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Full Disclosure: The Artist Revealed!

The End of Anonymity in the WWW and its Impact on Web based Art

A new Media Law went into effect on July 1, 2005. The new legislation has to do primarily with the Internet, where it has caused quite a commotion. In the wake of this change, doubt has occasionally been expressed as to whether legislators are even aware of what they are regulating. Indeed, some of the provisions are highly questionable, or perhaps "worthy of inquiry" would be an even better way to put it. One proponent of the legislation voiced the opinion that lawmakers cannot possibly be expected to consider every eventuality, and judges will certainly be able to correctly interpret the law's intent. Now, I am a judge but I am no clairvoyant, so do not expect me to be able to tell you in advance how the Supreme Court would decide such cases if they were ever to come before it.

What advantages even accrue to the state from this formalism in the World Wide Web? There is a long story behind this. The dream of the Internet as a realm not subject to government regulation long ago turned out to have been an illusion. The obligation to identify the person responsible for online content has also been in force for some time, though this is limited to commercial content. § 5 of the E-Commerce Law requires that the proprietor of a website provide highly detailed information about himself. However, this duty of disclosure does not apply to an online artist if he is not going about selling his works through his website. The Media Law goes beyond this and seeks to cover all those offering electronic content.

The newly-instituted obligation of disclosure applicable to "electronically retrievable content (websites)"—to adopt the phraseology used in § 1, Paragraph 1 Z 5a of the new law-is one of the core provisions of the new regulations. And, lo and behold, we are immediately confronted by the first area of uncertainty. What could the lawmakers have meant? Are they equating electronically retrievable content with websites or are they taking note of the fact that there also exist other electronically retrievable forms of content in the Internet? Do they mean only websites or websites as an example?

Some have already expressed fear that contributions to discussion threads in online forums must now be labeled by name as well. But things cannot possibly have gotten that bad. In fact, the obligation of disclosure affects not the author of a contribution but rather the proprietor of the media outlet to which it is posted. In the case of an online media outlet, that is the person who "is responsible for arranging the content and who makes it or causes it to be made retrievable." This formulation suggests overall responsibility for a website. Thus, the proprietor of the media outlet is, for example, the Austrian Broadcasting Company and not Kritik@x25!

Accordingly, the term "proprietor of the media outlet" is determinative of where disclosure is necessary and where it is not. Unfortunately, due to multiple dynamic linkages with other content in electronic networks, this overall responsibility is not as clearly delineated as the author of the legislation obviously imagines it to be. In the area of print media, this demarcation is clearly determined in a purely physical fashion: the publisher is responsible for his newspaper. This may well hold true in the case of a standard website as well. But what about interlinked networks of websites, linkfarms, weblogs, and news or discussion forums? The online medium has no hard-and-fast borders; it is often part of an interwoven wickerwork with overlapping areas of responsibility.

In this tangled web, it is not always easy to find the one who is supposed to stand up an accept responsibility. Thus, in the case of a weblog, for instance, the decision will hinge on whether its structure bears a greater resemblance to that of a conventional website or a

discussion forum. At the same time, this indeterminacy also allows for a degree of latitude in arranging ones affairs in this regard. Whoever does not wish to make a public appearance online under his own name can seek refuge within a community, which, of course, must then in turn assume ultimate responsibility in order to attain the status of proprietor of the media outlet.

What information are we actually talking about here? The stories circulating initially have referred to an "imprint obligation" (equivalent to what is made known in the masthead of a newspaper) for websites. Nevertheless, the law differentiates between imprint obligation (§ 24) and disclosure obligation (§ 25). Whereas both apply to recurrently produced electronic media outlets (newsletters), the proprietor of a website (in the broadest sense) is subject only to disclosure obligation. What does this entail?

