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Media kit

Modernising copyright

Background, goals and the most important developments

1. Background

Two years ago, the AGUR12 working group set up to modernise copyright by the President of the Swiss Confederation, Simonetta Sommaruga, made a number of recommendations on conditions concerning copyright. The Federal Council took the recommendations of this broad-based working group as an opportunity to mandate the FDJP with the preparation of a draft bill to revise copyright law.

2. Goal of the revision

Parliament last revised the Swiss Copyright Act in 2008 in order to adapt it to the digital environment. The review by the AGUR12 highlighted the need for improvement in certain areas. Rights owners are failing to curtail copyright piracy; simultaneously, piracy is hindering the creation of lawful and attractive offers. The proposals in the draft for consultation are primarily aimed at an improved anti-piracy strategy and a more efficient collective management of copyright, and at proposing modifications to limitations and exceptions to copyright as well as other changes. The Federal Council also submitted two new international agreements for consultation.

3. Improved anti-piracy measures

Anyone can retrieve films, music and even scientific articles worldwide on the internet, immediately and without restriction. Unlicensed and therefore illegal offers can lead to lawful offers not having any chance on the market. The revision is therefore aimed at quickly remedying clear cases of piracy.

For reasons of practicality, internet service providers are to be involved in combatting piracy, even if they themselves do not infringe copyright as they can disable pirated offers directly. The draft bill also makes provision for a mechanism that prevents unjustified or overly stringent blocking measures known as "overblocking". In return for these new obligations, the bill will ensure greater legal certainty for internet service providers by exempting them from liability for copyright infringement by their customers.

With severe copyright infringement via peer-to-peer networks, it is to be made easier in future for rights owners to initiate civil proceedings against negligent users.

3.1. Obligations of hosting providers

Hosting providers headquartered in Switzerland are required to remove copyright infringing content from their servers ("take down"). If they do not join a self-regulating body, they also have to prevent such content from being re-uploaded onto their servers ("stay down").

With larger providers, the first option is already standard practice and smaller providers generally do not have the transmission capacity necessary to host pirated offers. In fact, the practice applied currently will be included in the new legislation meaning little is likely to change for hosting providers.

Content providers who believe their content has been wrongly blocked are to be able to file an objection with the hosting provider. In such a case, the content concerned would be reactivated.

3.2. Obligations of access providers

Access providers headquartered in Switzerland should block access to pirated offers on the order of the Swiss Federal Institute of Intellectual Property if hosting providers headquartered abroad or in unknown locations are hosting these offers. An administrative objection procedure should ensure that such blocking is not ordered without good reason and that "overblocking" is not disproportionate.

Under the bill, access to "offers concerning works and other protected subject matter" can be blocked. This does not mean that access providers should block access to individual illegally offered content; the IPI should only order blocking in obvious cases. Offers that contain only isolated illegally offered content should not be blocked.

Numerous copyright infringements appear to still take place via peer-to-peer networks. In these cases, blocking would be the wrong approach. The draft for consultation therefore takes up the AGUR12 proposal of easing the *civil* pursuit of internet copyright infringement, although this rule is only aimed at serious cases of infringement such as uploading films not yet released or making thousands of music files available worldwide for downloading. Under current law, there is only provision for *criminal* prosecution. Under the new regulations, access providers should initially send the user an initial notification that informs them of the legal situation and the possible consequences of failing to observe it. If the copyright infringing conduct continues despite the first notification, the user will receive a second notification from their access provider by post. This is to provide the user with sufficient time to change their conduct. If, after the second notification, the user does not do anything and serious copyright infringement continues to take place via their internet connection, the user can be identified. Identification of the user must be requested by an infringed rights owner and ordered by a civil court. The customer thus identified can subsequently be required by a civil court to desist from the copyright infringing behaviour and make good the damage thus caused. There is no provision for blocking internet access or throttling the bandwidth as happens in other countries.

This new possibility creates an alternative to existing criminal procedures and helps to avoid an unnecessary criminalisation of the internet user. If the subscriber changes their conduct on the basis of this notification, they can avert proceedings.

