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Media kit

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The modernisation of copyright law

The most important developments

An important goal of the revision of the Copyright Act is to adopt an even more forceful approach to tackling internet piracy. However, consumers who take advantage of illegal offers remain unpunished. This means, for example, that consumers will therefore still be able to download a piece of music that has been made available on the internet without the permission of the rights holder for their own private use.

Around this core provision related to tackling piracy are grouped a number of proposals that will benefit creative artists, producers, cultural intermediaries, consumers and internet service providers.

In addition, the Federal Council proposes the ratification of two international World Intellectual Property Organization (WIPO) treaties.

1. Improved anti-piracy measures

Anyone can retrieve films, music and even academic articles worldwide from the internet, immediately and without restriction. Unlicensed and therefore illegal offers can lead to lawful offers not having any chance on the market. To counteract these illegal offers and encourage the development of lawful ones, legislative action is needed.

a. Obligation of hosting providers (“stay down”)

Currently, hosting providers remove copyright-infringing content from their servers when notified to do so (known as a “take-down”). However, some “rogue” hosting providers encourage copyright infringement in order to generate advertising and subscription revenues. In such cases, a take down is pointless as copyright-infringing content is often re-uploaded in a matter of minutes. For rights owners, this means they have to again report the copyright infringement to the hosting provider. A stay-down obligation will stop this game of cat and mouse. Hosting providers that encourage copyright infringement will now have to ensure that once copyright-infringing content is removed from their servers, it remains off their servers. The new stay-down obligation will make the fight against piracy more effective and sustainable. Moreover, the obligation is proportionate as it is restricted to hosting providers that present a particular risk for copyright infringement.

b. Basis for data processing for the prosecution of copyright infringement

When copyright is infringed on the internet, for example via peer-to-peer networks (which are used to share files, such as films and music), rights holders are usually unaware of who is behind the infringement. The only information they have is the IP address via which the infringement was committed. In order to be able to enforce their rights, rights holders have to save the said IP addresses and submit these records as part of a criminal complaint to the competent authorities. Up to now, there has been some debate as to what extent the recording of IP addresses in this way is permissible. The new provision on data processing provides the requisite clarity and legal certainty.

For example: shortly after a film is released in cinemas, a copy of it is offered illegally on various websites. The producer finds out about it. He finds his film on one of these websites and sees the IP address of the user connection via which the film is being offered. No further information on the user is available. The producer is allowed to save the information on his film in connection with the relevant IP address. He can then file a criminal complaint and submit the stored data to the public prosecutor, who in turn decides how to proceed.

2. Other key points of the draft bill

a. Broader protection for photographs

Photographs document what is happening in the world and play an important role in society by providing snapshots of our lives. However, copyright law only protects photographs if they are works of art. This is unsatisfactory and means that photographers can only protect the unauthorised acquisition of their photos with difficulty. Current technology exacerbates this problem as photographs can be copied and disseminated very quickly and easily. Broadening protection for photographs will remedy this. To ensure photographers no longer have to watch helplessly as their photographs are used without permission, all photographs in Switzerland – including those taken by amateur photographers – will be protected; in other words, product images as well as everyday family and holiday photos, for example.

Internet users can continue to share their holiday snaps on Facebook. Linking to such photographs is still to be permitted, provided the original image is freely accessible. However, it will no longer be possible to upload images belonging to third parties (such as photos of specific products, landmarks or landscapes) to your own website without asking permission. Internet users should either acquire the rights to these images or use their own.

b. Extension of the term of protection for related rights

The new provision improves conditions for performing artists and for producers of audio and audiovisual media by extending the term of protection of their rights from 50 to 70 years, thereby aligning it with EU law in the area of music. Extending the term of protection will help creative artists benefit from the exploitation of their artistic activities for longer.

For example: when the rights of performers and producers have expired, albums do not usually become any cheaper. Let us take the following Rolling Stones albums as an example:

- "December‘s Children" (1965)
- "Aftermath" (1966)
- "Flowers" (1967)
- "Let it Bleed" (1969)

They all cost the same price from a Swiss online retailer – irrespective of whether the Rolling Stones as performers are still entitled to royalties ("Flowers", "Let it Bleed"), or not ("December‘s Children", "Aftermath"). Albums for which the Rolling Stones are no longer entitled to royalties (because the term of protection has expired) should be cheaper. If income from the use of rights remains unchanged, expiry of the term of protection leads to additional revenues for other players in the exploitation chain. The extension of the term of protection will ensure that performers and producers continue to benefit from the share to which they are entitled.

