THE MEDIA AND ENTERTAINMENT LAW REVIEW

SECOND EDITION

Editor
Benjamin E Marks

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PREFACE

I am pleased to serve as editor and US chapter author of this important survey work on the evolving state of the law around the world as affects the day-to-day operations of the media and entertainment industries.

By any measure, 2020 has been a highly unusual and especially challenging year, particularly for the media and entertainment industries, with large sectors devastated by the effects of the covid-19 pandemic. In many countries, live music, festivals, theatrical performances and sporting events were shut down entirely for much of the year (and, in many cases, remain so), ravaging the businesses that depend on in-person events for their success and the individuals that depend on them for their livelihoods. For other parts of the media and entertainment industries, the results have been uneven. The largest online distributors of books, for example, have generally fared quite well, while many independent bookstores that depend on foot traffic are in dire straits. In the music industry, touring artists, concert promoters, and theatre and venue operators have been particularly hard hit, but most streaming services, music publishers and record companies are continuing to flourish. It remains to be seen which changes to the media and entertainment industries are temporary and which will be permanent.

The pandemic is hardly the only global phenomenon accelerating changes to media and entertainment. We continue to see a rise in challenges to press freedom by repressive government regimes – a phenomenon, it should be noted, that has been testing the strength of free speech traditions in the world's most protective speech regime, the United States. The manifestations include increased censorship, reduced transparency, and more appalling acts of violence against journalists and editors. Around the world, businesses, governments and legal regimes continue to adapt to technological change, with the increased use of artificial intelligence and 'deep fakes' just a few of the examples at the forefront.

This timely survey work provides important insights into the ongoing effects of the digital revolution and evolving (and sometime contrasting) responses to challenges both in applying existing intellectual property laws to digital distribution and in developing appropriate legislative and regulatory responses that meet current e-commerce and consumer protection needs. It should be understood to serve, not as an encyclopedic resource covering the broad and often complex legal landscape affecting the media and entertainment industries but, rather, as a current snapshot of developments and country trends likely to be of greatest interest to the practitioner. Each of the contributors is a subject field expert, and their efforts here are gratefully acknowledged. Each has used his or her best judgment as to the topics to highlight, recognising that space constraints require some selectivity. As will be plain to the reader, aspects of this legal terrain, particularly as relating to the legal and regulatory

treatment of digital commerce, remain in flux, with many open issues that call for future clarification.

This work is designed to serve as a brief topical overview, not as the definitive or last word on the subject. You or your legal counsel properly should continue to serve that function.

Benjamin E Marks
Weil, Gotshal & Manges LLP
New York
November 2020

Chapter 12

SWITZERLAND

Dirk Spacek[1]

I OVERVIEW

The Swiss media landscape faces fundamental structural changes owing to the worldwide digitalisation trend. The population is increasingly informing itself through alternative online media offerings, such as Google, YouTube or individually tailored online content offerings, with a rather low willingness to pay. Against this background, the Swiss Federal Council issued a preliminary draft of a new Electronic Media Act (EMA)[2] in June 2018. The EMA aimed to widen the scope of regulation from traditional media providers (such as radio and television broadcasters as regulated under the current the Swiss Federal Act on Radio and Television of 24 March 2006 (RTVA))[3] to online media offerings with similar audio or audiovisual programmes. However, the outcome of the consultation proceedings on the EMA turned out to be so controversial that the Swiss Federal Council decided, on 28 August 2019, that it will not propose the enactment of the EMA, but will instead revise the RTVA. Stakeholders claimed that the EMA did not improve the difficult economic situation of the press and that it lacked a constitutional basis.[4] In this context, the Swiss Federal Council announced its will to implement measures to financially support online media with editorial content providing high journalistic standards and newspapers, owing to the digital shift. A package of recommended measures will be submitted to parliament in the first half of 2020.

Radio and television broadcasters with a public licence are under a constitutional obligation to contribute to education, cultural development, opinion-forming and entertainment in Switzerland (public services). Since self-financing through advertising is not considered sufficient to fulfil this mandate in an independent manner, a public radio and television fee is charged in Switzerland. Prior to 2019, this fee had to be paid by every holder of a television or radio device. In the course of the revision of the RTVA, this fee has been detached from the ownership of a television or radio device. The underlying rationale of the enacted statute was that almost every other electrical device (such as mobile phones or computers) is now capable of receiving and viewing broadcasted content. The new

1 Dirk Spacek is a partner at CMS von Erlach Poncet Ltd. The author thanks his colleague Sergej Schenker for gathering substantial material for, contributing to and critically reviewing this chapter.

