

# Internet Service Provider Liability

## The Swiss Perspective

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**Abstract:** Switzerland does not have a concrete legal framework dealing with rights and obligations of ISPs; however, legal doctrine and practice apply similar principles as stated in the E-Commerce Directive of the EU.

The liability of ISPs depends on the “closeness” to the content. Whereas in cases of solely transmitting services the risk of liability for illegal information is remote and the duty of ISPs is limited to a take-down, content, host and link providers (in cases of moderated newsgroups) can become liable if the information made available is not controlled.

**Keywords:** Access Provider; Host Provider; Content Provider; ISP; Switzerland; Liability

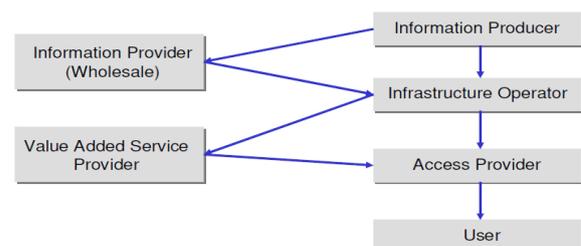
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### A. Introduction

1 As an introductory remark, the following two related observations can be made: (1) Switzerland does not have a concrete legal framework dealing with Internet Service Provider (ISP) liability; and (2) Switzerland has not and most likely will not take over the corresponding provisions of the EU E-Commerce Directive of June 2000.<sup>1</sup> The Swiss Minister of Justice presented proposals for a possible revision of the Swiss Code of Obligations in 2001 encompassing rules on electronic contracting, on distance selling requirements and on ISP liability; whereas the proposals related to the electronic contracting have remained uncontested, particularly the proposals on the distance selling framework and also on ISP liability caused lively discussions. The first official reaction consisted in a “calming down” of the debate; afterwards, the subsequent Minister of Justice decided to put the file on hold and to evaluate its revitalisation at a later stage.<sup>2</sup> In February 2008, the third Minister of Justice fully “liquidated” the file, meaning that a revision of the Swiss Code of Obligations might not occur during the coming years. The “liquidation” of the file includes a potential adjustment of the Swiss Penal Code.

- 2 These facts, however, do not mean that the legal situation in Switzerland is completely different from the legal framework in the surrounding countries. Obvious similarities exist, but this diagnosis is based more on the voices of legal doctrine than on decided court cases since relevant court practice is almost inexistent.
- 3 Like the EU member states, Switzerland addresses the different participants of an information chain in the Internet in a distinct manner; liability gradually increases subject to the closeness to the illegal or offensive content. Therefore, light must be shed on the following “players” in the Internet:

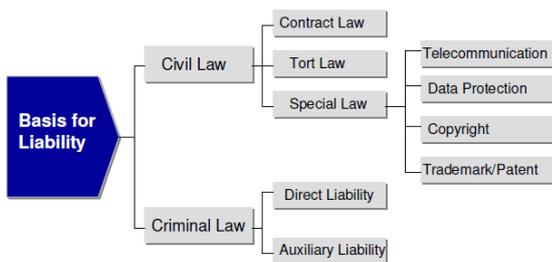


## B. Legal Framework

4 Looking from a general legal angle, the following situations can lead to undesired anomalies and therefore to the application of legal provisions:<sup>3</sup>

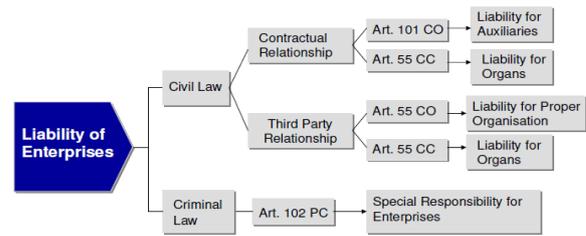
- § *Public form of the information:* The illegality of information transported by way of the Internet consists in the fact that the information becomes public and is not fully kept confidential.
- § *Violation of privacy:* The making available of information to the public infringes the privacy and data protection provisions (Art. 28 Civil Code and Art. 15 Data Protection Act), in particular the authenticity and the integrity of information.
- § *Content of the information:* The most important cases of illegal activities concern the content – for example, the distribution or making available of pornographic, obscene, racist and similarly critical material; mistakes in advice giving and information gathering; misleading acts in information search; unfair competition; violation of copyright; or other intellectual property rights.
- § *Interruption of information access or problem of information transfer:* This group of anomalies encompasses technical aspects of the information delivery, including risks caused, for example, by denial-of-service attacks.

