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LEGAL LIABILITY ISSUES IN REPOSITORIES OF GREY LITERATURE

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Abstract

Any institution that decides to operate a public repository has to assess its legal liability for content of the repository, regardless whether such content was created by the institution itself or third parties, such as repository's users. This article will describe the main questions that have to be solved before one starts operating a public repository. Special attention will be paid to legal liability of public repositories that contain grey literature.

Keyword

ISP Liability, Civil liability, Data protection, Personal Rights, Copyright

I. MAIN CATEGORIES OF LIABILITY AND LIABLE SUBJECTS

The potential liability of an repository's operator can be divided into three main categories: civil liability, criminal liability and liability towards public authorities (administrative liability)¹. The civil liability is a potential responsibility towards other person (natural or artificial) whose rights have been breached. A typical sanction under most jurisdictions would be payment of damages. The civil liability would be typically enforced by a civil legal action (complaint) in a lawsuit at a civil court or arbitration. The lawsuit can be initiated only by a party whose rights have been breached, hence the repository cannot be held liable in a civil proceedings if nobody complains².

The criminal liability is enforced through combined actions of Police, public attorneys and judiciary. The criminal procedures are traditionally led against individuals, however there is an increasing trend to prosecute corporations as well. The criminal proceeding can be even initiated without any formal complaint. The potential sanctions range from financial fees to

1. The term "Administrative liability" can be confusing, because is sometimes used to describe the civil liability of the Administrative body itself. However for the purpose of this paper, we will use and understand the term "Administrative liability" as a liability of the repository's operator towards Administrative bodies and public authorities.

2 The legal principle NEMO IUDEX SINE ACTORE i.e. when there is no complainant there is no judge, is a legal principle that is applied in all democratic jurisdictions.

imprisonment and include bans on specific activities and suspensions from receiving public funds³.

The administrative liability arises when the repository's operator violates other than criminal legal regulations, such as data protection act, competition rules, work safety etc. Even though the administrative liability may appear to be the least serious of the three mentioned categories, the financial fees may be quite significant.

The liability for the illegal content in a repository can be borne by the corporation that operates the repository, its employees or third party, most typically the user of a repository. The corporation may be held liable in all kinds of proceeding, whereas employees' liability would be usually limited by provisions of employment law. The users of the repository could be held liable in case they are allowed to generate/upload their own content.

2. CIVIL LIABILITY

As was already mentioned, the civil liability is a consequence for breaching somebody else's right. When speaking about online repositories, it is quite probable, that at certain point, somebody will raise claim against the repository for violation of his copyright rights. The repository operator will be liable for a violation of copyright, if such content was uploaded by his employee or subcontractor. The repository operator may seek remedy for any damages he would have to pay, however the liability of the employee is limited to an amount that is usually significantly lower, than damages. The liability of subcontractor for any damages he may cause to the repository by uploading infringing material is not limited unless specified otherwise in a contract.

The violation of copyright is however not the only legal risk, that has to be taken into account by the operator of the online repository of grey literature. The other two major issues that have to be considered carefully are possible violation of trade secrets and possible violation of privacy rights. Grey literature that contains business-related data, economic reports or technical documentation can contain information that has a legal nature of a trade secret. It is however important to note, that the repository is bound by confidentiality towards third parties only if the information was disclosed under the condition, that he will keep such information confidential. It is not likely, that other documents, that can be qualified as a trade secret⁴ would appear in a public repository. Such publication would probably mean the end of the legal protection of such information under a trade secret clause. The repository would be liable only in case, that he displayed such information by mistake (negligence) or with

3 i.e. Art. 15 of the Czech act no. 418/2011 Coll. On criminal liability of corporations. For further reference see - JELÍNEK, Jiří, HERCZOG, Jiří, *Zákon o trestní odpovědnosti právnických osob : komentář s judikaturou -- 2. aktualiz. a přeprac. vyd.* -- Praha : Leges, 2013. -- 256 s.

4 i.e. Trade secret as defined under the Art. 17 of the Czech Commercial code - Law no. 513/1991 Coll. For further reference see SMEJKAL, Vladimír, *Nekalá soutěž na internetu*, Právní rádce, *Economia* 2/2002, str. 11

intention to harm the interest of an individual corporation. These situations will not arise frequently, however the repository operator should be aware of a potential liability for unintentional disclosure of a trade secret and should train and instruct its employees accordingly.

