

Lukas Heckendorf Urscheler (éd.)

Rapports suisses présentés
au XIX^e Congrès international
de droit comparé

Swiss Reports Presented
at the XIXth International
Congress of Comparative Law

Vienne, du 20 juillet au 26 juillet 2014

Schulthess § 2014

Information bibliographique de la Deutsche Nationalbibliothek

La Deutsche Nationalbibliothek a répertorié cette publication dans la Deutsche Nationalbibliografie; les données bibliographiques détaillées peuvent être consultées sur Internet à l'adresse <http://dnb.d-nb.de>.

Tous droits réservés. Toute traduction, reproduction, représentation ou adaptation intégrale ou partielle de cette publication, par quelque procédé que ce soit (graphique, électronique ou mécanique, y compris photocopie et microfilm), et toutes formes d'enregistrement sont strictement interdites sans l'autorisation expresse et écrite de l'éditeur.

© Schulthess Juristische Medien AG, Zurich · Basel · Geneva 2014

ISBN 978-3-7255-8503-8

www.schulthess.com

Cyrill P. Rigamonti*

Secondary Liability of Internet Service Providers in Switzerland

Table of Contents

1.	Preliminary Remarks	390
2.	Secondary Liability Standards	390
2.1.	Elements Required to Establish Secondary Liability	390
2.2.	Single Horizontal or Subject-Matter Based Standards	391
2.3.	Legal Definition of Service Providers	393
2.4.	Legal Origins of Standards for Secondary Liability	393
2.5.	Comparison to the General Standard for Secondary Liability in Tort Law	394
2.6.	The Relationship between Secondary and Primary Liability	394
2.7.	Remedies	395
3.	Immunity from Secondary Liability	396
3.1.	Safe Harbor Provisions	396
3.2.	Remedies without a Finding of Secondary Liability	396
4.	Further Issues	396
4.1.	Best Practices and Voluntary Codes	396
4.2.	The Source and Relevance of Best Practices and Voluntary Codes	397
4.3.	Graduated Response Systems	397
4.4.	Abuse of Notice-and-Takedown Mechanisms	397
4.5.	Mechanisms to Balance Enforcement and Business Concerns	398
4.6.	Impact of Fundamental or Constitutional Rights	399
4.7.	Criminal Liability	399
4.8.	Extraterritorial Application of Law	400
4.9.	Current Reforms	400

* Professor of Intellectual Property, Competition and Media Law, University of Bern. I thank my academic assistant, Andrea Schäffler, MLaw, for her research support.

1. Preliminary Remarks

The following country report on the secondary liability of internet service providers was written in response to a questionnaire prepared by Professor Graeme B. Dinwoodie of Oxford University in his role as General Reporter on Computer Law for the 19th World Congress of the International Academy of Comparative Law. The questionnaire sought information about the doctrinal structure, content and source of secondary liability rules as applied to the online environment. This report largely follows the structure of that questionnaire and is meant to be an objective rendition of the current state of the law in Switzerland as reflected in statutory and case law, which does not necessarily imply that the author of this report agrees with the state of the law on the conceptual, doctrinal, and/or policy levels. In terms of subject matter, this report is limited to the secondary liability of internet service providers in the context of the law of intellectual property, unfair competition, data protection and rights of personality with a focus on civil (as opposed to criminal) law. For ease of reference and clarity, the individual questions contained in the questionnaire are reflected in the section headers and cited in the corresponding footnotes. This report reflects the state of the law in Switzerland as of November 2013.

2. Secondary Liability Standards

2.1. Elements Required to Establish Secondary Liability¹

Substantively, under Swiss law, the only legal bases for establishing the secondary liability of service providers in the fields of intellectual property, unfair competition, data protection and rights of personality are the general principles of accessory liability.

In the context of Swiss civil law (as opposed to criminal law), the general principles of accessory liability require, at a minimum, (i) an act of infringement by a user of the internet service in question and (ii) a legally relevant contribution to that act of infringement by the service provider.²

Regarding the first requirement, the general rule is that there is no accessory liability without direct infringement, but proof of a completed act of direct

¹ See Question I.1: "What are the elements required to establish secondary (or indirect, or accessory) liability of service providers for the conduct of others using their services? Is there more than one basis on which to establish secondary liability?".