4. New developments for the collective management of copyright

4.1. Voluntary collective management

The internet provides numerous possibilities for using content ranging from internet television and streaming services to electronic lending. With such offers, there is an often an insurmountable obstacle in the way: it is impossible to acquire the necessary rights individually. Only collective management by a collective rights management organisation can make such mass use possible. For this, there needs to be a legal basis or an ordinance under applicable law.

In the draft for consultation, there is provision for a possible voluntary collective management based on a model under the name "extended collective licensing" that has already been successfully implemented in Scandinavian countries. Collective rights management organisations can, as a result, allow collective use without any specific legal basis and therefore respond much more rapidly to the needs of the market. With voluntary collective management, they can allow mass use even if they do not have the rights of all affected rights owners. The economic freedom of the rights owner is preserved as they have the possibility of opting out of such an agreement concerning their rights. Participation in such management is therefore optional for rights owners.

Tariff provisions for voluntary collective management should apply by analogy. The Federal Arbitration Commission for the Exploitation of Copyrights and Related Rights (FACO) verifies such agreements for appropriateness. The distribution of royalties to rights owners from voluntary collective management will be under the supervision of the IPI.

4.2. Blank media levy

Works are being increasingly saved on several devices simultaneously (e.g. computer, tablet, smartphone, etc.). Many online providers of works currently allow for such multiple storage

(copies) of works and factor this into their offer price. However, these copies are already compensated for with the blank media levy. To avoid such double payments in future, those copies allowed for by providers should therefore be taken into consideration when determining the blank media levy. On the recommendation of the AGUR12, the provision concerning the blank media levy will be specified in more detail accordingly and, consequently, the discussion on multiple remuneration for downloading content from paying services decided in the interests of the consumer.

4.3. Remuneration for lending copies of a work

Significantly more people use a copy of a work rented or lent out by a library than is sold to private individuals. Current copyright law therefore makes provision for the remuneration of the rental of copies of works, which is collected by the collective rights management organisations. It is to take into account the increased use of rentals. In contrast to *rental*, the equally intensively used *lending* currently does not bring any remuneration. The Federal Council wants to eliminate this difference in treatment.

In addition to remuneration that already exists for the rental of copies of a work, remuneration is also to be introduced for the lending of copies of a work. When lending, a copy of a work is given to somebody for a certain period of time to use free of charge. Only those who lend out copies of work as a main or part-time business, such as libraries, should therefore owe remuneration. Whoever lends a book to friends or family therefore doesn't owe any remuneration.

4.4. Exception for scientific purposes

Copying plays a key role in copyright. It is an important means of facilitating further use in the analogue world. In the digital world, however, numerous copies arise that are of a purely technical nature and in no way extend the user group. For this reason, an exception was created for temporary copies that is technically necessary for internet transmission.

The revised law now makes provision for an exception for the use of works for scientific purposes to take into account the requirements of modern scientific research activities. Copies and adaptations that arise as a result of a research method due to technical reasons is to be allowed by law. This is to ensure the possibility of text and data mining, for example, i.e. software-based text analysis for identifying key information contained in a text. The regulation makes provision for entitlement to remuneration for authors. A collective rights management organisation is to assert the claim.

4.5. Use of orphan works

The regulation on the use of orphan works specifically for broadcasting organisations is to also include copies of works in public or publicly accessible libraries, educational institutions, museums, collections and archives and thus make possible the further use of these works.

A work is considered as an orphan work if the rights owner remains unidentified despite searching for them or if they cannot be found. In the new legislation, it is to be possible to use such works without their permission if various requirements are fulfilled. Firstly, the copy of the work must be located in a memory institution (e.g. a museum or archive) or a broadcasting organisation. Secondly, the copy of the work must have been produced, copied or made available in Switzerland. Thirdly, a collective rights management organisation must give permission to use the work. Remuneration will be owed for using the work, which will be collected by the collecting society. The rights owner, who can be subsequently identified, should be remunerated with the royalties collected.

