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Retweeting: From Bricks and Mortar to Bits and Bytes

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[Rz 1] In 2002, the Swiss Federal Court delivered a judgement on (political) billboard posting in the canton of Valais. It ruled that who within the supply chain of producing and disseminating media products (e.g. billboard posting) merely supports publication shall not be held liable: «[...] celui qui se limite à distribuer dans le public un écrit constitutif d'une infraction comme le libraire, le kiosquier, le vendeur de journaux, le distributeur de tracts, le colleur d'affiches, le facteur, etc., ne saurait répondre à titre subsidiaire de l'infraction commise.»¹ This ruling specifies art. 28 para. 1 CC², which regulates that if an offence is committed and completed through publication in a medium and if the offence is exhausted in such publication³, then only the author shall be liable to prosecution.

[Rz 2] The County Court of Zurich recently applied this bricks and mortar ruling to the dissemination of a retweet posting via the social media platform Twitter.⁴ The story goes as follows: in 2012, a (to date) anonymous author known to the Twitter community only as @KueddeR (aka «Newsmän»)⁵ posted a tweet about a Swiss politician. An employee of a publishing house who was following Newsmän's tweets retweeted the posting «as is», i.e. without any comment or endorsement, to his (at that time) approx. 1'500 followers. The politician who was mentioned in the (re-)tweet also received the message. This politician pressed criminal charges against the unknown Newsmän and the employee of the publishing house who had retweeted the posting for defamation⁶ (libel) and wilful defamation⁷ (calumny) due to an allegedly defamatory statement made in the (re-)tweeted posting.

[Rz 3] Linking of third party Uniform Resource Locators (URLs), i.e. web links, on a website can qualify as endorsing the content of such linked website.⁸ It has been suggested to apply such ruling by analogy to retweets: whoever retweets without disclaiming endorsement⁹ might be liable if the retweeted content is illegal.¹⁰ Given that linking URLs is Internet-inherent, without which the Internet would not exist, it seems questionable whether uncommented linking of URLs should qualify as endorsement of the content linked on the website. If this were the case, then – with regard to uncommented URL linking – the Internet would be one giant endorsement. This, in turn, might lead to the chicken or egg question: what is the original endorsement? Therefore assuming that an uncommented retweet also qualifies as endorsement seems debatable.

[Rz 4] The County Court of Zurich drew another comparison. In its judgement it compared Twitter's micro blogging platform to blogging on a website of a publishing house, which has been qualified by the Swiss Federal Court as «medium» (or part of such medium, respectively) as defined in art. 28 and 28a CC.¹¹ A medium is any means by which thoughts can be disseminated,

¹ FCD 128 IV 53, Cons. 5e.

² Swiss Criminal Code (CC; SR 311.0).

³ E.g. defamation, certain forms of unfair competition, betrayal of secrets, fraud, coercion. See STEFAN TRECHSEL/MARC JEAN-RICHARD, in Trechsel/Pieth (eds.), StGB PK, 2. ed., Zürich/St. Gallen, Art. 28 N. 7.

⁴ Bezirksgericht Zürich, Judgement of 26 January 2016, GG150250-L.

⁵ @KueddeR. See: twitter.com/kuedder.

⁶ Art. 173 CC.

⁷ Art. 174 CC.

⁸ Bezirksgericht Zürich, Judgement of 10 September 2002.

⁹ Newsmän disclaims his retweets as follows: «RT endorsement».

¹⁰ REGULA BÄHLER, Der Retweet-Button, meine 157 Follower und ich, Medialex 2014, p. 1.

¹¹ FCD 136 IV 145, Cons. 3.3

including, e.g. e-mail or SMS.¹² This comparison seems more adequate than the one with URL linking.

[Rz 5] In its open-minded, technology-neutral and differentiated opinion, the County Court of Zurich rightfully concluded in a first step that Twitter qualifies as medium.¹³ In a second step, the court argued that Newsmän's tweets qualified as a publication as defined in art. 28 CC.¹⁴ In a last step, the court reasoned that not only could retweeting be compared to billboard posting,¹⁵ but retweeting was a typical, necessary and system-inherent element of Twitter.¹⁶ Therefore, the court dismissed the criminal charges, but nonetheless granted the politician (who had filed a claim as private petitioner) satisfaction due to infringement of his personality rights based on the Swiss Civil Code. It argued that protection of personality under the Civil Code is farther reaching than under the Criminal Code.

[Rz 6] In essence, this means for Twitter users that retweeting without comment or endorsement disclaimer will (currently) not lead to a criminal law conviction, provided the retweeted content does not relate to representations of acts of violence (art. 135 CC), hard pornography (art. 197 CC), or racial discrimination (art. 261^{bis} CC). However, as civil law protection of personality rights exceeds the protection foreseen by criminal law,¹⁷ there might be civil law consequences if the original message content of the retweet infringes personality rights.

[Rz 7] The ruling of the County Court of Zurich is not final. Both the private petitioner and the public prosecutor have filed an appeal to the Supreme Court of the Canton of Zurich.¹⁸

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¹² TRECHSEL/JEAN-RICHARD (Fn. 3), Art. 28 N. 3.

¹³ Judgement GG150250-L (Fn. 4), section 4.3.7.

¹⁴ Judgement GG150250-L (Fn. 4), section 4.4.

¹⁵ See Fn. 1.

¹⁶ Judgement GG150250-L (Fn. 4), section 4.5.

¹⁷ Judgement GG150250-L (Fn. 4), section 5.1.1.

¹⁸ Judgement GG150250-L (Fn. 4).