² See, e.g., in the context of contributory patent infringement, BGE (= Official Collection of the Decisions of the Swiss Federal Supreme Court) 129 III 588, consideration 4.1.

infringement is not required. It is sufficient that an act of direct infringement by a third party (who does not have to be known by name) is impending.³

Regarding the second requirement, it is a matter of debate as to what exactly constitutes a legally relevant contribution sufficient to establish accessory liability, but it is generally accepted that the service provider's conduct must at least objectively further direct infringement.⁴

In addition to these general requirements for a finding of accessory liability, each remedy sought may have additional requirements. For example, injunctive relief is only granted upon a showing that the service provider's conduct (found to be illegal under the general rules of accessory liability outlined above) is impending or, if it has already occurred, that it will likely be repeated in the future.⁵ By contrast, if damages are sought, the existence of damages and their specific amount must also be shown, in addition to establishing that the service provider's conduct (found to be illegal under the general rules of accessory liability outlined above) proximately caused the damage in question with fault, that is, intentionally or negligently, in accordance with the general civil law principles of tort liability under Article 41 of the Swiss Code of Obligations.

2.2. Single Horizontal or Subject-Matter Based Standards⁶

While it is unclear whether the standards used to define what constitutes a legally relevant contribution for purposes of accessory liability are or should be identical across all fields of law, the overall conceptual framework for assessing secondary liability does not significantly vary according to the cause of action (see Section 2.1 above).⁷ However, the formal legal bases of this framework differ from field to field.

Regarding violations of the right of personality, such as defamation, there is a broad statutory rule in Article 28(1) of the Swiss Civil Code that allows a cause of action against anyone who "participates" in the illegal act constituting a violation

³ See, e.g., in the context of contributory patent infringement, BGE 129 III 588, consideration 4.1.

⁴ See, e.g., BGer. (= Decision of the Swiss Federal Supreme Court) 5A_792/2011, consideration 6.2.

⁵ See, e.g., BGer. 4A_300/2013, consideration 3.1.

⁶ See Question I.2: "Do the laws creating such possible liability consist of a single horizontal standard applicable without regard to the specific area of law in question, or does the liability standard vary according to the cause of action (e.g., intellectual property, defamation, etc.)?".

⁷ See, for intellectual property law in general, ANDRI HESS-BLUMER, Teilnahmehandlungen im Immaterialgüterrecht unter zivilrechtlichen Aspekten, *sic!* 2003, p. 100.

of a right of personality.⁸ Note that there is no formal distinction between direct infringement and accessory liability in this context, because the statutory language is sufficiently broad to cover both. The wide scope of Article 28(1) of the Swiss Civil Code is the result of legislation intentionally designed to make sure that individuals are protected against invasions of privacy and acts of defamation committed or disseminated by the mass media⁹ (although the statutory text is neither limited nor intended to be limited to the mass media).

The broad definition of Article 28(1) of the Swiss Civil Code also applies to violations of data protection laws, because Article 15(1) of the Swiss Data Protection Act incorporates Article 28(1) of the Swiss Civil Code by reference.

Similarly, there are two intellectual property statutes that contain express provisions dealing with accessory liability, namely the Swiss Patent Act in Article 66(d) and the Swiss Design Protection Act in Article 9(2), both of which establish a cause of action against anyone who participates in or abets, furthers, or facilitates an act of (direct) infringement prohibited by patent or design law. By contrast, neither the Swiss Trademark Act nor the Swiss Copyright Act currently contains any such provisions addressing accessory liability. Nevertheless, there is case law, in both trademark and copyright, that applies the principles of accessory liability to these fields,¹⁰ based, at least in part, on the reasoning that accessory liability is a general principle of law that is also recognized as such in Article 50 of the Swiss Code of Obligations governing the joint and several liability of tortfeasors and their accessories for damages.¹¹

Regarding the law of unfair competition, there is no specific statutory provision governing accessory liability. However, Swiss courts recognize that an action for unfair competition may be directed against accessories,¹² typically on the basis of an analogy to the law governing rights of personality or on the basis of general legal principles.

