Media & Entertainment - Switzerland

Supreme Court rules on protection of sources for blog comments

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Facts
Decision
Comment

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The Federal Supreme Court recently awarded Schweizer Fernsehen the right to rely on the protection of confidential sources afforded by Article 17(3) of the Constitution and Article 28a(1) of the Criminal Code in refusing to give evidence which could identify the author of a comment on a blog that it maintained.

Facts

The case that led to the Supreme Court's decision was triggered by an inappropriate blog comment by an anonymous person. This gave rise to a criminal complaint for offence against personal honour and for misuse of a telecommunications installation. The blog was maintained by Schweizer Fernsehen to accompany a programme dealing with Swiss history during World War II. The complaint led to an investigation by the public prosecutor's office against the unknown author of the comment. The prosecutor obtained a court order obliging Schweizer Fernsehen to provide information on the author's identity. Schweizer Fernsehen lost a first appeal against this decision, but appealed again to the Federal Supreme Court – the highest court in Switzerland. The Supreme Court sustained Schweizer Fernsehen's appeal, finding that Schweizer Fernsehen could rightfully refuse to provide the identity of the author as well as information that could lead to his or her identification (eg, the author's IP address).

Schweizer Fernsehen relied on the freedom of the media and the protection of sources afforded by Article 17(3) of the Constitution (and protected by Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms) and on Article 28a(1) of the Criminal Code. According to this provision (which is identical to Article 172 of the new Federal Code of Criminal Procedure which entered into force on January 1 2011), entities (and their auxiliaries) professionally involved in the publication of information in the editorial section of a periodical medium cannot be penalised for refusing to give evidence in order to identity their sources. The Supreme Court therefore had to consider whether the comment on Schweizer Fernsehen's blog was information in the editorial section of a periodical medium, and whether the blog and comment should be considered 'information' as opposed to 'entertainment'.

Decision

The Supreme Court held that in addition to Schweizer Fernsehen's broadcasts, its blogs – which are regularly updated and directed to the public at large – must also be qualified as 'periodical media', and are undoubtedly of a professional nature. It did not matter whether the author of the comment acted in a professional capacity because the source itself cannot directly rely on the right to protection. In a second step, the court confirmed that the blog and comments made on the blog posts were "publications in an editorial section". The purpose of this requirement is to exclude advertisement both printed in publications and aired on television and radio.

At the core of the court's reasoning was the notion of 'information' because, pursuant to Article 28a of the Criminal Code, only entities involved in the "publication of information" may refuse to give evidence on their sources; entities that are exclusively engaged in providing entertainment lack this privilege. Limiting the scope of application of Article 28a to 'information' is plausible as a matter of principle because the right to protect sources is derived from the freedom of information, which is necessary for the media to fulfil its function. By the same token, pure entertainment is not an essential part of democratic society and cannot justify restricting a criminal procedure. The court did not challenge this distinction. However, it noted that, in practice, distinguishing between

information and entertainment is no simple task, particularly for certain current journalistic styles such as 'infotainment' and 'docufiction', in which information and entertainment are increasingly intertwined and in which entertainment may have informational value. In dealing with this difficulty, the court drew on the importance of the freedom of the media and the protection of sources and gave broad application to the notion of information. The court stated that 'information' includes not only reputable statements, but also trivial and petty messages; it does not matter whether the information is true, serious or in the public interest. Accordingly, 'entertainment' is interpreted in a rather narrow sense.

The court underpinned its reasoning by invoking the interest in legal certainty and by referring to the fact that Article 28a(2) of the Criminal Code makes an exception from the protection of sources for investigations into certain serious crimes, suggesting a broad application of the principle as such. Finally, the court pointed out that the protection of sources is not a free ticket. Rather, refusing to give evidence on sources – which is a right, not an obligation – may protect the source from criminal liability, but may lead to criminal liability on the part of the editor in charge or, if the editor cannot be identified, of other persons responsible for the publication of the information that gives rise to prosecution (Articles 28 and 322 of the Criminal Code).

In the present case, the court identified sufficient informational content in the broadcast and the blog – which functioned as a complement to the broadcast – to allow the protection of sources to be claimed. As, by design, the blog solicited comments, the court considered the blog posts and the comments to be a whole. Therefore, the comments ultimately could not be disconnected from the informational content of the blog, which led to Schweizer Fernsehen's right to rely on the protection of sources with respect to the anonymous author.

Comment

The Supreme Court did not consider the informational value and purpose of the blog or the comment in detail. Its reasoning is thought to have been based on the concept that, in a pluralistic society, any kind of 'information' should be protected regardless of its form.

A similar issue arises when advertisement is restricted for reasons such as the protection of young persons. According to several decisions rendered by the court, the freedom of expression and of information is exclusively awarded to expressions of an ideal nature. Advertisement is protected only as part of economic freedom; this is relevant because economic freedom can be restricted more easily than the freedom of expression and information. Legal scholars oppose the view taken in these decisions and argue that advertisement can have a political or cultural content and is often a consciously chosen part of the media's overall message, and should therefore be protected under freedom of information. This reasoning by the doctrine is closely related to that on which the court relied to confirm the protection of sources for blog comments.

It remains to be seen whether the rationale of the present decision will spill over to the protection of advertisement and other areas of communication law.

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