5 As far as the applicable legal framework is concerned, an overview leads to the following picture that encompasses various legally covered segments:

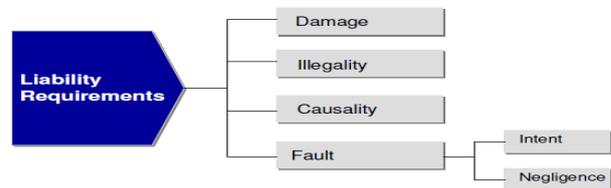


6 Liability can generally be based on civil or criminal law. Within the range of civil law, liability may be derived from a contractual relationship between the provider and the person concerned. If the parties involved have not entered into a contractual relationship, liability can arise from general tort law or from special laws such as copyright, trademark or data protection law. If the alleged content violates personal rights, civil liability is based on the personality right. In the criminal law framework, the provider may be held responsible directly or indirectly in an accessory function.

7 In respect of the civil and the criminal liability of an enterprise, specific rules dealing with recruited personnel apply:<sup>4</sup>



8 Generally, the four well-known elements of a liability claim need to be fulfilled in order to successfully start a legal action:



9 Based on this general understanding of the legal framework for the different types of ISPs, the specific legal aspects governing the Swiss legal environment will be discussed in regard to the various providers.

## C. Civil Law Differentiations for Specific Provider Types

### I. Content Provider

- 10 A content provider makes content of whatever nature (information, pictures, music, films) available to the public. Obviously, in case of harm, the content provider becomes liable. However, two major issues are at stake: on the one hand, a “clever” content provider will try to hide any traces or remain invisible and therefore not recognizable; on the other hand, a content provider could be domiciled in a jurisdiction which does not know an adequate legal framework or which does not allow the enforcement of a judgment rendered in another country.<sup>5</sup>
- 11 Contractual liability depends on whether a contract has indeed been concluded between the content provider and the person concerned. Specific problems occur if the content or information produced by the content provider is available at no charge; in that

case, it must be judged whether the parties involved had any intention to enter into a legally binding relationship. In addition, even if a contractual relationship exists between the content provider and the user, often the content is accessible free of charge, which leads to a reduction of liability according to general contractual principles for non-remunerable deliveries (Art. 99 para. 3 and Art. 44 para. 1 CO).