⁸ For a recent application of this statutory provision in a finding of secondary liability of an internet service provider, see BGer. 5A_792/2011, consideration 6.2.

⁹ See Federal Council, Administrative Statement, BBl. 1982 II 636, 637.

¹⁰ Regarding copyright law, see, e.g., BGE 107 II 82, consideration 9a. Regarding trademark law, see, e.g. Zurich Commercial Court Decision No. HG980397, 29.3.2001, slip op., p. 4.

¹¹ See, e.g., BGE 107 II 82, consideration 9a.

¹² See, e.g., Regional Court of Bern, SJZ 1995, 388, consideration 5.2.

2.3. Legal Definition of Service Providers¹³

The Swiss laws creating secondary liability for service providers are drafted in very general terms and do not define the concept of a service provider (nor do they implicitly rely on any such concept). Accordingly, Swiss law does not differentiate between different types of service providers, and accessorial liability is neither limited to internet service providers nor limited to service providers in general. Consequently, the rules governing accessorial liability also apply to search engine providers and to operators of online marketplaces.

2.4. Legal Origins of Standards for Secondary Liability¹⁴

In general tort and intellectual property law, the relevant principle of accessorial liability was originally created by statute on the basis of the notion that aiding and abetting had always been treated – not just in civil law, but also in criminal law – as illegal conduct. In some areas of law, for example trademark and copyright law, statutory provisions on secondary liability were later deleted (see also Section 2.2 above), because the general legal principles were considered to be sufficient to establish accessorial liability. In fact, the courts do continue to apply this doctrine in both copyright and trademark law.¹⁵

Regarding rights of personality, the courts first established a broad principle of accessorial liability through their case law,¹⁶ which was later codified when Article 28 of the Swiss Civil Code was revised. This revised version of Article 28 now also applies to violations of data protection laws (see also Section 2.2 above).

Regarding the law of unfair competition, which largely developed parallel to the law governing rights of personality, the courts also developed a broad principle of accessorial liability¹⁷ which, however, has never been formally codified in the Swiss Unfair Competition Act.

¹³ See Question I.3: "Do laws creating the secondary liability of service providers for conduct of others using their services define (or make use of) the concept of a 'service provider'? [...] Does the definition encompass search engines and operators of online marketplaces?".

¹⁴ See Question I.4: "Were the standards for establishing secondary liability of service providers for the conduct of others using their services first developed by the courts or created by statute? If developed by the courts, from which existing principles (if any) did the courts draw?".

¹⁵ See, e.g., BGE 107 II 82, consideration 9a; Zurich Commercial Court Decision No. HG980397, 29.3.2001, slip op., p. 4.

¹⁶ See, e.g., BGE 103 II 161, consideration 2; see also BGE 64 II 24; BGE 106 II 92, consideration 3.

¹⁷ See, e.g., Regional Court of Bern, SJZ 1995, 388, consideration 5.2.

2.5. Comparison to the General Standard for Secondary Liability in Tort Law¹⁸

The standard for secondary liability outlined above (see Section 2.1) corresponds to the general standard for accessorial liability that is also recognized in general tort law. Therefore, on the level of the conceptual framework, there is no material difference between, on the one hand, secondary liability in the law regarding rights of personality, data protection, intellectual property, or unfair competition, and, on the other hand, secondary liability in general tort or other civil (as opposed to criminal) law. However, this unity applies to the general principles only, and it is still a matter of debate whether the law is or should be completely identical across the board in terms of what exactly is required to establish a "relevant contribution" under the second prong of the standard test used to establish accessorial liability (see Section 2.1 above).

2.6. The Relationship between Secondary and Primary Liability¹⁹

As a general matter, it is a defining element of the theory of accessorial liability in Switzerland that the secondary liability of service providers substantively depends on a demonstration of the primary liability of third parties using their services. However, it is sufficient to show that the third party's illegal conduct is impending (see above Section 2.1). By contrast, the scope of primary liability – that is, the question of whether a certain remedy will be granted against the primary infringer – does not depend on the possibility of finding a service provider secondarily liable.

Note also that, procedurally, rights holders are free to bring a court action against the service providers for secondary liability without first (or, for that matter, ever) suing the primary infringers in joint or separate legal proceedings.