The third type of civil liability that has to be considered is the liability for the violation of privacy and personal rights. Every individual has a right for protection of his private and family life and correspondence⁵. Under majority of European jurisdictions, the protection of privacy covers also protection of someone's appearance and actions, that would regulate photographs, voice recordings and video footage with any individual person. The protection of personality on the other hand protects reputation and dignity of an individual. The right for privacy is nowadays interpreted very extensively and the situation, where an individual would consider a certain information published in repository as damaging to his privacy is quite likely. It has to be noted, that even the information which is truthful can be damaging to someone's personality or privacy. Therefore, any entity that operates a digital repository should have at least a basic understanding of the concepts of privacy and personality.

3. CRIMINAL AND ADMINISTRATIVE LIABILITY

It is not very likely that criminal law will be of huge concern to any repositories of grey literature. It is however very important to remember that criminal law has provisions to protect intellectual property, trade secrets and personality rights, which can be classified either as crimes⁶ or offences⁷. The liability for these crimes will most likely vest on an individuals, who made particular content available and not on the institution that operates the repository. Serious violations can however affect the institution as well, which can be prohibited from operating the repository for a specific period of time.

Regarding the administrative liability, the repositories should be aware mainly of the liability for the possible data protection breaches⁸. The data protection is closely related to privacy rights and personal rights it is not however the same legal concept. Whereas privacy and personality are a concept of civil law, the data protection is the set of formal and administrative duties of the person who administers the data. This person is called either 'controller' or 'processor', who is a controller's subcontractor. The personal data is a very broad

5 The most general definition can be found in the Art. 18 of the Universal declaration of human rights, which reads: No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

6 E.g. Articles, 248 or 270 of the Czech Copyright code

7 Such as e.g. Art. 49 of the 200/1990 Sb Act on offences (prestupkový zákon)

8 For further reference see KUČEROVÁ, Alena. Zákon o ochraně osobních údajů: komentář. Vyd. 1. Praha: C.H. Beck, 2012, xvii, 516 s. ISBN 9788071792260, MATOUŠOVÁ, Miroslava a Ladislav HEJLÍK. Osobní údaje a jejich ochrana. 2., dopl. a aktualiz. vyd. Praha: ASPI, 2008, xi, 455 s. ISBN 9788073573225.

and general term. The European directive on personal data⁹ defines personal *data as any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity*¹⁰;

The processing of personal data is not forbidden by any regulation or law on data protection. These laws and regulations merely describe the set of conditions that have to be met and duties that have to be fulfilled by the controller and processor of the personal data. Non-compliance with these regulations will result in a financial sanction for the institution that operates the repository.

4. LIABILITY FOR USER GENERATED CONTENT

Digital repositories that enable third-party uploads, or that allow users to generate their own on-line content need to be aware, that such content might be infringing. In order to protect itself from any consequences of the users' misconduct, the operator of such repository should make use of the legal instrument of so called 'Notice-and-action procedures' or 'safe heavens'. Under the European secondary legislation¹¹ the digital repository which is open for uploads is considered as a 'Hosting service'¹². Under the Art. 14 of the directive, the provider of the hosting service is not liable for a user generated content if *(a) the provider 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 (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information*. In other words, the provider is not liable for the uploaded content up to the very moment he is made aware by the second party. It is recommended that the repository itself contains a specific tool to notify the infringing content or at least a contact address where the infringing content can be reported¹³.

5. CONCLUDING REMARKS

9 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data Official Journal L 281 , 23/11/1995 P. 0031 - 0050

10 *ibid.* Article 2

11 Namely the 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)

12 Art. 14 of the directive on electronic commerce

13 For further reference see -POLČÁK, Radim. *Právo na internetu - spam a odpovědnost ISP*. Brno: Computer Press, 2007. 150 s. *Právo pro denní praxi*. ISBN 978-80-251-1777-4.

Even though the operation of a digital repository is frequently non-commercial, pro-bono activity, it contains several legal risks for its provider that can be rather easily managed, but should not be underestimated. The operator of the digital repository should invest resources to train its employees in the basic aspects of privacy and copyright law or risk not only the financial fees, but also sanctions that would force him to close the service of digital repository.

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