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Fight against piracy – what's new ?

A. Genesis of the revision

On April 1, 2020, the revised Federal Act on Copyright and Neighbouring Rights (SCA) came into force. Initiated in 2012, the revision took almost eight years to complete. A first report, published in 2013 by the AGUR 12 working group, was published at the end of 2015. Faced with the innumerable positions taken (more than 1,200 for a report of 8,000 pages...), the AGUR 12 II working group was forced to revise its copy. It was finally only on September 27, 2019 that the draft was approved by both chambers of the Federal Parliament.

At the same time, the European Union was not to be outdone, since the new Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the digital market had entered into force on June 7, 2019, with a two-year transposition period set for the Member States.

These revisions had several objectives, including making suppliers more responsible in order to fight piracy more effectively and to better remunerate creators. We will limit ourselves here to the question of liability.

The approach taken between Switzerland and the European Union is different. It should be recalled that, unlike Swiss law, the European Union already had, through Articles 12 to 15 of 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 (the "Directive on electronic commerce"), a fairly clear limitation of liability regime for technical intermediaries, in particular access or hosting providers. This was not the case for Switzerland, a situation that had led it to be placed on a watch list of countries in 2016 that did not provide sufficient protection for US intellectual property interests (Special Report 301). The revision will have remedied this unfortunate situation.

B. Lack of responsibility of access providers

In contrast to the approach adopted by the majority of Member States within the European Union, the Swiss legislator has not, however, enshrined any liability on the part of access providers for the illegal content to which they provide access. Considering them to be too far removed from the incriminated behaviour, fearing that the blocking of the sites to which these providers could have been forced would go beyond what was strictly necessary (the phenomenon known as *overblocking*), the legislator finally abandoned the idea of regulating their liability, following the opinion of the Federal Court in a ruling 4A_433/2018 handed down on February 8, 2019 (ATF 145 III 72).

Swiss law therefore renounces in this respect a tool that most European states have equipped themselves with. Telecommunication operators therefore emerge unscathed from this revision.

C. The new treatment of hosting providers

The same is not true for hosting providers, that will now have to show a certain degree of diligence, as defined in the new Article 39d SCA. However, their diligence remains limited in several respects:

- first of all, their liability is only engaged if the illegal content which they are accused of hosting has already been withdrawn once. In so doing, the legislator decided to give primacy to the self-regulation enshrined in the Code of Conduct for Hosting adopted by market players in 2013 (CCH, also known as the simsa code). Therefore, it only is if the withdrawn content is once again put online that the behaviour of the hosting provider will fall under the scope of art. 39d SCA.

Without going into detail here, one may wonder about the nature of the illegal content; does it necessarily have to be a work protected by copyright, as the insertion of this provision in the SCA may suggest, or can it be another type of illegal content, such as a site of counterfeit products which, by hypothesis, will not be systematically protected by copyright, but which could fall under the notion of "other protected subject matter"? As soon as trademark owners are entitled to refer to the aforementioned simsa code, it would obviously be desirable for them to also be able to avail themselves of art. 39d SCA to force a host to close down a counterfeit site that has been put back online. However, there is nothing at this stage to suggest that this is the case, even if one may hope so.

- Secondly, assuming that the illegal content has been put online, the provider can only be held liable under Art. 39d SCA if its attention has been drawn to this new violation. Such notification, which can take place outside of any legal proceedings, must however be sufficiently precise to enable the identification of the offending content. Since the simsa code requires the denouncer to have a particular interest in the denunciation, it is questionable whether anyone is entitled to invoke a violation of art. 39d SCA. On the face of it, nothing should prohibit it.

- Finally, the hosted service must generate a particular risk of copyright infringements, whether due to the fact that the system directly or indirectly creates an incentive for users to make illegal content available, a high number of denunciations or an accumulation of links to illegal content, or even the possibility for users to conceal their identity.

If these conditions are met, the provider must then take the measures that can reasonably be expected from it in view of the risk of infringement to not only remove the content (*take down),* but also to prevent it from being uploaded again (*stay down*). Needless to say, the slider here may vary according to the size of the provider, its financial capacity and the evolution of technology. The margin of appreciation is therefore wide.

However, since the application of Art. 39a SCA can only be applied to hosting providers located in Switzerland, it is to be feared that its application will remain limited, since most of the platforms concerned are mostly hosted abroad.

D. Practical implications

In any case, assuming that art. 39d SCA applies, what are the recommended steps to be taken by rigthholders?

- Report the content by communicating (a) the name and address of the whistleblower; (b) how the whistleblower is concerned by the offending content; (c) the URL address of the page in question; (d) the precise designation of the illegal content; and finally (e) how the content would be illegal.

- Once this has been done, the hosting provider has two days (as provided for in the simsa code) to acknowledge receipt of the notification and inform its customer, inviting him either to withdraw the content that has been denounced to him or to justify its lawfulness. If necessary, the host may request securities from its customer and, in the worst cases, proceed directly to block all or part of the site concerned.

- If the site reappears with the same hosting provider (if the site is put back online with a different host, then the above procedure must be repeated), the whistleblower or, in our opinion, anyone else can then draw the provider's attention upon the fulfilment of the conditions set out in art. 39d SCA.

- In the event that the hosting provider does not react or that the conditions laid down in art. 39d SCA are not applicable (for example because the service in question would not generate a particular risk of violation), then legal action must be brought before the ordinary courts (art. 62 para. 1 lit. a SCA).

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