altenburger
legal+tax

**Altenburger Ltd legal + tax**
Via P. Lucchini 7
6900 Lugano
T+41 58 810 22 44
F+41 58 810 22 45
www.altenburger.ch

**Alessandro Pescia**
Senior Associate, Avvocato
pescia@altenburger.ch

Iscritto al registro cantonale
degli avvocati

Right of Reply Ltd
20-22 Wenlock Road
London N1 7GU
United Kingdom

via email a avlugano@gmail.com

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**Right of Reply: legal advice under Swiss law**

## Preamble

I was commissioned to develop a legal study on the potential of the "Right of Reply" (ROR) IT tool, focusing in particular on its compatibility with the Swiss legal system and in indicating whether it can be an efficient solution that can extend the protection of a given person.

ROR is a software configured to implement a method of analysis and response to information content relating to a subject of interest and to allow an effective and optimal right of response both in terms of contemporaneity and relevance.

In short, ROR is therefore basically a system that provides Internet users with a method to index and comment on information content (i.e. any article, photo, video, voice track, data of any nature containing information about at least one subject of interest) present in the Web.

## General legal scenario

As the name of the software itself says (Right of Reply), the ambition of the tool is to automatize the right of response on the Net; this means that from a legal point of view, there is a clear connection between ROR and the protection of personality rights.

It follows that the general context of the review is obviously the Internet and it is necessary to point out preliminarily that in Switzerland there is no "Internet code" or "Internet law", just as there are no general international conventions or treaties on the Internet.

Of course this does not mean that Switzerland is a territory where there is a legal deficit in this area, since the rules that bind the physical world are also applied in the virtual one.

It should therefore be noted that in Switzerland the traditional instruments given to the person injured in his or her personality are the measures to protect it enshrined in the Swiss Civil Code (Art. 28 and following of the Swiss Civil Code – CCS – which establish a range of judicial initiatives to prevent, detect, suppress and stop the injury, as well as the right of reply – established by Art. 28 g-l CCS – ) and those arising from criminal law: in particular, the repression of crimes against honor (defamation, slander and insult, which have their legal basis in Articles 173 and following of the Swiss Criminal Code – CPS – ) and crimes against the personal sphere, which are covered by Articles 179 and following CPS.

Collaterally (or more precisely, at the top of the normative hierarchy), we should also remember the constitutional consecration of the so-called fundamental rights (art. 7-36 of the Swiss Federal Constitution – Cst – ) among which, in the context of this study, we include in particular the protection of human dignity (art. 7), the protection of the private sphere (art. 13), freedom of opinion and information (art. 16) and freedom of the media (art. 17).

However, we will refrain from a specific examination of the issue from a constitutional point of view because, although it is the supreme normative source of these rights, from the point of view of the protection of the personality, constitutional protection is a subordinate and accessory instrument to those mentioned above.

Based on the above, there is no specific protection of the personality affected in the virtual context, so that the instruments previously mentioned can and must be invoked even in the case of injury to personality resulting from the automatized processing of personal data.

However, this can be ineffective due to factors of a basically practical nature: the injured party is often not able to be duly or promptly informed of the injury; if he/she is, it is often difficult to determine precisely the source and perpetrator of the injury and, in any case, he/she is forced to move judicially with all the delays, difficulties and procedural charges that this entails.

For the reasons explained above, the Swiss federal legislator adopted a special law to implement the protection of persons subject to automatized data processing: the Federal Data Protection Act (LPD), a legal text that has already been subject to changes over the years, came into force in 1992.

Despite the expression "data protection", it is clearly not these that are protected but the fundamental rights of those affected by their processing: this protection derives from the said constitutional right to respect for privacy (art. 13 Cst.), the second paragraph of which expressly provides that " Every person has the right to be protected against the misuse of their personal data.".

This law has therefore led to a certain implementation in the protection of personality in relation to the context of diffusion focused in this study; however, the LPD is essentially a concretization and clarification of the principles established by the above-mentioned provisions of the CCS and represents more a guidebook for those who processes personal data, aimed at illustrating the operating mode that respects the rights of the personality of the subjects involved (therefore the focus is more on the lawfulness of the exercise than on the resources of reaction in the event of unlawfulness). Regarding the claims of the injured party, the LDP refers to the mechanisms previously mentioned and consecrated by art. 28 and following CCS, subject to certain implementations provided at art. 15 LDP, which are, however, an extension of the right of reply established by Art. 28 g CCS. (subject, however, to the traditional mechanisms referred to above, with all the limitations that distinguish them).

