


**COPYRIGHT
IN THE DIGITAL AGE**

HIGHWAY OR DEAD-END?



FACTS AND OPINIONS



Save your money,
Grandma!
I can download
the song for free!

IMPRINT

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TO OUR READERS

We are all authors – whether of love letters, original photos or our own website on the internet. At the same time we are all users and consumers, whether we are reading a book, purchasing a song online or watching television. Many of these works and activities are protected under copyright. To continue protecting them appropriately in the digital age, today’s copyright law needs to be revised. But what is appropriate protection? This brochure addresses that question. It has been compiled and written by the Swiss Federal Institute of Intellectual Property in cooperation with representatives from the various interest groups in the hopes of making a contribution to public understanding and opinion. It presents facts, explains special terms in the context of

copyright, and introduces the positions of the various groups concerned so that you, the reader, can decide for yourself: Is the new copyright law a highway or just a dead-end?

*Felix Addor, Editorial Chairman
Executive Board Member
Federal Institute of Intellectual Property*

More about copyright under www.swiss-copyright.ch

*For purposes of readability only the male pronoun is used.
All quotations are personal opinions only.*

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Couple more things for copyright? Put them on the pile here!



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THE NEW COPYRIGHT ACT: HIGHWAY OR DEAD-END?

THE DEBATE IS ON

Society is in the middle of a transition similar to the advent of printing. New information technologies such as the internet and cellular telephones offer infinite possibilities and many challenges.

How can we assure that artists and scientists continue receiving fair pay for their activities? What are the consequences when a copy is identical to the original? What entitlements do users have? How can access to digital content be secured? Is digitalization a dead-end or a highway? These questions are at the center of the many-sided debate concerning copyrights, freedom of information and consumer protection.

The digital world: A blessing

The breakneck speed of digital technology development has fundamentally changed the way society relates to information and the creation of culture. Content is now accessible to users and consumers anywhere in the world, and it can be copied and saved. At the same time, the entertainment industry has developed new forms of production and distribution. For instance, digital rights management systems offer a much simpler means of providing and marketing creative works and other protected performances online. This is an advantage for users and consumers as well. Instead of going to a store to buy music recordings, films,

books, or software, they can acquire them online. And this content can be copied and further circulated over the internet without any loss of quality.

Or a curse?

With new technologies consumers also have the resources to do the impermissible. The consequence for those involved in the production of culture is empty pockets and a diminished incentive to create cultural contents. In response to these changed consumer behavior patterns, the entertainment industry is protecting commercial cultural goods with technological measures such as copy barriers on CD's and DVD's and by fighting unlicensed file-sharing on the internet.

Such technological measures, however, can get in the way of legal uses, such as making a private copy. In addition, consumers and users fear that access to existing works as well as the use and further development of technologies for disseminating

information could be restricted. Consumers, educational institutions and industry are all demanding that the limits of copyrights be more clearly defined for the digital age.

The Internet Treaties

In response to this multifaceted problem two treaties were brought into existence in 1996 through the World Intellectual Property Organization (WIPO). They offer starting points for WIPO member states in the process of revising their national protection to modern communication technology for authors, musicians and music producers.

As a signatory to these treaties, Switzerland wants to participate in the international harmonization of copyright and thus needs to revise its copyright legislation.

“Music is healthy and it’s fun. It’s created by musicians – i.e., authors. That’s work, and work should be compensated. Copyright helps me to be able to live off my art. Internet piracy and free copies of music and films gnaw at the substance and creativity of artists. That’s why copyrights have to be adapted to changing technologies.”

*Polo Hofer
Musician*

“Of course artists and performers should be protected from piracy. But copyright shouldn’t ignore the rights of users to the sole advantage of copyright holders. Access to protected works, including in digital form, should be kept in the interest of the general public as well as for research and education.”

*Jacqueline Bachmann
Director of the Foundation for Consumer Protection (SKS)*

“The digital world provides the advantage that we are able to easily access a wide range of contents around-the-clock. Fair billing for purchased contents is guaranteed by new IT solutions. Thus consumers are able to pay user-specifically for the offered services.”

Urs T. Fischer

General Manager, Hewlett-Packard, Switzerland

“Using open source software can offer very large savings for the public. Software which is commissioned by the government belongs to the public and should be made available under open source licenses to anyone for free.”

Kurt Bader

IT Director, Canton of Solothurn

“We can meet the needs of today’s consumers worldwide thanks to DRM systems and the extension of copyright protection. Without developed protection it’s impossible for us to practice our profession as musicians, in the long or short term, because too much of our music is available over the internet for free.”