2 Available at www.bakom.admin.ch/bakom/de/home/das-bakom/organisation/rechtliche-grundlagen/vernehmlassungen/vernehmlassung-zum-neuen-bundesgesetz-ueber-elektronische-medien.html.

3 Available at www.admin.ch/opc/en/classified-compilation/20001794/index.html.

4 See Mirjam Teitler, 'Keine Verfassungsgrundlage für eine Bundeskompetenz im Online-Bereich', *Medialex*, 2018, p. 18; another opinion is expressed by Martin Dummermuth in 'Die Zuständigkeit des Bundes im Bereich der elektronischen Medien nach Article 93 BV', *ZBl* 117/2016, p. 347.

radio and television fee amounts to 365 Swiss francs for each private household per year and, for businesses with an annual turnover of over 500,000 Swiss francs, it ranges from 365 to 35,590 Swiss francs per year, depending on the turnover.

II LEGAL AND REGULATORY FRAMEWORK

In Switzerland, the media and entertainment sector is not governed by a uniform regulation due to its multidisciplinary nature.[5] Various legal provisions, which are part of both private and public law, do affect the realm of media and entertainment.

The fundamental right to freedom of media is expressly guaranteed in Article 17 of the Swiss Federal Constitution of 18 April 1999 (FC),[6] which concretises the fundamental right to freedom of expression (Article 16 FC) and specifically deals with mass communication. The FC applies equally to press, radio, television and other forms of information dissemination.[7] At its core, it prohibits any kind of censorship.

Radio and television broadcasters are regulated by the Federal Office of Communications (OFCOM), which acts as a supervisory authority. Any person or entity offering a sequence of programmes disseminated continuously to the public is considered a television or radio broadcaster and is subject to a notification duty to OFCOM,[8] or to a public licence if it assumes a public service mandate (such as the Swiss national public broadcaster, SRG SSR).[9] The Independent Complaints Authority for Radio and Television is competent to deal with complaints against editorial publications or against any refusal to grant access to the programme services of Swiss broadcasters.

Telecommunication service providers (TSPs) are regulated under the Swiss Federal Act on Telecommunications of 30 April 1997 (FAT).[10] Unlike broadcasters addressing public audiences, TSPs are in charge of individual communications channelled through their telecommunication networks. They are generally subject to a notification duty[11] to, or require a public licence from, OFCOM if they procure universal services or want to make use of the radio frequency spectrum.[12]

In addition, the Swiss media and entertainment industry is characterised by its well-developed self-regulation. In the area of journalism, the Swiss Press Council (SPC) monitors compliance with ethical principles that are set out in its Code of Conduct.

Finally, content created or disseminated by different players in the media and entertainment industry, such as producers or broadcasters, is protected by copyright as set out in the Federal Act on Copyright and Neighbouring Rights of 9 October 1992 (FACN),[13] which is currently subject to a substantial revision, and the Regulation on Copyright and Neighbouring Rights of 26 April 1993 (RCN).[14]

5 Franz Zeller, *Öffentlichrechtliches & internationales Medienrecht*, 15th edition, Berne 2018, p. 20.

6 Available at www.admin.ch/opc/en/classified-compilation/19995395/index.html.

7 Franz Zeller, *Öffentlichrechtliches & internationales Medienrecht*, 15th edition, Berne 2018, p. 108.

8 Article 3(a), RTVA.

9 Article 3(b), RTVA.

10 Available at www.admin.ch/opc/en/classified-compilation/19970160/index.html.

11 Article 4, FAT.

12 Articles 14 and 22, FAT.

13 Available at www.admin.ch/opc/en/classified-compilation/19920251/index.html.

14 Available, in German, at www.admin.ch/opc/de/classified-compilation/19930114/index.html.

III FREE SPEECH AND MEDIA FREEDOM

i Protected forms of expression

Freedom of media guaranteeing the unhindered flow of news and the free exchange of opinion and expression form the basis of freedom of speech. Media freedom is considered a fundamental right as provided in the FC.[15] However, even fundamental rights are subject to various restrictions, which are set out in various Swiss federal statutes:

a Freedom of speech and media freedom find their limits in publications that, without just cause, contain untrue factual claims or libellous value judgements.[16] These publications may violate the social integrity of the addressed person and trigger manifold claims, such as injunctive relief, damages and equity-based compensation.[17] Publications infringing the economic reputation of a business and, therefore, interfering with fair competition law principles may violate the Federal Act against Unfair Competition of 19 December 1986[18] (UCA).[19]

b Defamatory public statements violating the ethical integrity of a person may also constitute a criminal act under the Swiss Criminal Code of 21 December 1937[20] (SCC).[21] Swiss criminal law provides for a multitude of provisions restricting free speech.[22] One prominent example is the prohibition to publicly incite hatred or discrimination against a person or a group of persons on the grounds of race, ethnic origin or religion.[23]

c Broadcasters must comply with certain minimum requirements for editorial and advertisement content based on statutory provisions in the RTVA;[24] for instance, they must present facts in editorial programmes (i.e., news programmes) in a fair and well-balanced manner.[25] Furthermore, editorial content and advertisement content must be clearly separated from each other and labelled as such.[26] Finally, broadcasters are banned from advertising tobacco goods, alcoholic beverages, political parties, religious beliefs and institutions, and therapeutic products and medical treatments.[27] In addition to these duties, broadcasters subject to a public licence (e.g., SRG SSR) must appropriately express the variety of events and opinions in the totality of their editorial programmes (public service).[28]

15 Articles 16, 17 and 27, FC.
16 Federal Supreme Court Decision (FSCD) 126 III 305 of 7 July 2010, p. 308.
17 Franz Zeller, *Öffentlichrechtliches & internationales Medienrecht*, 15th edition, Berne 2018, p. 173.
18 Available, in German, at www.admin.ch/opc/de/classified-compilation/19860391/.
19 Article 2, UCA; Article 3, Paragraph 1(a), UCA.
20 Available at www.admin.ch/opc/en/classified-compilation/19370083/index.html.
21 Franz Zeller, *Öffentlichrechtliches & internationales Medienrecht*, 15th edition, Berne 2018, p. 173.
22 Article 173 et seq., SCC.
23 Article 261 *bis*, SCC.
24 Article 4 and Article 9 et seq., RTVA.
25 Article 4, Paragraph 2, RTVA.
26 Article 9, Paragraph 1, RTVA.
27 Article 10, RTVA.
28 Article 4, Paragraph 4, RTVA

ii Newsgathering

Research activities of journalists editing news are protected by the fundamental right to freedom of media.[29] The Swiss Federal Supreme Court (FSC) has confirmed, in principle, that journalists must be granted access not only to general public sources but also to sources that are not publicly available,[30] and that information-gathering of journalists may only be limited if there is a legal basis to it (e.g., based on third-party rights that could be at stake).[31]

As regards journalists' access to documents of public agencies, the Swiss Freedom of Information Act of 17 December 2004 (FAP)[32] provides that anyone must be granted access to documents of the Swiss Federal Administration.[33] However, this right to access may be limited based on several grounds, such as the impairment of the privacy of individuals, the implementation of official measures, the protection of professional or trade secrets or the endangerment of security in Switzerland.[34] However, any incitement to breach official secrecy[35] and to bribe public officials[36] is strictly prohibited.

Furthermore, when gathering news, journalists should refrain from any breach of privacy or integrity of personality under private or criminal law statutes. In particular, it is considered a criminal offence under Swiss law to listen in on or record private conversations by using a listening or recording device, or to disclose information gathered in such a manner without the permission of the participants involved.[37] Finally, unlawful entry of a building, apartment or demarcated proprietary area can be prosecuted.[38]

iii Freedom of access to government information

Court hearings and the delivery of judgments are generally public in Switzerland.[39] However, they may be declared as secret where the personality rights of the involved participants, especially victims, are at stake. Furthermore, the pretrial phase is generally not considered public.[40]

Legislative procedures are considered public in Switzerland. Parliamentary sittings can therefore be accessed by journalists.[41] However, in some cases, the public can be excluded to protect personality rights or for security reasons. Furthermore, discussions in committees are confidential.[42] However, such committees must inform the general public of the results of their deliberations.