## Editors' responsibility

All the above has a general and generic nature and starts from the classical assumption of a direct linearity between the author and the victim. In the specific context of this analysis, however, this correlation is often not clear, explicit or immediately determinable and involves third parties and entities whose position deserves to be examined.

In the light of what has been expressed in the previous pages, it must be pointed out that the basic concept of the examination is that everyone is responsible for his own actions and that the author of a damage is obliged to repair it.

The above is obviously applicable in both the real and virtual worlds; in this last dimension, however, one must face difficulties of a purely practical nature: in the Web often the person responsible for certain actions is territorially far away from the victim or is even unspecified, while the supplier of access to information/publication will be closer or at least known and/or identifiable by the person touched. The owner of a site is obviously very easily identifiable thanks to the domain name or IP address, It follows that the injured party may be tempted to attack (just or even) these more identifiable "intermediaries"..

However, it is a question of defining the involvement and ultimately the attribution of responsibilities to these entities.

The concept is therefore that of " indictability", or the question of whether the person who intends to be involved had a role in the realization of the result (the injury or damage).

Procedurally speaking, indictability is a notion of a merely criminal nature, while from the civil law point of view it is the conception of passive legitimation (i.e. the statute of the subject who can be sued).

There have been many legal debates on this subject and it does not seem that the issue is yet clearly defined: These led to numerous parliamentary interventions which in turn led to the creation of a committee of experts "Cybercrime" which made a report in 2003 highlighting the difficulty in comparing the position of the hosting or access provider to that of the actors of traditional mass media so as to conclude that the special regime of media law does not adapt to the specificity of the Internet. The only surety that emerged from the commission results, which will not be questioned later, is that the person on whom the existence of the site and its content depends directly (the content provider) is responsible as the author of the offence/violation.

Since then, further reports and even a preliminary draft law have been drawn up (in 2004, the Federal Council had submitted for consultation a draft law focusing on the prosecution of offences committed by the electronic media - cybercrime - which was later shelved). Although the situation has not changed in any concrete way, concerns about the alleged legal uncertainty have decreased and the Federal Council has considered that the issue of criminal liability does not need to be re-examined.

On the civil front, the Federal Council has published a report on the civil liability of Internet service providers. In this report, the Federal Government Authority considers that the law in force already provides the courts with the necessary tools to assess the passive legitimacy and this according to the necessary requirement of the so-called "adequate causality principle" between infringement and damage (general *conditio sine qua non* in the area of civil liability, both contractual and non-contractual) and that this is therefore a sufficient principle which does not require a change in the legal framework.

In the future, it is conceivable that an exception could be adopted in the context of copyright since the draft of the related law (in consultation from December 2015) provides for new blocking and information obligations for providers of derived communication services (including hosting providers) and telecommunication providers in exchange for an exemption from liability.

However, it should be noted that qualifying search engines as providers of access, hosting or content is sometimes difficult.

While the notion of access providers can be reasonably excluded, it appears more comparable to that of hosters in that extracts of content from third parties are offered.

However, search engines do not only offer storage space, they also index, organize and process third-party content. In a certain sense, therefore, search engines propose their contents by suggesting searches or selecting and ordering results; it follows that the search engine must have at least the same degree of responsibility as a hosting provider or, in some cases, even a content provider.

For the Court of Justice of the European Union, a search engine does much more than display links: by using the Internet in an automatized, constant and systematic mode to search for information published, a search engine collects data that is organized and made available to its users in the form of a list of results. It is therefore a data processing for which the search engine is responsible.

The activity of the search engine also differs from that of the publisher of the indexed site, where the data are initially hosted. The reasons justifying the processing of these data may therefore benefit the indexed site and not the search engine. In other words, data processing can be legal for one (e.g. a newspaper that keeps its archives) and not for the other (the search engine that extracts a text from the archives and suggests that it is current because it is presented with more recent search results).

In specific terms of criminal law

In general, it can be observed that, at a criminal level, the content provider will be primarily responsible for what it publishes. In principle, the access provider has no responsibility as he has no control over the content. The criminal liability of hosting service providers therefore varies according to their participation. They may be liable as co-authors, accomplices or instigators. However, only those who knew or should have known that they were hosting illegal content, those who encouraged users to post such content or those who published it themselves, are responsible.

The Federal Supreme Court (TF) has pointed out that the operation of a discussion forum is inseparable from the risk of publishing illegal content, which does not yet justify a permanent monitoring obligation.