- 12 Copyright infringement is of crucial importance with regard to the legal position of the content provider. According to the Swiss Copyright Act (Art. 10 para. 2), the content provider – if it is not the copyright owner – is not only liable for the creation of the infringing content but also for collecting the content from third persons and making it available to third persons by uploading it on a server. The same applies for the download and integration of content created by third persons through hyperlinks.<sup>6</sup>
- 13 Similarly, a liability of the content provider can be based on Unfair Competition Law, Trademark Law or Data Protection Law if the uploaded content is not in compliance with the provisions of these laws. Furthermore, the general provisions of tort law may apply.
- 14 A specific aspect concerns the liability of the content provider under the Product Liability Law. To what extent a failure in electronic data or software can be considered a product failure is still contested; however, relevant cases in this field are not known in Switzerland. Generally, the legal doctrine is reluctant to apply Product Liability Law.<sup>7</sup>
- 15 Furthermore, according to contract law, the access provider is obliged to inform the user about upcoming access problems and also to protect its server against phishing, hacking or viral attacks. Nevertheless, access provider contracts often also contain terms about obligations of the user; mostly, such terms specifically prohibit making infringing material available.
- 16 In addition, the contractual framework can be considered sufficient grounds for an obligation of the access provider to specifically block the user's Internet access related to content being knowingly harmful to the user. So far there have been no Swiss court decisions, but such an understanding may be drawn from the general notion of a contractual framework.
- 17 The access provider is only exercising a "transport" function since normally the material is carried through an automatic technical process without acknowledgement of the access provider. Even if the usually applicable criteria of damage, illegality and causality are fulfilled, the evidence of fault in non-contractual situations must be established, which is often not easy to achieve. Legal doctrine denies an obligation of the access provider to control all possible content that can be reached through its services (similarly to Art. 12 of the E-Commerce Directive).<sup>9</sup> The fact that the access provider makes it technically possible for the user to get access to illegal content is not considered a non-diligent behaviour per se.
- 18 If, however, the access provider is advised to take down illegal content, legal doctrine generally assumes an obligation to immediately proceed to a take-down of the notified content if the complainant is reliable and the content is obviously illegal. However, it is not reasonable for the access provider to pursue every lead, so notices should be directed through a governmental agency (for example, KOBIK [Coordination Unit to Combat Internet Criminality], a special organisational unit of the federal government).<sup>10</sup> Apart from that, the illegality of content is not always visible at first glance; in particular, trademark or copyright infringements are indistinguishable for non-professionals in this area. For the time being, there is still no concrete court practice in Switzerland.<sup>11</sup>
- 19 The debate in Switzerland about the suitability and reasonableness of access blocking by the access provider is also open because a blocking may not be in compliance with freedom of expression and freedom of information as fundamental rights of the users.<sup>12</sup> Furthermore, the effect of access blocking is uncertain as such measures can be evaded easily. In such a situation, the access provider has to rely on legal advice or on the opinion of KOBIK. Since 2010, domain names suspected of being used for illegal activities can be blocked for a short time through the registry operator.

## II. Access Provider

- 15 The contractual relationship between the access provider and the user cannot qualify as a traditional contract type regulated in the Swiss Code of Obligations. Even if analogies to the provisions on Sale and Purchase Law, on Lease Law and on Mandate Law are possible, in principle the general norms on non-execution of contracts (Art. 97-109 CO) remain the most important source in case of any anomalies.<sup>8</sup> As the making available of Internet access is the main duty of the access provider, non-performance of a contract must be assumed if the user does not have access to the Internet or to the mail account. In such cases, it also has to be taken into account that malfunctions related to Internet access are part of the daily business, and the access provider is not liable for 100 percent Internet access availability. Normally, access providers commit to providing users an access ratio of 97 - 98 percent. Often this access risk is contractually transferred from the access provider to the user; however, the transfer of duties is only legally binding to the extent that the access provider complies with the general due diligence behaviour.

- 21 Similar considerations that have been developed in regard to tort law in general also apply in relation to compliance with copyright law, unfair competition law, trademark law and data protection law. A special rule applies to the telecommunications providers: user identification data must be retained during a period of six months (and disclosed to prosecution authorities), but after the expiration of this time period the respective data needs to be deleted.<sup>13</sup>

### III. Host Provider

- 22 In a webhosting agreement, the host provider leaves storage location on its server to the content provider. The contract is considered to be governed by the provisions of lease law and entrepreneur's law. Most crucial is the question whether the host provider can be held liable for illegally acting on behalf of third persons.
- 23 Similarly to Article 14 of the E-Commerce Directive, the extra-contractual liability of a host provider depends on the activities in a given situation and under the prevailing circumstances. In the case of private websites/homepages – and particularly of non-moderated newsgroups – special diligence obligations do not apply if the host provider is not advertising for its own special services. In parallel to the access provider, a host provider does not have an extensive control obligation in regard to all information available on such private websites/homepages or in non-moderated newsgroups; however, compliance with the notice-and-take-down approach is required since knowledge of illegal content can cause a liability.<sup>14</sup>
- 24 A different legal appreciation applies in the case of serviced homepages/websites and moderated newsgroups since the control activity is considered to be adequately limited because it does not exceed reasonable efforts of the provider. If a host or service provider announces in public that the content of such generally available platforms will be serviced, a similar situation to traditional media is given: the provider has to take care that illegal content is not uploaded or is removed within a short time. This obligation relates to all relevant legal provisions (copyright, unfair competition, trademark, data protection, product liability).<sup>15</sup>

### IV. Service Provider

- 25 A service provider in general can enter into different contractual relationships with a user. A mail service contract encompasses elements of a lease contract and a mandate, while an information broker or a search machine provider mainly delivers mandate services. Notwithstanding the actual qua-

lification of the contractual relationship, the traditional provisions on non-performance of contracts do apply and do not cause any specific problems in the virtual world.