¹⁸ See Question I.5: "To what extent does the standard for secondary liability discussed in answering the previous question depart from the general standard for establishing secondary liability in tort (or other relevant) law?".

¹⁹ See Question I.6: "What is the relationship between the standard for secondary liability of service providers and the relevant standard for primary liability (either of the service providers or third parties using their services)? To what extent have courts assessing the scope of primary liability taken into account the possibility of secondary liability of service providers (and vice-versa)? To what extent is secondary liability tied to establishing primary liability of others?".

2.7. Remedies²⁰

In general, Swiss law does not distinguish between remedies available against primary infringers and remedies available against secondary infringers. The statutory provisions governing remedies are identical for both types of infringers in all fields of law relevant to this report, and they typically provide for declaratory judgments, injunctive relief, the award of damages, the disgorgement of the infringer's profits, compensation for unjust enrichment, the publication of judgments, information orders, and the seizure and forfeiture of infringing goods or equipment used in their production.²¹

However, to the extent that a particular remedy has particular requirements, that remedy may not necessarily be available against both primary and secondary infringers in any given individual case, because both defendants' actions may not call for that remedy. For example, it may well be that while both the primary and the secondary infringer are subject to injunctive relief, only the primary infringer is liable for damages, because the required showing of fault (that is, intentional or negligent conduct) may only be present for the primary infringer, but not for the secondary infringer.

Moreover, in fashioning the appropriate remedies for each case, Swiss courts are bound by the general principles of law, such as the principle of proportionality enshrined in Article 5(2) of the Swiss Constitution. Therefore, for example, even when injunctive relief may be available against both the primary and the secondary infringer, the courts will have to take into account the nature and extent of the participation of or contribution by the secondary infringer to the primary infringer's illegal conduct and tailor their judgments accordingly.²²

²⁰ See Question I.7: "What remedies will a court grant where a service provider is found secondarily liable for the conduct of others? Do these remedies differ from those available against the third parties who are primarily or directly liable? In determining remedies, do courts take account of relief available against those who may be directly or primarily liable?".

²¹ See, e.g., Articles 61–63, and 66 of the Swiss Copyright Act of 9.10.1992 (SR 231.1); Articles 52, 55, 57, and 60 of the Swiss Trademark Act of 28.8.1992 (SR 232.11); Articles 69, 70, 72, 73, and 74 of the Swiss Patent Act of 25.6.1954 (SR 232.14); Articles 33, 35, 36, and 39 of the Swiss Design Protection Act of 5.10.2001 (SR 232.12); Article 9 of the Swiss Unfair Competition Act of 19.12.1986 (SR 241); Article 28a of the Swiss Civil Code of 10.12.1907 (SR 210); Article 15 of the Swiss Data Protection Act of 19.6.1992 (SR 235.1); and Articles 41, 62, and 423 of the Swiss Code of Obligations of 30.3.1911 (SR 220).

²² See also NIK SCHOCH & MICHAEL SCHÜEPP, Provider-Haftung "de près ou de loin"?, *Jusletter*, 13.5.2013, N. 40.

3. Immunity from Secondary Liability

3.1. Safe Harbor Provisions²³

There are no specific statutory provisions establishing "safe harbors" or otherwise immunizing service providers from secondary liability. Therefore, service providers seeking to avoid liability must make sure that they do not fulfill the general requirements of accessory liability in the first place. For example, an internet service provider which implements an effective notice-and-takedown system for illegal content may significantly reduce its likelihood of being held liable for damages, because Swiss courts may construe the establishment of a working notice-and-takedown system as excluding fault. Nevertheless, sensibly limiting the liability of service providers in view of broad general rules governing accessory liability is one of the main present and future challenges for Swiss courts.

3.2. Remedies without a Finding of Secondary Liability²⁴

As a general matter, in order for a court to award remedies, a service provider's conduct must be illegal (that is, it must qualify as secondary infringement). If a service provider is not secondarily liable, there are no remedies available to the rights holder in order to force that service provider to provide information or to cooperate in restraining wrongful conduct by third parties under general tort law or under the laws governing intellectual property, unfair competition, rights of personality and data protection.²⁵ However, it should be noted that the threshold for a finding of secondary liability is relatively low (see Section 2.1 above).

