointly by leading Swiss hosting providers, such as Host Point, Green, Webland, Nine, Metanet, Swisscom and Zion, under the lead of simsa.

Why a hosting code of conduct?

As Switzerland is not part of the European Union, the EU E-Commerce Directive (2000/31/EC) does not apply. Swiss law sets down no specific rules about the civil and criminal liability of internet service providers (ISPs) and particularly not for a legal privilege of liability for ISPs.

When a claim is raised against an ISP after a person's personality has been infringed online, the courts must resort to general rules about the protection of personality rights. According to Article 28 of the Civil Code any person whose personality rights are unlawfully infringed may apply to the court for protection against all those causing the infringement. In a recent case the Federal Supreme Court decided against a newspaper publisher providing a blog on its website in which one person was unlawfully attacked by another.⁽²⁾ The Supreme Court held that anyone who contributes to an infringement of personality, even in a subordinated manner, is liable in the same way as the author of the infringement, irrespective of:

- the contributor's fault;
- the existence of a causal link between the contributor's action and the infringement; and
- any knowledge by the contributor of the infringement.

This legal situation is uncomfortable for hosting providers, which risk getting involved in court proceedings for content made available by their customers without their knowledge. In view of this, simsa has published a code in order to strengthen legal certainty and establish an industry standard to help clarify the roles, responsibilities and processes relating to illegal content online.

Procedures

The code provides for a 'notice and notice' procedure and a 'notice and takedown' procedure in cases of illegal content. 'Illegal content' is defined as content infringing IP rights, personality rights or constituting a criminal offence (particularly pornography, the portrayal of violence, racism and libel).

The code provides that a person affected by allegedly illegal content may send a notice to the hosting provider, which must meet the following formal and content-related requirements:

- name and address of sender;
- explanation of why sender is particularly affected by the allegedly illegal content;
- URL of the offending webpage or subpage;

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- precise description of the allegedly illegal content; and
- motivation of its illegality.

Notice and notice procedure

After receiving a notice meeting such requirements, the hosting provider will, generally within two working days after receipt of the notice, send written messages to both the customer and sender of the notice.

In the letter to the customer, the hosting provider will provide the customer with a copy of the notice and remind him or her that the sole responsibility for content stored, processed or made accessible to third parties by use of the hosting services lies with the customer. The hosting provider will ask the customer to either remove the offending content or explain to the sender of the notice why the content is lawful.

In the letter to the sender of the notice, the hosting provider will confirm receipt of the notice and inform him or her about the letter sent to the customer. The hosting provider will inform the sender that sole responsibility for content stored, processed or made accessible to third parties by use of the hosting services lies with the customer. The hosting provider will not disclose any customer data, but inform about possible ways to find out the identity of the owner of an internet domain (eg, WHOIS database) and about state authorities to contact in order to assert its claims.

Notice and takedown procedure

In cases where it appears very likely that a customer has stored, processed or made accessible illegal content, or if the hosting provider itself could be criminally responsible or liable under civil law, the hosting provider can partially or completely block access to the website at its own discretion until the matter has been resolved between the parties concerned or by a court or other authority.

Immediately before or after blocking a website, the hosting provider will forward the notice to the customer and inform about the reason for the block. At the same time, the hosting provider will inform the sender of the notice about the block and the letter sent to the customer.

When assessing whether a notice is complete, whether a website should be blocked and if legal proceedings (eg, criminal complaint) should be instigated, the hosting provider will apply the benchmark of a legal layman.

simsa provides its members with sample clauses in order to ensure that they incorporate the code in their general terms and conditions.

Comment

The concept of a code should be supported. It enhances transparency by defining the requirements of a notice and the processes to be followed. The courts will presumably give some consideration to the code when it comes to illegal content online.

However, the code does not provide a legal framework for the liability of ISPs in cases of infringement online. The legal situation in Switzerland is unclear and dissatisfactory.

Article 28 of the Civil Code, which allows for the approach of all those causing the infringement of personality rights, may be adequate in an offline context but not in an online context. It can potentially lead to a liability of hosting providers for infringements of personality rights due to content of which they are unaware.

Hosting providers might encounter similar risks when it comes to IP rights infringement. The respective laws regarding copyrights, trademarks, designs, patents and unfair competition do not provide for a legal privilege of liability for ISPs. It can therefore not be excluded that a hosting provider will be held liable for content uploaded by their customers that infringes the IP rights of others, even if the hosting provider has never been made aware of the illegality of such content.

Consequently, the code is of no added value if the hosting provider has no knowledge of the alleged infringement. In cases where the hosting provider is aware of the alleged infringement, some discussion points remain.

The notice and takedown procedure is well established in the European Union. Yet hosting providers in Switzerland which apply the procedure must ensure that they have taken appropriate contractual safeguards regarding their customers before blocking any websites. If they fail to do so, they may be held liable by their customers.

The notice and notice procedure and the concept of a choice between two procedures could turn out to be problematic.

First, the concept of two alternative procedures is debatable, because whatever procedure the hosting provider applies, one party can always blame the hosting provider for having chosen the wrong option. In general, alternative procedures hardly enhance legal certainty. Arguably, a sole notice and takedown procedure would give the

hosting providers better guidance.

Second, even if the notice and notice procedure can help to prevent certain unnecessary proceedings (opposed to simple inactivity of the hosting provider), it does not provide a solution if an infringement has occurred and the customer refuses to remove the infringing content.

Third, application of the notice and notice procedure could create a false sense of security for the hosting provider. Under the given legal situation, the risk of liability for infringing content remains, notwithstanding full compliance with the code.

Fourth, from a data protection perspective, one might ask whether the sender of the notice has ever consented that its identity gets disclosed to the customer.

Finally, it may become a problem that the notice and notice procedure has no follow up. The hosting provider gains no knowledge of whether the involved parties have reached any solution or whether the customer has reacted at all. This problem could have been solved by providing for management of all correspondence by the hosting provider - a solution which was rejected possibly due to cost considerations.

simsa is fully aware of the risks that derive from the given legal situation. The code correctly states that it is a document of voluntary self-regulation only and that in view of the current legal uncertainty around provider liability, simsa cannot guarantee that hosting providers will be exempt from criminal prosecution or civil liability if they comply with the code.

The Federal Supreme Court appears to be displeased with the existing legal situation. It has stated that it is not for the courts but for the legislature to rectify the serious implications the actual legal situation might have for the Internet and ISPs. It remains to be seen whether the legislature will react and whether the code will turn out to be effective.

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Endnotes

(1) See www.simsa.ch.

(2) Federal Supreme Court 5A_792/2011, January 14 2013. See www.bger.ch (in French).

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