### V. Link Provider

- 26 The legal position of the provider of links depends on the factual question whether its action is to be qualified as a simple transmission of the content produced by third persons or whether the provider of links – similarly to a content provider – keeps its own content available. Normally, a link provider cannot be compared with an access provider because the link provider refers to websites for their substantial content, and the link provider can check those before linking to them. However, it is not feasible for the link provider to supervise all the linked websites. Insofar, the link provider's situation is close to that of a host provider. The main legal issue concerns the suitability of a control duty of the provider setting the link.
- 27 As far as visible links (hypertext links) are concerned, the user immediately and obviously becomes aware of the fact that the link refers to a website of a third person. Nevertheless, the link provider does not completely escape any kind of liability; a similar legal treatment as in the case of a host provider seems to be justified.<sup>16</sup> Finally, it should be noted that for the link provider – even if the link provider is aware of illegal content – it is not feasible to supervise additional links (links going from the linked website to other websites).
- 28 If the link provider is setting so-called inline links and not obviously recognizable frames, giving the impression that the websites referred to are part of the website of the link provider (aspect of identity), a not limited liability regime does take place. Consequently, the link provider is liable as the content provider.<sup>17</sup>

### VI. Disclaimers and Limitation of Liability

- 29 Limitation of liability is only possible to a certain extent;<sup>18</sup> in contractual relations, fundamental obligations cannot be excluded from the stated liability, and the limitation of liability for reckless or institutional acts is null and void. However, according to Swiss law, disclaimers and clauses limiting liability apply not only in contractual relations (Art. 100/101 CO) but also, under certain conditions, in non-contractual situations.<sup>19</sup>
- 30 Switzerland has no specific law governing the use of General Business Conditions (GBC). Only a few rules

developed by court practice apply, such as the principle that General Business Conditions must be made available to the users in a transparent way and that unclear terms are to be interpreted in favour of the customer. However, court practice in Switzerland does not begin to reach the level of consumer protection given in the member states of the European Union and based on the Directive 1993 on General Business Conditions<sup>20</sup> and the Directive 2005 on Unfair Business Practices.<sup>21</sup>

- 31 As far as the visibility of General Business Conditions on the website of a provider is concerned, the legal requirements in Switzerland are relatively low. In particular, no requirement applies that would make it necessary for the user to expressly agree to the GBC by pushing a button.