4. Further Issues

4.1. Best Practices and Voluntary Codes²⁶

On 1 February 2013, the Swiss Internet Industry Association ("simsa") adopted a voluntary "Code of Conduct [for] Hosting (CCH)"²⁷ that recommends that Swiss

²³ See Question II.1: "Are there laws immunizing (or providing a so-called "safe harbor" for) service providers against liability for the conduct of others using their services?".

²⁴ See Question II.6: "Does the law in your country provide for the possibility of remedies being awarded against service providers to help restrain wrongful conduct by others independent of the service providers being secondarily liable? If so, in which circumstances will courts grant such remedies, and for what purpose?".

²⁵ See, e.g., BGE 122 III 353, consideration 3b/bb.

²⁶ See Question III.1: "To what extent have service providers developed best practices or voluntary codes for dealing with conduct by third parties using their services that allegedly amounts to a violation of law?".

²⁷ See http://static.simsa.ch/1374153439/130201_simsa_cch_public-en.pdf.

hosting providers implement an elaborate notice-and-takedown procedure to deal with potentially infringing material uploaded by the hosting provider's customers.

4.2. The Source and Relevance of Best Practices and Voluntary Codes²⁸

The CCH (mentioned in Section 4.1 above) was a private industry initiative undertaken by various Swiss hosting providers working under the auspices of the Swiss Internet Industry Association ("simsa"). There have been no relevant court decisions since the adoption of the CCH in February 2013, so it is unclear at the time of writing (November 2013) whether the Swiss courts will take the private CCH into account when deciding questions of secondary liability.

4.3. Graduated Response Systems²⁹

There are currently no "graduated response" systems or other legally binding regulatory regimes in Switzerland that would force service providers to cooperate with rights holders in the civil enforcement of measures against the third parties who use their services for improper purposes (regarding cooperation with law enforcement authorities in the context of criminal enforcement, see Section 4.7 below).

4.4. Abuse of Notice-and-Takedown Mechanisms³⁰

While concerns regarding the potential abuse of notice-and-takedown mechanisms do exist in Switzerland, there is no penalty or other legal (as opposed to business) disincentive for service providers who are over-compliant with takedown requests. However, the private CCH (see Section 4.1 above) tries to mitigate the problem by including customers affected by a takedown request in the decision-making process, except in cases of clearly illegal content.

²⁸ See Question III.2: "[W]ho was involved in the development of such practices or codes? In what form have these been embodied (e.g., a memorandum of understanding with select rights holders, or a settlement agreement)? Have courts paid any attention to these practices or codes in deciding questions of secondary liability?".

²⁹ See Question III.3: "To what extent have service providers been subjected to regulatory regimes (e.g., in the online context, so-called 'graduated response' systems) that require them to cooperate in the enforcement of measures against the third parties who use their services for improper purposes?".

³⁰ See Question III.4: "To the extent that the laws referred to above include a so-called 'notice and takedown' system, has there been any concern expressed about right-holders abusing the mechanism or service providers being cautiously 'over-compliant' with takedown requests? Does your law contain any penalty or disincentive for either such conduct?".

4.5. Mechanisms to Balance Enforcement and Business Concerns³¹

There is too little case law on internet service provider liability in Switzerland to be able to say reliably what mechanisms the courts use to balance the need for effective enforcement of rights with the ability of service providers to conduct business. So far, however, the Swiss courts have not established onerous monitoring duties on service providers that make it particularly difficult or even impossible to conduct business.

For example, in a leading case decided on 14 January 2013, the Swiss Supreme Court held that the publisher of a newspaper was secondarily liable for defamatory statements made by a third party on a blog hosted by the publisher and therefore upheld the lower court's declaratory judgment and takedown order.³² In doing so, however, the Court suggested that the question of general monitoring duties was only relevant in the context of assessing fault for purposes of damage awards (in the sense that such an award of damages would require that a duty to monitor be recognized by the courts and be breached by the service provider). Fault, however, was not at issue in the case at hand and therefore did not need to be decided.³³ Moreover, the Court further explained that the award of damages or other financial compensation would be subject to additional requirements under the general tort rules contained in the Swiss Code of Obligations, thereby indicating that while it may be fairly easy to obtain a declaratory judgment or a takedown order, it would be much harder to obtain monetary relief.