29 Article 16, Paragraphs 3 and 17, FC.
30 FSCD 1B_292/2010 of 23 December 2010.
31 id., with reference to Article 36, FC.
32 Available at www.admin.ch/opc/en/classified-compilation/20022540/index.html.
33 Article 6, FAP.
34 Article 7, FAP.
35 Article 320, SCC.
36 Article 322 ter et seq., SCC.
37 Article 179 bis et seq., SCC.
38 Article 186, SCC.
39 Article 30, Paragraph 3, FC.
40 Franz Zeller, *Öffentlichrechtliches & internationales Medienrecht*, 15th edition, Berne 2018, p. 265.
41 id., p. 275.
42 Article 47 of the Federal Act on the Federal Assembly of 13 December 2002, available at www.admin.ch/opc/en/classified-compilation/20010664/index.html.

Traditionally, the activities of government agencies were considered confidential in Switzerland;[43] however, in recent years, a shift towards more transparency can be observed under the FAP.[44]

iv Protection of sources

Swiss law provides for the protection of sources. Persons who are professionally active in the publishing of information in the content section of periodically disseminated media may refuse to disclose the identity, author, content or sources of their information and are not liable to any criminal sanctions or subject to any procedural law enforcement powers.[45] However, the protection of sources does not apply if a court holds that disclosure is required to save a person from immediate danger to life or limb or in the event of homicide or offences of a certain gravity that may not otherwise be resolved or where suspects may not otherwise be apprehended.[46]

v Private action against publication

Both natural and legal persons have legal remedies available against defamatory media coverage or media coverage infringing their privacy rights as provided for in the Swiss Civil Code of 10 December 1907 (CC).[47] They may ask local courts or the courts at the seat of a defendant to prohibit a threatened infringement, to order that an existing infringement ceases or to make a declaration that an infringement is unlawful if it continues to have an offensive effect. In addition, such persons may claim damages and satisfaction and the handing over of profits.[48]

Furthermore, persons whose personality rights are directly affected by a representation of events in periodically appearing media, especially the press, radio or television, have a right to reply.[49]

vi Government action against publication

No public cases are known of the Swiss federal governments or governmental agencies of Swiss cantons having officially intervened against Swiss media on publishing-specific content. Censorship is institutionally considered unlawful under the FC and radio and television must be independent from the state.[50]

43 Franz Zeller, *Öffentlichrechtliches & internationales Medienrecht*, 15th edition, Berne 2018, p. 278.

44 See Annina Keller, Daniel Kämpfer, 'Öffentlichkeitsgesetz: Gerichte stärken das Recht auf Zugang zu Verwaltungsakten', *Medialex*, 2018, p. 75.

45 Article 28a, SCC.

46 id.

47 Available at www.admin.ch/opc/en/classified-compilation/19070042/index.html.

48 Article 28, CC.

49 Article 28g, CC.

50 Article 17, Paragraph 2, FC; Article 3a, RTVA.

IV INTELLECTUAL PROPERTY

i Copyright and related rights

Overview

Swiss copyright legislation essentially consists of the FACN and the RCN. The RCN provides more details on matters not governed specifically by the FACN.

Switzerland is a member of many multilateral international conventions on copyright and neighbouring rights law, in particular the revised Berne Convention for the Protection of Literary and Artistic Works (Paris version of 1971) and the International Convention for the protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome 1961). Based on the majority of Swiss scholarly opinions, all obligations brought forward in these mentioned treaties have been implemented into Swiss national law.