## VII. Criminal Law Issues

- 32 Switzerland has ratified the Council of Europe Convention on Cybercrime (2001); the respective provisions have led to a few minor amendments of the Swiss Penal Code set to come into force in the second half of 2010 (for example, on computer hacking).<sup>22</sup>
- 33 Seven years ago, the Swiss Penal Code was revised to introduce the possibility of criminalizing enterprises apart from the sanctions that could be levied on individuals (Art. 102).<sup>23</sup> An enterprise eventually becomes criminally liable (and punishable by a fine) in the context of entrepreneurial objectives that cannot be easily allocated to an individual person. So far, this new provision has not played any practical role in relation to illegal content available on the Internet.
- 34 Apart from general criminal sanctions in cases of misuse of the freedom of expression (pornographic, obscene, racist, defamatory information), the Swiss Penal Code also covers specific computer crimes such as illegal collection of data, hacking or misuse of data collection equipment, and computer sabotage.<sup>24</sup>
- 35 For the last ten years, Switzerland has discussed the introduction of specific rules establishing the legal framework for a criminal liability of Internet service providers. However, as already mentioned, these attempts have failed. Criminal liability can arise from direct or accessorial liability. A direct criminal liability of a host or an access provider is rather unlikely; the only provision that can be taken into account remains Article 322<sup>bis</sup> Penal Code, which is applicable to the media in general. This provision criminalizes those media that actively participate in making illegal information public if the author of the content cannot be found.
- 36 Since an access provider usually does not actively make available illegal content, criminal liability cannot be easily based on Article 28 and Article 322<sup>bis</sup> Penal Code.<sup>25</sup> As mentioned, an access provider only transmits material and therefore cannot be compared with a print medium editor because its part in the publication process is passive rather than active;<sup>26</sup> the same applies to the host provider. In the case of a host or service provider, a criminal sanction may only be considered for a moderated newsgroup.
- 37 Accessorial liability is possible if a provider commits “auxiliary” services and provides the means for others to commit the crime.<sup>27</sup> This notion of auxiliary services was applied once by the Swiss Supreme Court in relation to a “Telekiosk” offered through the services of the state-owned telecommunications company;<sup>28</sup> however, the decision was widely criticized with the argument that if a relevant negligence had to be assumed, a direct liability is given. Moreover, liability for auxiliary services under Swiss law requires the knowledge and the intent of the respective person that a certain offence is committed, a provision making it unlikely to be related to most access or host providers.<sup>29</sup>
- 38 To limit the risk or even to avoid criminal liability, a provider can get in touch with the above-mentioned KOBİK, which is prepared and mandated to give advice on possible lines of action.
- 39 Furthermore, it is generally assumed that service providers have a special kind of obligation to cooperate with state authorities – in particular the prosecution authorities – to combat Internet criminality. Therefore, in case of doubt, a service provider is well advised to liaise with the authorities.

## D. Conclusions

- 40 As mentioned, Switzerland does not have a concrete legal framework dealing with Internet service providers; therefore, liability of service providers needs to be assessed by the conventional legal rules. However, the legal situation is not totally different from the situation in other countries, especially in EU countries, as legal doctrine (court decisions are practically non-existent) tends to apply a similar liability regime on Internet providers as the EU E-Commerce Directive.
- 41 While content providers are responsible for all infringing or illegal materials, direct responsibility of access providers as well as host providers appears to be extremely unlikely; only in cases of serviced homepages/websites can a direct liability of host providers be taken into account. However, as soon as the access or host provider becomes aware of illegal or harmful content, legal doctrine assumes a provider’s obligation to delete the content concerned. As the legal situation in Switzerland is quite uncertain, providers are well-advised to rely on the

legal advice of state authorities in unclear situations to help avoid civil or criminal liability.