Taking this case as a guide, it may be said that a balance seems to have been struck by the Swiss Supreme Court between the effective enforcement of rights and the ability of internet service providers to conduct business by combining a low threshold for takedown orders (effective enforcement for rights holders) with a high threshold for monetary compensation (protection of service providers' business concerns). As a caveat, however, it should be noted that the important issue of the exact scope of injunctive relief regarding post-infringement conduct by internet service providers has not yet been expressly addressed by the Swiss Supreme Court.

³¹ See Question III.5: "What doctrinal or other mechanisms have courts used to balance the need to ensure effective enforcement of rights (or prevent unlawful conduct) with the ability of service providers to conduct business?".

³² BGer. 5A_792/2011.

³³ But see, as an example from the offline world, BGE 126 III 161, considerations 5b/bb and 5b/cc.

4.6. Impact of Fundamental or Constitutional Rights³⁴

In Switzerland, concerns about fundamental and constitutional rights do not seem to have been outcome-determinative in any secondary liability case or even to have significantly influenced the courts' attitudes towards this type of liability, with the exception perhaps of the general constitutional principle of proportionality (see Section 2.7 above). The general understanding is that constitutional value judgments have been considered and balanced by the legislature during the law-making process and are therefore already reflected in the statutes.³⁵ Note also that, as a general matter, there is no constitutional review of federal statutes in Switzerland.³⁶

4.7. Criminal Liability³⁷

Currently, there are no specific rules in Switzerland regarding the criminal liability of internet service providers, but there are rules governing certain criminal acts committed by using the media, such as defamation, in which case certain representatives of media companies who published the incriminating statements may potentially be criminally liable for failure to prevent a criminal publication under Articles 28(2) and 322bis of the Swiss Penal Code if the author of the incriminating statement cannot be determined or brought to justice in Switzerland.

However, outside the narrow scope of these media crimes, general criminal liability as an accessory may be possible under Articles 24 and 25 of the Swiss Penal Code in the case of intentional aiding and abetting, which, in particular, may be the case if internet service providers fail to act once alerted by federal or state prosecutors about illegal content made accessible by third parties using their services.³⁸ On the basis of these provisions, a person maintaining a website with hash links to peer-to-peer networks used to illegally disseminate motion pictures and computer games protected by copyright was held criminally liable as an accessory to copyright infringement.³⁹

In addition to the general provisions of the Swiss Penal Code, Article 41(1)(b) of the Swiss Design Act and Article 81(1) in conjunction with Article 66(d) of the

³⁴ See Question III.6: "To what extent have fundamental or constitutional rights of service providers or their customers influenced courts' attitudes to secondary liability of the providers (or the award of remedies against the service providers in the absence of liability)?".

³⁵ See, e.g., BGE 131 III 480, consideration 3.1.

³⁶ See Articles 189(4) and 190 of the Swiss Constitution of 18.4.1999 (SR 101).

³⁷ See Question III.7: "To what extent might service providers be criminally liable for the conduct of third parties who use their services?".

³⁸ See, e.g., BGE 121 IV 109.

³⁹ See BGer. 6B_757/2010.

Swiss Patent Act may also serve as a basis for establishing potential criminal liability for service providers.

In the context of criminal law, it should also be noted that Swiss internet service providers cooperate with Swiss law enforcement authorities, in particular with regard to the identification of individuals who commit crimes over the internet,⁴⁰ which may be one reason for the low number of criminal cases brought against internet service providers in Switzerland.

4.8. Extraterritorial Application of Law⁴¹

Swiss courts have occasionally ruled on issues of extraterritoriality in the context of secondary liability in the offline world. In patent law, for example, the Swiss Supreme Court, invoking the principle of territoriality, denied secondary liability under Article 66(d) of the Swiss Patent Act in a case in which a machine delivered from Switzerland to a foreign country was allegedly used to infringe process patents in that foreign country.⁴² However, at the time of writing (November 2013), Swiss courts have not yet had the opportunity to discuss the extraterritorial application of the rules governing secondary liability in the specific context of internet service provider liability.