c. Remuneration for video-on demand

Video shops and the rental of films on video cassettes and DVD have dwindled in significance in recent years. New business models have sprung up to take their place, such as streaming and downloading of audiovisual content via online platforms (video-on-demand). But this has created new problems. Creative artists criticise the “value gap” (i.e. the mismatch between the strong growth in the use of online platforms and the remuneration paid to creative artists). The problem is alleviated for Swiss authors, such as for

screenwriters and directors, as the operators of such platforms in Switzerland pay a fee to access such works online, which is collected by the collective management organisations within the framework of voluntary collective management. Large international companies are sometimes unfamiliar with this practice, which leads to problems when enforcing remuneration claims. The Swiss approach should therefore be enshrined in law to safeguard the established system. For reasons of equal treatment, performers should also be entitled to remuneration, which will benefit actors in particular. For consumers, the cost of video-on-demand services is not expected to increase as a result of this remuneration.

d. Exception for scientific purposes

Nowadays, large quantities of information, such as text and images, are also available electronically. Particularly in the field of research, analysis of this data is increasingly automated as this allows simple connections to be made between pieces of data. The technology behind this is called text and data mining. This data processing technique automatically saves a copy of the information to be analysed on a separate server, reproduces the content, and therefore in many cases encroaches on authors' rights. In order to facilitate research and strengthen Switzerland as a location for research, authors will no longer be able to prohibit these automatically created copies that are necessary for analysis. The copies can be made free of charge provided they are primarily made and stored for the purpose of scientific research, are required for technical reasons, and that the work itself − for example an academic article − can be legitimately accessed.

e. Use of orphan works

Orphan works are works by a rights owner who is unknown or untraceable. It is estimated that depending on the category, up to 90% of works in libraries and archives are orphaned. Often such works cannot be lawfully used as permission cannot be obtained from the rights holders. The new provision solves this problem by allowing the use of orphan works located in the collections of memory institutions (e.g. libraries) under certain conditions, while ensuring that rights holders who are located receive remuneration for their work. The provision offers a pragmatic solution and saves valuable works from the risk of fading into obscurity due to lack of use.

For example: in addition to many works by Dürrenmatt, the Dürrenmatt Centre in Neuchâtel owns many photographs of the famous writer. In some cases, it is no longer possible to determine the identity of the photographer. Without permission, these images cannot be used in a biography of Dürrenmatt, for example. The new provision means such use will be possible in future.

f. Index privilege

The draft bill contains a detailed provision to facilitate the use of works held in public libraries, museums and archives. To allow these institutions to present the content of their collections in a contemporary format to the public, online searches should also be able to show the cover page, index or abstract for academic works, in addition to the author, title and collection number. For this reason, memory institutions will receive permission to reproduce short excerpts of works in their inventories, regardless of whether they are in digital or analogue format.

g. Extended collective licensing

If a museum wants to use a large number of film clips for an exhibition film, or digitise a significant quantity of photographs of historical interest, it would have to request permission from all of the rights holders concerned. When the origin of works is unclear or the expected remuneration is low, it may not be possible or economically viable to obtain the necessary rights individually. In addition, it is unrealistic in the first place to try and regulate all conceivable types of use of protected works on the internet, e.g. for internet TV. This is particularly the case in situations when a large number of works are to be used (mass use).

In future, the collective management organisations will be able to sign agreements (extended collective licensing) with users on the mass use of works and performances protected by copyright. This will also apply to areas that are not subject to collective management law. However, the rights owners concerned can object to the use of their works by opting out.

Extended collective licensing has been used successfully for some time in Scandinavian countries. It facilitates access to art and culture for users and provides legal certainty.

h. Electronic notifications of use

Anyone who performs or plays works protected by copyright, such as concert organisers, radio stations or even cafés (if they play music in the background, for example) must provide the competent collective management organisation with usage data. The collective management organisations then distribute royalties to creative artists on this basis. As before, users and collective management organisations will jointly determine the formats, standards and process for notifications of use. However, the Swiss Copyright Act is now to stipulate that the information should be submitted in state of the art technology and allow for automatic data processing (which in some cases is already standard practice). The legal basis for the exchange of such information between collective management organisations is also new. This means that users of works will only have to provide the information once.

The amendments aim to further develop electronic rights management. They promise significant medium- and long-term cost savings for both users and collective management organisations, which will have a positive knock-on effect on pay outs to members (i.e. creative artists).

i. Simplification and streamlining of the tariff approval process

In cases where collective management is required by law, the collective management organisations and relevant user associations negotiate the tariffs for the use of copyrighted works and performances. The Federal Arbitration Commission for the Exploitation of Copyrights and Related Rights (FACO) subsequently verifies the tariffs for appropriateness. The FACO's decision can be appealed before the Federal Administrative Court.

The FACO will be able to hear witnesses in order to better clarify the facts of a case. In addition, a new tariff is to remain in place despite an appeal brought before the Federal Administrative Court. This will avoid delays in the process, as well as loopholes on use and compensation. The definitive judgment is only be amended if the appeal is successful. In order to shorten proceedings brought before the Federal Administrative Court, new provisions will also be established regarding time limits and the number of rounds of correspondence.