Copyright essentially provides for protection of literary and artistic intellectual creations with an individual character, irrespective of their value or purpose,[51] in particular literary, scientific and other works of language, musical works, fine art, works with scientific or technical content, works of architecture or applied art, photographic, cinematographic and other visual or audiovisual works. The FACN protects authors by providing them with exclusive rights to the use of their copyrighted work and to authorise such use by others, in particular, the right to publish, reproduce or perform their work, or to make their work available.[52] Furthermore, an author has the exclusive right to allow modification of his or her work, such as adaptations or derivative works (e.g., a film version of a copyrighted novel).[53] At the same time, the FACN provides for a limited amount of copyright restrictions enumerated in the FACN to strike a balance between the interests of copyright owners and the user community (among which media providers are an important factor or pillar). In contrast to the Anglo–American copyright system, Swiss copyright does not provide an equity-based exception for use of copyrighted works as, for example, under the fair use doctrine. Only limited copyright restrictions enumerated in the FACN apply. The following restrictions to copyrights are noteworthy: restrictions may apply to the use of published works in the private or domestic sphere, within enterprises or for educational purposes.[54] The FACN also provides for other restrictions; for example, concerning citations (short excerpt references) or news reporting on current events.[55]

Recent noteworthy cases in the media sector

On 8 February 2019, in a recent landmark ruling, the FSC held that internet access provider Swisscom could not be obliged to block copyright-infringing content (via IP blocking, domain name server blocking or URL blocking) that is unlawfully uploaded by third parties on its online portals.[56] In its decision, the FSC made it clear that the existence of a technical infrastructure, which makes access to the worldwide web possible and is the core

51 Article 2, FACN.

52 Article 10, FACN.

53 Article 3, FACN.

54 Article 19, FACN.

55 Article 25, FACN (for citations) and Article 28, FACN (for news reporting).

56 FSCD 4A_433/2018 of 8 February 2019.

function of access providers, cannot be deemed an adequate causal contribution to copyright infringements over a particular hosted online platform. This decision is certainly one of the most important recent decisions in the digital media law field.

New legislation ahead

The FACN is currently subject to a major legislative revision. Driven by an expressed need to adjust Swiss copyright to the realities of the new digital age, the revised Swiss Federal Act on Copyright and Neighbouring Rights (NFACN)[57] has been discussed by the Swiss parliament. The remaining differences on the NFACN will be discussed in the parliamentary autumn session. If differences between the two parliamentary chambers can be resolved and a final vote in both houses goes forward, the NFACN could come into force in 2020. A strong focus of the NFACN is to improve anti-piracy measures available to copyright owners. At the same time, the NFACN aims to remain sufficiently flexible to facilitate the use of content among researchers and libraries and provide a more efficient management of video-on-demand rights. In particular, new rules on collective copyright management have been introduced to facilitate the exchange of digital content.[58]

ii Right of publicity

Overview

The right of personality is a considered a fundamental human right guaranteed in Article 13 of the FC. Swiss statutory law provides protection for the right of personality in Article 28 et seq. of the CC, which aims at protecting one's personality from unlawful exploitation and disparagement. In particular, it comprises the right to keep one's identity traits from being exploited without consent (e.g., published without permission).

In the past, the commercialisation of personality rights (i.e., the active use of personality rights for marketing and commercialisation purposes and whether this enjoys protection under Article 28 CC) has been controversially discussed. According to the older Swiss doctrine, personality rights were viewed as mere defence rights against unlawful exploitation or disparagement of one's personality. Nevertheless, scholarly opinions and courts have meanwhile shaped more modern arguments that even defence rights can be used to secure active exploitation interests and should also serve the economic interests of a person.[59] Based on this more progressive notion, the Swiss right of personality can be viewed as comprising a less commercial-driven defence component (which may be called the right of privacy) and a more commercial claim component (which may be called the right of publicity). The right of publicity is therefore indirectly recognised in Switzerland as the right to actively control the exploitation of the commercial value of someone's personality or identity traits. The enforcement of a right of publicity under Article 28 of the CC requires an individual display of infringement and damage, which can prove cumbersome in practice (although this can work and has been shown in practice: for example, in FSC Decision 133 II 153, where

57 Available at www.ejpd.admin.ch/dam/data/ejpd/aktuell/news/2017/2017-11-22/entw-d.pdf.

58 For further detailed information, see Dirk Spacek and Sergej Schenker, 'Switzerland set to pass a revision of its federal copyright act', 20 May 2019, available at www.cms-lawnow.com/ealerts/2019/05/switzerland-set-to-pass-a-revision-of-its-federal-copyright-act.

