

Liability of Internet-Service- Providers in Austria

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Limitation of responsibility

- Transposition of Art 12 – 15 EC-Directive in Art 13 – 19 Austrian E-Commerce-Act (ECG)
- National specificities:
 - Exclusion of responsibility not only applicable in European domestic market related cases, but general
 - Liability privilege also applies to non-commercial services
 - Not only Access-, Host- and Cache-Provider, but also provisions regarding the responsibility for search engines and links

Exclusion of responsibility for links and search engines

- Search engines (Art 14 ECA)
 - No responsibility for the information retrieved, provided the ISP does not
 - initiate the transmission of the retrieved information
 - select the receiver of the retrieved information
 - select or modify the retrieved information
 - *similar to Access-Provider*
- Links (Art 17 ECA)
 - No responsibility for the electronically linked information, provided the ISP does not
 - have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent or
 - upon obtaining such knowledge or awareness, acts expeditiously to remove the electronic link
 - *similar to Host-Provider*

Step-by-step: establishing liability of ISP

- Liability
 - Based on civil- or criminal law
 - E.g.: Art 1330 ACC (defamation), Art 53 ATL (trademark infringement), Art 86 ACA (copyright infringement)
- Contributory infringement
 - Willful support of the user's infringement, means
 - knowledge of illegal activity or
 - negligent non-knowledge
- Exclusion of liability Art 13-19 ECG

Step-by-step: establishing liability of ISP

- Liability of search engines

- contributory infringement only if unlawfulness of activity is obvious
- For keyword advertising this is not the case
- No civil liability
- E-Commerce Act does not come into play

Austrian Supreme Court: 4 Ob 194/05s

– AdWords; 4 Ob 66/04s – megasex.at

Further peculiarities

- Injunctive relief
 - Supreme Court (6 Ob 178/04a – *Online Gästebuch*)
 - Due to Art 19 ECG the liability privilege does not apply to injunctions
- Concrete monitoring obligation
 - Supreme Court (6 Ob 178/04a – *Online Gästebuch*)
 - Art 18 (1) ECG prohibits an obligation of ISP to monitor in a **general** fashion the information provided by the user
 - This does not preclude a **concrete** obligation of the ISP for monitoring for further cases of infringement after notification of a first infringement
 - The efforts for monitoring are less burdensome than a general monitoring obligation

Classifying ISP

- Content/Host Provider
 - A print medium that runs a website is regarded as a content provider and not a host provider if he publishes articles on the net without further review
 - But no monitoring obligation under general civil law
 - Austrian Supreme Court 6 Ob 218/03g – Online-Archiv

Information duties: The Austrian solution: Austrian Supreme Court July 14, 2009

- IP addresses are traffic data
- Use of traffic data for purposes of information duties requires explicit legislative permission and is permitted only for „limited times“ (DP Dir.) (Austria has no provision like § 101 IX German Copyright Act)
- Data Protection has higher weight than copyright information duty
- Traffic data have to be erased immediately
- There can be no information duty as to illegally stored data
 - -> Processing of information requests is against data protection law

Thank you for your attention!

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