3. Two new international agreements

The Federal Council would also like to use the upcoming revision of the Copyright Act to ratify two new international agreements. The Beijing Treaty on Audiovisual Performances strengthens protection for actors at international level. The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled improves the situation for people with disabilities. It aims to facilitate the importing of copies of works in a form that is accessible to beneficiaries. It also aims to ensure that works are also disseminated and made available in a form that is accessible to beneficiaries.

Switzerland already fulfils the requirements of both treaties. However, by ratifying the treaties, the Federal Council will send a clear signal that it supports balanced copyright protection that takes into account both the concerns of creative artists and those of cultural consumers.

4. Points not included in the draft bill

a. Blocking measures

More than 15 European countries already successfully use blocking measures in the field of gambling. Blocking in the area of child pornography is also effective and is now to be incorporated in federal legislation. The case of blocking in the field of copyright is somewhat different, however. Users, providers, consumers, parties and numerous cantons spoke out against blocking in the field of copyright during the consultation process. The Federal Council therefore considers that blocking in the field of copyright is not backed by the majority and that it would significantly reduce acceptance of the bill. Blocking is therefore not included in the revised bill.

b. Identification of internet subscribers in cases of heavy copyright infringement via peer-to-peer networks and notifications

In order to facilitate the prosecution of perpetrators of copyright infringement via the internet, the draft bill originally provided for the identification of internet subscribers if serious copyright infringements were committed via their internet connections on peer-to-peer networks. Access providers would initially send the user an email notification informing them of the legal situation and the possible consequences of failing to observe it. This would give users the time needed to change their behaviour or secure their connection. If, after a certain period of time, serious copyright infringement continued to be committed via the same connection, it would have been possible to order identification of the internet subscriber. Customers identified in this way could subsequently have been required by a civil court to desist from the copyright-infringing behaviour and make good the damage caused. The consultation process revealed that identification and the associated explanatory notifications were not backed by the majority. These measures are therefore not included in the revised bill. Through the stay-down obligation and the basis for data processing for the prosecution of copyright infringement, the bill already provides for important instruments to allow piracy to be tackled in an effective and sustainable manner.

c. Remuneration for lending copies of a work

The lending right provides authors with remuneration when their works are lent out (e.g. by a library). It faced resistance in the consultation as the majority of people feared that the lending right would entail a great deal of extra administrative work and expense, although only a small portion of the revenues would have benefited Swiss authors. In light of this, the Federal Council has opted not to adopt the lending right.

d. Academic secondary publication right

Scientific organisations and libraries advocate a secondary publication right. This right implies that a scientific work that is primarily publicly funded can be republished free of charge, for example in a university working paper series or on platforms such as the Social Science Research Network (ssrn). This “secondary” publication exists alongside the first or main publication of an academic article by a publishing house, and the publishing house cannot prevent it.

This topic is currently being debated across Europe. In Switzerland, the parties concerned were unable to agree on the recommendation for a secondary publication right. The Federal Council has not included this issue in the draft, but continues to follow the discussions at European level with interest in order to gauge whether any action is needed.

e. Blank media levy

There is some disagreement over the extent to which downloading content from paying services onto blank media results in double payment due to the price of the paid service and the blank media levy. In the end, the Federal Council decided not to reformulate the relevant provision, as there were fears that this could ultimately lead to cost increases.

f. Extending supervision

The draft bill for consultation provided for two extensions to the supervision of the collective management organisations. On the one hand, it proposed that fields subject to voluntary collective management should also be placed under federal supervision. On the other, it suggested that the Swiss Federal Institute of Intellectual Property (IPI) should not only check whether the management and basis of distribution of the respective collective management organisations comply with the applicable law, but also that it should verify whether they are appropriate. The extension of supervision was criticised from several quarters in the consultation (in particular by those whom the extension of supervision was designed to protect). Various reasons were given, including constitutional issues.

Effective supervision of collective management organisations should therefore in future be carried out on the basis of existing instruments. The members supervise the collective management organisations on key decisions, such as approving their annual accounts and monitoring appointments and executive management through the boards. A 2015 expert report published details on collection, distribution and documentation, and this has already resulted in an objective discussion and optimisation measures. The report provided evidence on the level of administrative costs, which varied slightly depending on the collective management organisation in question, but on the whole was deemed satisfactory by all parties.

In light of this, the Federal Council refrained from including tighter state supervision of the collective management organisations in the draft bill.

g. Supervisory fee

The draft bill for consultation contained a provision on the introduction of a general annual supervisory fee payable by the collective management organisations to the IPI. This fee was designed to cover the supervisory costs that could not previously be billed, such as the costs by the IPI of attending the general assemblies and assemblies of delegates in its function as supervisory authority. While the supervisory fee reflects the user pays principle, it was rejected in the consultation. The Federal Council has therefore opted not to introduce the fee in order to be able to present a bill that is balanced and properly takes into account the interests of the various stakeholders.

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