Gotthard – The band

“Radio and television’s public function is the best engine for the creation, production and, ultimately, validation of creative works in Switzerland. It remains in the best interest of the public to have broadcasters fulfill their mandate with as little hindrance as possible, even on the internet. Switzerland’s broadcasting production must be strengthened and promoted.”

Daniel Eckmann

Deputy General Director, SRG SSR idée suisse

“Know-how, innovation and creativity are factors for success of the Swiss economy. Copyright fills an important incentive function. The exploitation of works will expand decisively in the digital age. Regulations need to be conformed accordingly and the antiquated royalty systems dominated by monopolies and collecting societies need to be rethought.”

Thomas Pletscher

Executive Board Member, economiesuisse

You don't have
to reimburse the
copyright holder
with this model!



Fentana

FROM BOOK CURSE TO COPYRIGHT: PROTECTING WORKS OF LITERATURE AND ART YESTERDAY AND TODAY

For him that doth ill and doth sin with this book, in retribution for what he has done, I send this curse, and for him that would alter this book: may he be annihilated by leprosy, and may his name be erased from the book of the living and may he join the Devil for all Eternity.

13th century book curse adapted from Eike von Repgow, Sachsenspiegel.

In the Middle Ages when books were copied by hand, it was enough for authors to insert a written curse against unauthorized use of their works. With the invention of the printing press, however,

literary works could suddenly be copied in larger numbers. This great contribution towards spreading literacy and knowledge meant that it was no longer the exclusive reserve of a small elite. At the same time, more and more copies appeared. To protect the original author, authorities created printing privileges for a specific geographical area and time period. These privileges, however, were primarily for the printers, not the authors; i.e., they were considered rights to copy, not rights for the author.

The origin of intellectual property

The idea of protecting artist' work first became recognized during the Age of Enlightenment when a theory of intellectual property was born. The theory maintained that those who created intellectual work have just as much a right of ownership to the products of their intellect as craftsmen have to their products. It also recognized an idealized relationship between the author and his work, thus creating what is referred to as a moral right (droit moral).

By the beginning of the 19th century, national regulation of intellectual property existed in countries such as England, France and Prussia. In Switzerland, however, the idea met with opposition from the cantons because trade in unlicensed works with neighboring countries was a profitable business. This stopped in 1883 when the first national copyright legislation was passed.

Copyright: a balancing act

Society has multifaceted, and at times contradictory, expectations for copyright. Authors and producers basically demand comprehensive, exclusive rights to secure their livelihood, business and investment. At the same time, users and consumers want the most open and cost-effective access to content possible. But users can also be authors, for instance of creative or scientific works, and might need to refer to existing works within the context of their own work. Thus, it becomes a circle.

Only a well-balanced copyright law can meet these diverse needs. The current copyright act from 1992 managed this split, for example with the exception for classroom use which allowed the copying of works for school but at the same time made provisions for the copyright holder to be remunerated.

Copyright and technological developments

Technological developments are always creating new possibilities for production and use. What started with the printing press in the 15th century has continued into the 21st century, from the invention of radio and television to the establishment of the internet. The market for mass consumption of content has been built up step by step. Today, this market makes up an important part of the cultural and entertainment enterprise in Switzerland where more than 80,000 people are employed at an annual turnover of about 17 billion Swiss francs. This is a considerable portion of the Swiss economy.

As the internet, digital radio and television, and cellular telephone technology (think of all the online services or ringtones available) continue to spread, this market will become increasingly influential. Legislation needs to keep up with developments.

TODAY'S COPYRIGHT LEGISLATION

What exactly are copyrights?

Copyrights are temporarily limited monopolies. They give authors the power to allow or prohibit certain uses of their work. For example, an author can allow the performance or broadcasting of his work for remuneration, thus earning income. Copyright grants an economic right which can be licensed or transferred to others. This right includes the right to record, to perform, present or show, to reproduce, to distribute, to broadcast or rebroadcast and the right to make perceivable.

In addition to the economic right, copyright protects the personal relationship, or moral right, of the author to the work as an expression of his creativity and personality. This moral right protects him from acts that would damage the integrity of his work. In addition, the author can determine whether, when and under which conditions his

work shall be made public. Furthermore, he has the right to be named “author.” The moral right cannot be transferred to others.

An example of author rights

On the way to work you hum a new melody to yourself. You’ve become an author!

What are related rights?

To make a work audible or visible other people are often involved, such as performers (who interpret the work rather than create it), producers, and broadcasters. These people and businesses have certain related rights of ownership (also referred to as neighboring rights) to their performance, recording or broadcast.

An example of related rights

You perform a piece you composed with a band. You get a recording deal, your song is played on the radio, and your band becomes famous. You even get invited to appear on television shows! Related rights have been created.