- 1 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), L 178 , 17/07/2000, pp. 1 et seq.
  - 2 For more information, see SCHILD TRAPPE GRACE, *Strafrechtliche Verantwortlichkeit der Internet Service Provider*, Jusletter, 6. November 2000.
  - 3 WEBER ROLF H., *Zivilrechtliche Haftung im Internet*, in: ARTER OLIVER/JÖRG FLORIAN S. (ed.), *Internet-Recht und Electronic Commerce Law*, Berne 2003, p.161.
  - 4 **Art. 101 OC** Liability for acts of auxiliary persons:  
*If an obligor, even though authorized, has performed an obligation, or exercised a right arising out of legal relationship, through an auxiliary person, such as a co-tenant or an employee, the obligator must compensate the other party for any damages caused by the acts of the auxiliary person. The liability may be limited or excluded by prior agreement. If the party making the waiver is employed (Art. 319 et seq.) by the other party, however, or if liability arises out of the conduct of a business that is carried on under an official license, such liability may at most be waived for simple negligence.*
- Art. 55 OC:**  
*The principal shall be liable for damages caused by his employees or other auxiliary persons in the course of their employment or official capacity, unless he proves that he has taken all precautions appropriate under the circumstances in order to prevent damage of that kind, or that the damage would have occurred in spite of the application of such precautions. The principal may claim recourse from the person who caused such damage to the extent that the latter is liable in his own right (Art. 41 et seq., Art. 97 et seq.).*
- Art. 55 CC:**  
*Corporate bodies act through their official organs. These organs by their legal transactions and their other acts or commissions bind the corporate body which they represent. They are moreover personally liable for their own wrongful acts or omissions.*
- 5 WEBER, Fn 3, p. 162.
  - 6 For the liability of the link provider, see C.IV.
  - 7 WEBER, Fn 3, p.167.
  - 8 WEBER Fn 3, p. 170.
  - 9 ROSENTHAL DAVID, *Internet-Provider-Haftung – ein Sonderfall?* in: JUNG PETER (ed.) *Aktuelle Entwicklungen im Haftungsrecht*, Berne/Zurich/Basle/Geneva 2007, N 93; ROHN PATRICK, *Zivilrechtliche Verantwortlichkeit der Internet Provider nach schweizerischem Recht*, Zurich 2004, p. 247.
  - 10 More information is available at: <http://www.cybercrime.ch/>.
  - 11 ROSENTHAL, Fn 9 N 98 et seq.; ROHN, Fn 9, pp. 252 et seq.
  - 12 ROSENTHAL, Fn 9, N 100; ROHN, Fn 9, p. 252.
  - 13 SCHNEIDER JÜRIG, *Internet Service Provider im Spannungsfeld zwischen Fernmeldegeheimnis und Mitwirkungspflichten bei der Überwachung des E-Mail-Verkehrs über das Internet*, AJP 2005, pp. 179 et seq.
  - 14 WEBER, Fn 3, p. 176.
  - 15 WEBER, Fn 3, p. 177; ROHN, Fn 9, p. 208.
  - 16 WEBER, Fn 3, p. 184.
  - 17 WEBER, Fn 3, p. 185.
  - 18 WEBER, Fn 3, p.190; CEREGETTI LEONARDO, *Disclaimers und Haftungsfreizeichnungen im E-Commerce*, sic! 2002, pp. 1 et seq., p. 13.
  - 19 WEBER, Fn 3, p.189.
  - 20 Directive 93/13/EEC of the European Parliament and of the Council of 5 April 1993 on unfair terms in consumer contracts, L 095, 21/04/1993, pp. 29 et seq.
  - 21 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (“Unfair Commercial Practices Directive”), L 149/22, 11/06/2005, pp. 22 et seq.
  - 22 Bundesbeschluss über die Genehmigung und die Umsetzung der Europaratskonvention über Cyberkriminalität, available at [http://www.ejpd.admin.ch/ejpd/de/home/themen/kriminalitaet/ref\\_gesetzgebung/ref\\_cybercrime\\_\\_europarat.html](http://www.ejpd.admin.ch/ejpd/de/home/themen/kriminalitaet/ref_gesetzgebung/ref_cybercrime__europarat.html).
  - 23 For more information, see WOHLERS WOLFGANG, *Die Strafbarkeit des Unternehmens – Art. 102 StGB als Instrument zur Aktivierung individualstrafrechtlicher Verantwortlichkeit*, Festschrift für Franz Riklin, Zurich 2007, pp. 287 et seq.
  - 24 SCHWARZENEGGER CHRISTIAN, *E-Commerce – Die strafrechtliche Dimension*, in: ARTER OLIVER/JÖRG FLORIAN S. (ed.), *Internet-Recht und Electronic Commerce Law*, Zurich 2001, pp. 342 et seq.
  - 25 SCHWARZENEGGER, Fn 24, p. 351.
  - 26 SCHWARZENEGGER, Fn 24, p. 351; DONATSCH ANDREAS/TAG BRIGITTE, *Strafrecht I*, 8th ed., Zurich 2008, p. 205.
  - 27 See also SCHWARZENEGGER, Fn 24, pp. 349 et seq.
  - 28 BGE 121 IV 109, available at <http://www.bge.ch>.
  - 29 SCHWARZENEGGER CHRISTIAN/NIGGLI MARCEL ALEXANDER, *Über die Strafbarkeit des Hyperlink-Setzers*, Zum Urteil des Bezirksgerichts Zürich vom 10. September 2002, *Medialex* 2003, pp. 27 et seq.