Such surveillance would be illegal. However, the situation is different when the operator of the forum is aware of illegal content on its website. The operator's obligation to eliminate the content in question thus stems from the unwritten principle that it is for the person causing danger to take the necessary measures to avoid the consequences.

Criminal law provides for a liability in cascade when a crime has been committed in the form of publication by a channel of communication: the primary responsibility lies with the author and if this cannot be discovered or prosecuted in Switzerland, it legitimizes a subsidiary liability of the responsible publisher; only in a further subordinate way is there a liability of the person to whom the publication is due. The concept of the media is therefore broad, but there must still be a person who can monitor and intervene effectively if necessary.

The Zurich District Court recently ruled that Twitter should be described as a vehicle for communication and that retweeting should be regarded as an ordinary means of transmission and should not be punishable.

In specific terms of civil law

In the context of civil liability, the same principles apply.

However, the particular case of participants in an initiative that damages the personality still has to be taken into account. As indicated previously, Article 28 CCS allows a person who suffers an illegal attack on his or her personality to take legal action for his or her protection against any person who participates in it. The purpose of this approach is not to obtain the condemnation of the person responsible, but simply to stop the violation by attacking any link in the chain. The TF confirmed that a newspaper allowing its readers to host blogs on its website could be required to remove illegal content at the request of the aggrieved party, including blogs over which it had no editorial control.

A large news portal that operates professionally on the Internet can be held responsible for illegal comments published by users of the Web. In this case handled by the European Court of Human Rights, the portal invited Internet users to enrich their news with their opinions, which represented an economic interest for the portal. In a rather strict decision, the General Court considered that the role of the portal was greater than that of a passive provider of purely technical services, which could simply react if it had been brought to its attention. It was not necessary to prevent the publication of the contested comments, but they should have been withdrawn immediately after publication (and without waiting for anyone to report them). It is difficult to understand why the Court found that the portal was a commentator rather than a guest. It pointed out that the damage suffered was very limited, that it was a professional site carrying on a commercial activity and that it would have been sufficient to delete the observation immediately after its publication. In concrete terms, if this case law were to be maintained, it would seem difficult to escape systematic monitoring of comments published on a professional website.

However, the Court has specified that that constraint does not apply to other internet forums, such as discussion forums, where internet users may freely set out their ideas on any subject without the discussion being directed through interventions by the operator of the forum, or social media platforms where the provider of the platform produces no content and where the content provider may be a natural person who administers a site or a blog in the course of his or her recreational activities.

In a subsequent decision, the Court moderated its position and refused to recognize the liability of intermediaries. One of them was an ideal purpose association and the content of the incriminated messages was clearly not illegal. In addition, the victim had brought the matter directly before the court without first contacting the host.

Finally, it is still necessary to emphasize that measures such as general conditions prohibiting illegal advertisements, regular monitoring and immediate withdrawal in the event of a request are adequate. But in most cases, this may not be sufficient, especially when the hosting provider has a commercial purpose and the additional measures would not have significant negative consequences.

The special provisions on the media may ultimately also apply to an Internet activity. The Civil Code, in particular regarding the right of reply, refers to the "periodically appearing media" (art. 28g, para. 1, CCS), which presupposes that the diffusion of information takes place regularly and allows the public to be reached. The media must therefore be repetitive (even irregular), so that it can be assumed that they normally affect the same group of people. This will be the case for a newspaper, a local radio, a newsletter if your subscription is open to any recipient, online newspapers, blogs and public discussion forums, etc. ...

**Conclusions**

The efficiency of ROR is evident as an instrument aimed at the protection of the subject touched in his personality and in the concretization of a process of implementation of a right of response not only automatized but also compliant with the principle of immediacy and equal treatment because "action and reaction" are simultaneously usable by the user. This without in any way prejudicing the faculties of the subject involved in a publication on the Net to undertake traditional initiatives (for example, whether the publication in question may be criminally reprehensible, or whether it is the cause of damage that can be claimed judicially).

As we have seen, under the aegis of Swiss law, the position of those who publish certain information, is not defined in a clear way and is functional to a certain number of factors (especially in view of how active the role of the Editor can be considered). However, it is clear that the courts recognize the effectiveness of a number of preventive, surveillance and enforcement measures as valuable means of discharging liability.

I am of course available for any further details, clarifications or additions.

With my best regards,

Altenburger Ltd legal + tax

Avv. Alessandro Pescia