59 See Andrea Büchler, 'Personality goods as a contract subject? The power of the factual and dogmatic order', in: Honsell Heinrich, Portmann Wolfgang, Zäch Roger and Zobl Dieter (editors), *Aktuelle Aspekte des Schuld - und Sachenrechts: Festschrift für Heinz Rey*, Zurich 2003, 177 et seq. with numerous references.

a famous Swiss tennis player (Patty Schnyder) successfully obtained approval of remedies). Therefore, in the daily business field, further legal means are frequently put into place to make this right more easily enforceable, such as the undertaking of contracts (personality merchandising) or other intellectual property rights (such as the registering of personality traits as trademarks).

Statutory provisions and remedies

According to Article 28 of the CC, any person whose personality rights are unlawfully infringed may petition the court for protection against all those causing the infringement. An infringement is unlawful, unless it is justified by the consent of the person whose rights are infringed, or by an overriding private or public interest or by law (see information on available remedies in Section III.v).[60] Article 29 of the CC provides for claims against the specific use of an individual's name.

In general, all discernible aspects of a person's identity are protectable under the personality right of Article 28 et seq. of the CC. 'Discernible' means that an average addressee must be able to recognise the person portrayed as such. Pursuant to consistent Swiss case law, the right of publicity also covers characteristic voices or linguistic expressions, provided they are outstanding features of well-known personalities. However, publicly known personalities must, to a larger extent, tolerate being portrayed, commented on or criticised in the public media.

Personality rights in general are only protected for the lifetime duration of an individual under Article 28 et seq. CC. After death, these rights extinguish (there is no post-mortem personality right recognised in Switzerland). However, the relatives of a deceased person can, in certain cases, claim that their personality rights are indirectly infringed if comments on the deceased have an impact on their own personality.

Other statutory personality rights

The FACN recognises specific personality rights attributable to authors of copyrighted works. An author has the exclusive right to his or her own work and the right to recognition of his or her authorship (i.e., to be mentioned by name as an author).[61] Furthermore, an author has the exclusive right to decide whether, where and how his or her work may be altered and how the work may be used to create a derivative work.[62]

Swiss criminal law also provides for protection against defamation, disparagement and violation of intimate privacy (see Section III.ii). Infringement of such criminal privacy law provisions is generally sanctioned with fines, but only upon request (not *ex officio*).[63]

iii Unfair business practices

Unfair business practices in general

Business practices among competitors in the market may generally not be unfair (against good faith principles) or misleading. Unfair practices include (but are not limited to)

60 Article 28, CC.

61 Article 9, FACN.

62 Article 11, FACN.

63 See Article 173 et seq., SCC.

any behaviour that is misleading, aggressive, offensive or harmful to competitors (see the general clause in Article 2 UCA).[64] Article 3 of the UCA provides for a specific list of unfair competition practice cases.

In addition to the statutory rules, Swiss unfair competition law is governed by self-regulatory codes of practice issued by organisations. The key principles of such codes are widely similar to the principles established in the UCA. Organisations cannot issue binding decisions, but merely recommendations. However, their recommendations are widely respected by their members and are also often followed by the reasoning of the courts.

Select unfair business practices in the context of the media sector

In the context of media, internet and online entertainment, the following cases have shed some light on unfair competition practices in this sector.

Digital influencer marketing

Digital influencer marketing is a new subtle form for reaching target online audiences with the help of intermediary opinion leaders (influencers) that are able to reach broad audiences. Influencers can be celebrities, such as actors or football players, but also other individuals with strong communicative engagement. They usually act through blogs, online fora or social media networks, mostly in the form of product reviews (e.g., 'my new Omega watch is the best there is, I love it!'). Where influencing amounts to misleading people in their informed decision-making, such behaviour is forbidden under the UCA. On 22 January 2014, the SPC took a position on a complaint against a post with contextual advertising in the online newspaper *Watson*. The SPC held that professional ethics in journalism require a strict separation of editorial and advertising content and advertisements should be disclosed with terms such as 'ad', 'advertisement' and 'publicity spot', and by being labelled with 'paid by'.