Which works are protected?

Protected works	Unprotected works
Music compositions	Court decisions
Texts (literary, journalistic, etc.)	Laws
Photographs, films, paintings	Concepts
Computer programs, architectural works, maps	Patent documents
Pantomimes, etc.	Means of payment, etc.

An overview of Swiss copyright protection

Who is protected?	Authors	Performers	Phonogram and video-gram producers	Broadcasters
What is protected?	Works (including software)	Performances	Recordings	Broadcasts
How long is it protected?	70 years (software: 50 years)	50 years	50 years	50 years
	after the author's death or from the first performance			
Which rights exist?	Right to deliver or perform	•		
	Right to record	•	•	•
	Right to reproduce	•	•	•
	Right to distribute	•	•	•
	Right to make perceivable	•	•	•
	Right to broadcast	•	•	
Right to rebroadcast	•	•		•

How does one become entitled to copyrights or related rights?

Copyrights are automatic the moment someone has created, performed, broadcasted or recorded a work according to the legal definition. There are no formalities which must be completed in Switzerland, and registration is neither necessary nor possible.

Benefits and limits of copyright

The author decides what to do with his work: He can publish it or keep it for himself. He can earn money with the work or make it available for free. He can collect the royalties himself or he can transfer his economic right to someone else, for example to a publisher, producer or collecting society.

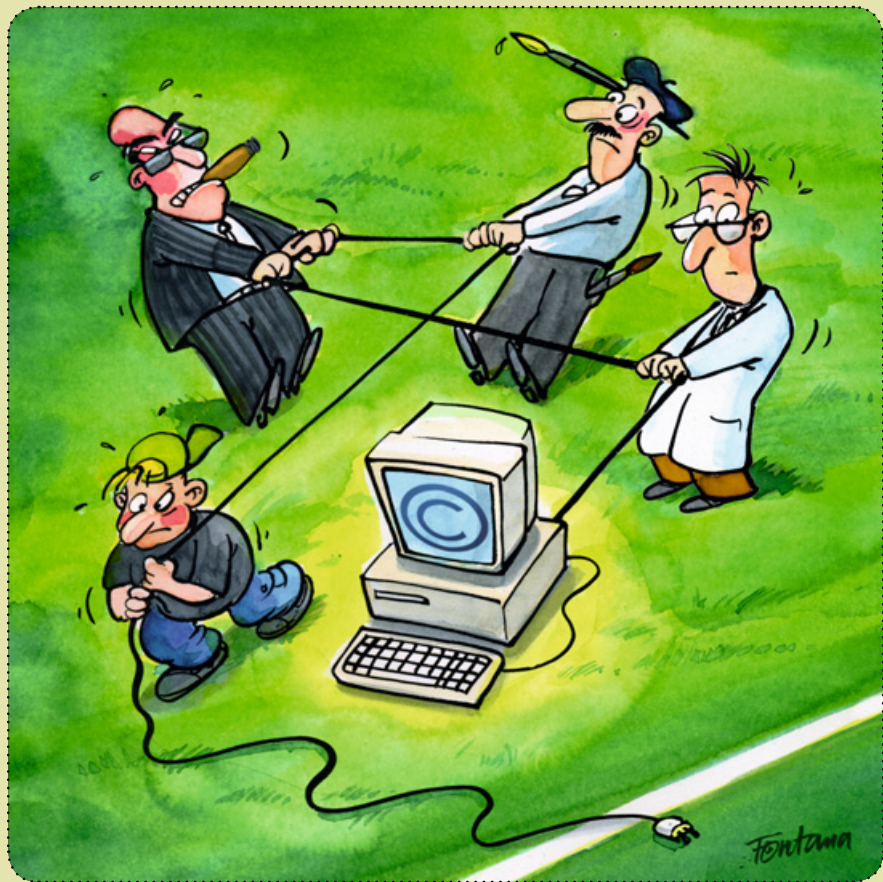
Copyrights, however, are not unlimited. The monopoly is restricted in some areas by the interests of the public at large. This is to guarantee appropriate access to information and cultural goods and thus to create a fair balance in favor of freedom of speech and information. The most important limitation is the term of protection. Protection lasts up to 70 years after the death of the author (50 years for software) or 50 years after the first performance in the case of related rights. Thereafter, the work, or the performance, is freely available to the public. It becomes public domain.

Exceptions to copyright law exist in areas where, up until now, it was impossible to individually monitor usage, such as situations of using contents for personal use. The law allows certain uses for teaching and internal business purposes as well as any uses for personal purposes, including, in particular, private copies.