4.9. Current Reforms⁴³

So far, the standards for secondary liability, that is, the general rules governing accessorial liability, seem to have worked reasonably well in Switzerland, perhaps because they are sufficiently abstract and therefore sufficiently flexible to allow the courts to tailor their decisions to the individual cases before them. Regarding internet service provider liability for intellectual property infringement, the existence of abstract but flexible rules has created relative uncertainty. However, this uncertainty seems to have had the effect that both sides, rights holders and internet service providers, are treading lightly, that is, trying to avoid adverse court rulings and therefore refraining from taking overly aggressive positions.

The Swiss government has been reluctant to propose the enactment of legislation specifically addressing secondary liability for internet service providers (despite several requests from Members of Parliament and contrary to recommendations

⁴⁰ See Article 14(4) of the Swiss Federal Act on the Surveillance of Postal and Telecommunications Traffic of 6.10.2000 (SR 780.1).

⁴¹ See Question III.8: "In disputes involving the laws discussed [...] above, to what extent have concerns about extraterritorial application of law been considered by the courts?".

⁴² See BGE 122 III 81, consideration 5.

⁴³ See Question III.9: "Are there any particular reforms of the current law in your country that you would believe establish a more appropriate standard for secondary liability of service providers than currently exists?".

by expert groups the government had appointed to study the criminal law of secondary liability). However, following the Supreme Court's decision of 14 January 2013, in which the Court held that a blog hosting service was, at least in part, responsible for the violation of rights of personality committed by a customer on the customer's blog (discussed in Section 4.5 above), a new motion was submitted by a Member of Parliament to the Swiss government.⁴⁴ In its reply, the Swiss government conceded that there may be grounds for legislative activity in this field with regard to civil liability (as opposed to criminal liability), but that it would await the outcome of studies it commissioned on the revision of copyright law and the law of social media before deciding whether any proposals would be made.⁴⁵

In the meantime, the Swiss government's report on the legal basis for social media has been released.⁴⁶ It concludes that the broadly phrased provisions of Swiss statutory law enable balanced solutions that can be tailored to the individual case at hand and that, therefore, there is no pressing need for statutory reform of substantive law.⁴⁷ However, the report recognized that enforcement problems do exist and that further studies are required to determine whether it is advisable to enact more specific legislation regarding the civil liability of internet service providers.⁴⁸

Finally, the Working Group on Copyright (AGUR12), tasked by the Swiss Minister of Justice in August 2012 to develop a proposal for the adaptation of copyright law to recent technical developments, published its final report in November 2013. Regarding improving the enforcement of copyright law in the online environment, the Working Group proposes (i) the establishment of a self-regulatory notice-and-takedown system along the lines of the CCH (see Section 4.1 above), (ii) the creation of a limited statutory duty to monitor for certain hosting providers in order to guarantee that infringing content stays down (after its takedown), (iii) the adoption of a statutory duty for Swiss access providers to block access to infringing web portals in serious cases upon a notice from law enforcement authorities, (iv) the authorization of rights holders under data protection laws to collect IP addresses to identify copyright infringers in compliance with the guidelines of the Federal Data Protection Officer, (v) the establishment of a duty for access providers, upon request from a competent governmental authority, to provide information to rights holders about customers whose account is used to infringe copyrights through peer-to-peer networks despite a previous warning from the access provider, and (vi) the adoption of safe harbor provisions along the lines of the Euro-

⁴⁴ Motion No. 13.3215 of 21.3.2013 [submitted by MP Kathy Riklin].

⁴⁵ See Federal Council, Reply to Motion No. 13.3215 of 15.5.2013.

⁴⁶ See Swiss Federation, *The Legal Basis for Social Media*, Report of the Federal Council in Fulfillment of the Amherd Motion No. 11.3912 of 29 September 2011 (published on 9.10.2013).

⁴⁷ Id. at p. 59.

⁴⁸ Id. at pp. 63, 75.

pean Union's E-Commerce Directive for internet service providers who comply with the aforementioned duties.⁴⁹

It is unclear as of the time of writing which concrete measures, if any, the Swiss government will actually propose for legislation.

⁴⁹ See Working Group on Copyright (AGUR12), Final Report of 28 November 2013, pp. 73-76.