TV quotas

A larger dispute has emerged in recent years surrounding the Swiss company Mediapulse Ltd, which had implemented new applications to measure and publish viewer quotas of television channels. Several broadcasters filed a civil lawsuit against Mediapulse alleging that their data analysis was flawed and, therefore, misleading to the public under the UCA. In a later step, the same proceedings were initiated before the Department of Environment, Transportation, Energy and Communications and appealed to the Swiss Federal Administrative Court to assess compliance under the statutory rules of the RTVA. All legal proceedings have meanwhile been settled. However, it cannot be excluded that similar disputes will arise in the future.

TV formats

TV formats are the underlying essence, plot or concept of disseminated TV shows, series or similar forms of entertainment content. Underlying concepts can easily be copied by competitors and adapted to their local requirements, which is unpleasant for the original content producer as he or she has little time to amortise his or her production costs. Under Swiss copyright law, underlying concepts are mostly qualified as mere ideas that do not enjoy

64 Available, in German, at www.admin.ch/opc/de/classified-compilation/19860391/.

copyright protection. Consequently, unauthorised copying of TV formats gives rise to alleged legal claims under the UCA if such act proves particularly unfair. Public cases on TV format disputes are not available in Switzerland, but are frequently settled out of court.

V COMPETITION AND CONSUMER RIGHTS

i Competition law

The Federal Law on Cartels and Other Restraints of Competition of 6 October 1995[65] is the legislation governing cartels in Switzerland. The regulatory framework is complemented by several federal ordinances. Further, general notices and communications of the Competition Commission (Commission) are issued from time to time.

On the national Swiss media level, one highly debated topic in past years has been the strategic joint venture entered into between SRG SSR (the Swiss national broadcaster), Swisscom (the Swiss national telecom provider) and Ringier AG (one of the largest Swiss publishers) named Admeira. The main concern was whether Admeira could lead to excessive media concentration in Switzerland, since Swisscom could share telecommunications subscriber data with SRG SSR (broadcaster) and the latter would be in a position to craft personalised content ads for viewers. On 14 December 2015, the Commission approved the joint venture as it did not see impediments under competition law statutes. It remains controversial whether the aforesaid personalisation activities of SRG SSR could be unlawful under the RTVA, since SRG SSR is required to provide TV programmes for the general public[66] rather than personalised content for individual viewers.

ii Big data analytics and personalised media content

This has become of increasing relevance in online media practice. Personalised content delivery is increasingly used via customers' personal items (e.g., smartphones), personalised content itself, customer-interactive content and the personal smart home (e.g., items such as Amazon's Alexa installed in private homes), all of which provide a suitable basis for collecting personal user data, and analysing and delivering personalised services. The Swiss Federal Act on Data Protection of 19 June 1992[67] provides that personalisation (as an analytic processing tool) and personalised content delivery must be made transparent to customers and – depending on the manner of conduct – must comply with further data protection principles (e.g., automated processing and decision-making). The UCA also provides that personalised media offerings may not be misleading (in the sense of alleging to being addressed equally to the general public).[68]

65 Available at www.admin.ch/opc/en/classified-compilation/19950278/index.html.

66 See Section II.

67 Available at www.admin.ch/opc/en/classified-compilation/19920153/index.html.

68 For further information, also see Dirk Spacek, 'Personalisierte Medien und Unterhaltung', *sic!*, 2018, p. 377 et seq.

iii Net neutrality

In the past, Switzerland has not known specific network neutrality obligations. Network neutrality matters were reviewed under general non-discrimination principles established in competition law statutes[69] and interconnection provisions under the FAT (applicable between interconnecting TSPs).[70]

On 7 March 2019, the Swiss second chamber of parliament approved a new provision titled open internet in the revised FAT (NFAT).[71] Article 12e of the NFAT[72] provides that internet access providers must convey data irrespective of sender, receiver, content, service, service classes, protocols, applications, programs or end devices (i.e., without applying technical or economic differential treatment to them).[73] Differential treatment of data is only permitted if it is required to follow a legal provision or court decision, secure the integrity of the network, follow an explicit request of a customer or combat temporary and unusual network congestion.[74] In addition, differential treatment of data transmission must be made transparent to customers.[75] The new provision has been sent back to the first chamber of parliament, but changes to the provision are not expected to occur.