4.6. Expanding supervision

The collective management of rights is increasing in importance. In parallel to this, supervision is also to be strengthened. Whoever wants to benefit from state authorisation and thus a strengthened position in the market should also, in future, accept complete supervision in all activities in return. The bill makes provision for two measures concerning this. Those who are authorised to manage rights collectively are currently only subject to approval by the IPI concerning supervision of their management. This has led to problems of delimitation in the past. Firstly, the activity in the domain subject to authorisation will therefore be subject to complete

supervision by the IPI. Secondly, the IPI should also verify the management of the collecting societies for appropriateness instead of having to be limited to checking their adherence to legal requirements. Appropriateness exists if the collecting society exercises its discretion as the specific situation requires. This removes a difference in the Copyright Act, for which there is no reason, as the FACO already verifies the collecting society tariffs for their appropriateness.

5. Additional modifications

Press photographers deserve better protection. Photo journalists are just as important for information as text journalists. Press photographers document current events and make a significant contribution to forming opinions. Yet while the work of text journalists is routinely protected by copyright, this is not the case for photo journalists. As a result, they can only protect the unauthorised acquisition of their photography work with difficulty. A specific related right for "producers of press photography" is to correct this unequal treatment. In order for photographers to no longer have to watch their press photographs being acquired without any protection, they will have the sole right of copying and selling their photographs. These rights will be applicable for as long as these photographs are of interest for current media reporting.

On the recommendation of the AGUR12, the bill also contains a detailed regulation that will facilitate access to memory institution collections. Memory institutions such as public libraries, museums and archives are to be able to present the content of their holdings in a contemporary format to the public. Online searches should also be able to show the cover pages, the index or summary for scientific works in addition to the author, the title and the collection number. For this reason, memory institutions will receive permission to reproduce short excerpts of works in their inventory indices, regardless of whether the inventory index is in digital or analogue format.

6. Two new international agreements

The Federal Council would also like to use the upcoming revision of the Copyright Act to ratify and implement 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. Importing copies of works in a form accessible to beneficiaries is to be made possible and the works are to be disseminated and made available in a form accessible to beneficiaries.

Switzerland already fulfils these requirements today. However, with the ratification of the agreement, it sends a clear signal that it supports a balanced copyright protection, which takes into account both the concerns of creative artists and those of the cultural consumer.

7. Modernising copyright in figures

The specific implications of the copyright revision cannot be precisely estimated. However, they are not to be underestimated. According to studies, copyrights account for more than four per cent of the gross domestic product. The music market alone is estimated at a volume of CHF 897 million. The revision aims to essentially protect this significant copyright market from distortions of competition in the form of piracy by free riders.

8. Author expectations

With all the benefits of the internet, authors are finding themselves being confronted with the problem of these increasingly difficult economic conditions, which is why they are calling for measures against internet piracy. The draft for consultation takes this demand into account. By including internet service providers in the fight against piracy, an instrument is being created with which piracy can be quickly and comparatively inexpensively be fought.

9. Consumer expectations

Consumers have three key issues concerning copyright. They do not want to be criminalised by a ban on downloading from illegal sources. There was consensus on this issue in the AGUR12. The preliminary draft therefore refrains from criminalising consumers. Downloading for private use will continue to be permitted. Consumers are also concerned about multiple remuneration when downloading from paying services. As recommended by the AGUR12, the preliminary draft decides in the interests of consumers on this matter by proposing improvements to tariffs for the

blank media levy. Consumers ultimately want the best possible choice of attractive content at reasonable prices, a demand that is also taken into consideration in the draft. The improved possibilities for proceeding against piracy increase the attractiveness of the Swiss market for lawful offers and should lead to an improvement in existing offers. Voluntary collective licensing also makes it easier for new providers to easily acquire the rights required for providing their offers, which in turn encourages the creation of new offers.

10. Expectations of internet service providers

Under current law, internet service providers can be held responsible for copyright infringement by their customers under certain conditions. With the regulations provided for, internet service providers therefore obtain the desired legal certainty. They will not to be made liable for copyright infringement by their customers if they implement the anti-piracy measures provided for.

You can find up-to-date information on modernising copyright on the website of the Swiss Federal Institute of Intellectual Property: www.ipi.ch

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