Until the 2005 amendment of the Media Law, the obligation of disclosure applied to all media outlets appearing periodically. Given the fact that this provision not only applied to those putting out hard-copy publications but also encompassed media outlets such as radio and television stations, the conclusion was drawn by certain commentators that this obligation of disclosure would already necessarily apply to the medium of the Internet as well. In actuality, though, this was purely theoretical. The author of the amendment, though, has presupposed an obligation of disclosure on the part of all periodical media outlets and deals only with the extent of this obligation with respect to websites not meant to influence public opinion and the location of the publication (under the law, a website is considered a periodical because it is retrievable at any time).

Like the imprint (as well as the duty to label paid-for insertions), disclosure serves the aim of transparency. A media outlet's personal and economic background ought to be made public, and that includes information about who owns it, so that, in case of multiple ownership, the extent of media concentration is also revealed. The disclosure of what a media outlet acknowledges as its basic direction (philosophy, agenda or allegiance) is designed to enable media consumers as well as media colleagues to classify the particular media outlet with respect to the *weltanschauung* it propagates and the political stances it takes.

These requirements certainly do make sense in the case of a newspaper publishing company with a highly complex interlocking corporate structure and considerable political clout. But making them applicable to an average website? All the same, whether this was the lawmakers' intent or not, the obligation of disclosure is the law of the land and must be enforced; all that is left to be interpreted is how.

According to § 25 of the Media Law, the proprietor of the media outlet must identify himself by name and place of residence (in the case of a business, the name of the firm, nature of the business, headquarters location and ownership details) and disclose a fundamental direction. According to § 1, Paragraph 1, Sub-paragraph 8, the proprietor of the media outlet is "the person who is responsible for arranging the content of the electronic media outlet and who causes such content to be retrievable (in the case of e-mail and push service providers, who causes it to be disseminated)." The idea behind this is the concept of "publisher," formerly a common term. According to the new definition, the proprietor of the media outlet is no longer necessarily an enterprise; rather, it could be a natural person, a group of natural persons or a legal person. Ultimately, this has to do with the question of who is assuming financial responsibility for the media outlet's content, since the proprietor of the media outlet is the respective claimant/respondent (i.e. party to a lawsuit) in the diverse legal proceedings provided for in media law (payment of compensation, publication of replies and verdicts, etc.) and he is the one who must pay in the case of a finding in the opposing party's favor. In the field of art, this can be an agency or the artist himself.

The extent of the requirements differs according to how the website is set up. The author of the legislation wanted to limit the application of the Media Law in the case of the vast majority of websites, and this obviously raised problems. The outcome was a compromise that is highly dependent upon the orientation of the observer and that also yields no tangible advantages for those who are privileged in this respect. Websites that "display no informational content beyond a portrayal of the personal sphere of life or a presentation of the proprietor of the media outlet, and thus no content that is liable to influence the process of public opinion formation" are neither subject to a duty to publish opposing points of view nor must they disclose details about ownership and fundamental direction (and thus only the proprietor's name and place of residence). Each artist can decide for himself whether his contents can influence the opinion formation process. In case of uncertainty, I recommend full disclosure since the additional information does nobody any harm: co-ownership will be inapplicable in most cases and the statement of "fundamental direction" could even provide an occasion for a thoroughly artistic answer.

Another question remains: which name? Pseudonym or real name? The law is silent on this issue. Since the point of the disclosure obligation is not to provide a name and address to which media consumers can assert their claims (this is the point of the imprint obligation) but rather to serve the purpose of transparency, the answer to this question will depend upon the name by which the artist is known to the public. After all, few members of the public were aware that it was actually a fellow named Hans Hölzel behind the singer Falco. An artist's pseudonym certainly does fall under the provisions of § 43 ABGB; so then, why not use your pen name or stage name?

It is reasonable to doubt that the disclosure of the identity of website proprietors is what the author of the historical legislation had in mind when the obligation of disclosure was originally introduced. The fact is that we now have it and have to live with it. It will not make the slightest difference to most website proprietors since they either are already subject to the stricter provisions of the E-Commerce Law or are already listed in the Whois Register as a domain proprietor. In a few sensitive cases, though, it makes it impossible to operate websites that have been anonymous heretofore. Artists will opt for a creative way of dealing with this stipulation. After all, artistic freedom still exists, so why not as the art of disclosure?