VI DIGITAL CONTENT

Digital content is not a distinct Swiss legal area of law. Swiss intellectual property and personality law is generally familiar with the notion of contributory or secondary infringement by third parties.[76] Online platform providers qualify as third parties and may incur liability if they are causally facilitating intellectual property or, for example, personality law infringements. While injunctive relief can be enforced against online platform providers without a provider's knowledge of infringement, damage claims require some form of knowledge attribution to the provider.[77] On 14 January 2013, the FSC held that a host provider (that can effectively control uploaded content) is required to take down infringing content and is liable for related court costs.[78] As regards internet access providers, the FSC has recently rendered a decision according to which no secondary or contributory infringement lies at hand (see Section IV.i).[79]

VII CONTRACTUAL DISPUTES

Contractual disputes in the media sector can occur in any affected field, such as day-to-day business operations, online distribution and compensation disputes, failed media joint ventures and disputes between artists and producers or publishers. Most of these disputes are

69 For example, Article 7, FAC.
70 Article 11, FAC.
71 See https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20170058.
72 See www.parlament.ch/centers/eparl/curia/2017/20170058/S4%20D.pdf.
73 Article 12e, Paragraph 1, NFAT.
74 Article 12e, Paragraph 2, NFAT.
75 Article 12e, Paragraph 3, NFAT.
76 See, e.g., Article 62, FACN.
77 See, e.g.,, Article 62, Paragraph 2, FACN.
78 FSCD 5A_792/2011 of 14 January 2013.
79 FSCD 4A_433/2018 of 8 February 2019.

not publicly known and there is almost no established case law available. Disputes between artists and producers or publishers are not usually resolved through traditional litigation routes but, rather, through informal settlements, as an artist's reputation is at stake.

VIII YEAR IN REVIEW

i Recent developments: covid-19 and its impact on the media and entertainment sectors

Covid-19 had a major impact on the media and entertainment sectors in Switzerland. In Switzerland, all public and private events were banned from 17 March 2020. Entertainment and leisure facilities such as cinemas, concert halls and theatres remained closed to the public. After the loosening of the lockdown, medium-sized events with over 300 and up to 1,000 people were permitted again as from 22 June 2020. The ban on large events with more than 1,000 persons was lifted under strict conditions on 1 October 2020. The entertainment sector (comprising gastronomy and sports as well) was hit hard by government measures taken against covid-19, since companies had to either partially or completely cease their activities.

Shortly after the announcement of the lockdown on 17 March 2020, initiatives were intensified to give the public the opportunity to enjoy live performances via streaming (e.g., operas were offered to subscribers via streaming services). Even if such distribution channels do at least make it possible for an artist to maintain the connection to his or her audience, income will in most cases still be diminished due to lost performance fees. Furthermore, developments in the field of virtual reality could also be of great importance for the event industry in the future. For example, virtual participation in a live event could go far beyond simply watching an event on a monitor and listening to it over loudspeakers.

The situation also has a profound impact on the media market in general. The situation is quite paradox: on the one hand, advertising revenues plummeted during the crisis, while at the same time readership figures rose sharply. On the other, this increase in readership (the rising number of digital subscriptions sold) has not been sufficient to fully compensate for the missing revenues from the advertisement sector.

Appendix 1

ABOUT THE AUTHORS

DIRK SPACEK

CMS von Erlach Poncet Ltd

Dirk Spacek is the partner in charge of the technology, media and communications (TMC) and IP practice groups. He primarily deals with new business models arising in the media, internet and technology sectors, data protection and intellectual property law. He mainly advises clients from the media, technology, industrial and financial services sectors on technology-related legal matters, in particular IT contract law, outsourcing, data protection, the internet of things, patent research cooperations and traditional intellectual property law. Dirk specialised early with a dissertation in intellectual property law entitled 'Protection of TV Formats', and was admitted to the Swiss Bar in 2009. He then gained many years of experience in large, prestigious law firms and as an in-house lawyer during multiple in-house secondments. Dirk regularly publishes on current issues in the TMC and IP fields. He is co-chair of the Interactive Media and Entertainment Law Committee of the International Technology Law Association, where he is regularly present on an international level. Owing to his earlier experience as a musician in various music groups, he is also familiar with contracts from the entertainment industry and occasionally works on a pro bono basis.

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