In compensation for such legally permitted copies of a work, the rights holder receives a royalty payment from the collecting societies under so-called collective management. The amount of the royalty collected by the societies is fixed according to tariff schedules which have been negotiated with the user associations. The tariffs are audited by a price monitor and approved by an independent board. Once collected, the income is distributed to the entitled rights holders according to regulations.

An example of collective management

You make a copy of your favorite CD for a friend. The blank CD (80 minutes) costs 70 cents. Of that, seven cents goes to the collecting society SUISA for royalties. SUISA then pays a fixed amount to the entitled rights holder according to an agreed upon distribution plan.



NO ONE-SIZE-FITS-ALL SOLUTION: THE WORLD INTELLECTUAL PROPERTY ORGANIZATION INTERNET TREATIES

The primary goal of the copyright law revision is to adapt protection to the modern information society.

From analog to digital

The current copyright law originated in an analog world, a time of cassettes and video recorders. Compared to analog copying technology, digital technology such as CD or DVD burners or PC's can cheaply produce unlimited copies with no loss of quality: The hundredth copy of a copy is identical to the original in sound and image. Digital technology not only allows copying content, it can also be used for protecting content. Thanks to copy protection and controlled access, impermissible uses can be prevented.

The technological breakthrough caused by digitalization has become even greater with the internet. The internet is a means for transferring digital content throughout the world in a cost-effective way. Borderless communication has brought many advantages and increased the accessibility of information. The idea of the free flow of information – unimpeded access – resonates more than ever. The downside of the development, however, has been that the internet is also a place of abuse: for example, copyright protected content being provided without permission through file-sharing.

Two international treaties

Such considerations needed to be taken into account in the harmonization of international copyright law. The WIPO Internet Treaties – which refers jointly to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) – created in 1996 set new standards for securing author's rights and certain related rights in the digital age. It is Switzerland's goal to meet these standards in its copyright law revision.

The WCT concerns the protection of works while the WPPT guarantees a minimum protection for musicians and record producers.

The WPPT does not cover the rights of broadcasters, audiovisual producers or actors. However, their needs are currently under discussion and efforts are being made to adapt the international level of protection accordingly.

CORE ISSUES IN THE WIPO INTERNET TREATIES

Improving on-demand rights

On-demand rights refers to the right to make a work accessible to the public through a communication network such as the internet. Online music stores are dependent on this right. They are required to acquire licenses not only from the authors but also from the performers and producers for their business. In Switzerland, authors already hold an exclusive on-demand right. Now, parties protected under the related rights provisions in the WPPT must also be guaranteed this right. This means that Swiss copyright law needs to be extended in the area of related rights.

Broadcasters have responded by demanding that the on-demand right be limited so that they can make their broadcasts accessible without having to negotiate individually with each rights holder involved in an integrated broadcast recording. This demand is controversial among some of the rights-holder groups.

Better protection for the performers

Protection for performers has been improved through two measures in the WPPT: The first is that folkloric performances are also protected along with performed works; the second is that performers also now have a moral right to their work.

a) Protecting folklore

Folkloric traditions, such as flag twirling, are the product of a community which has been practiced and developed over generations. However, such folklore is not considered works in the sense of copyright.

Equating the performances of works with those of folklore is controversial and will continue to be discussed. Those in favor of this position make no practical difference between folkloric presentations and the presentation of creative works. Those against it argue that the term folklore is unclear and that equating it with creative works would lead to unjustified royalty obligations.

b) Protecting the moral right of performers

The protection of moral rights is already well-developed under Swiss civil law. The only amendment needed to conform to the international provision is to add “the right to recognition.”

An example of moral rights

You accompanied an acquaintance on your own guitar when she sang and even played a solo. When the CD of the performance appears, the name of the producer appears as the guitarist, not yours. The producer had technically enhanced your solo before remixing it for the recording. Besides financial claims, you can also demand that your name appear on the list of credits as a performer.

PROTECTION THROUGH TECHNOLOGICAL MEASURES

What are technological measures?

Technological measures refers to the use of special technology in equipment and computer programs designed to prevent users from accessing or copying digital content without permission or authorization. Copy protection on audio CD's, regional coding on DVD's, and password protection for online music stores or publishers providing newspapers, magazines and scientific papers online are forms of technological measures.

Why should technological measures be legally protected?

Technical developments have simplified and lowered the cost of producing and circulating first-class copies in great quantities. Technological measures are meant to assure that rights are upheld and, with that, offer a basis for new forms

of business. But such protection is imperfect: Experts and professionals can crack the protection code without much difficulty (software is easily found on the internet). To counteract this, it was decided at the international level to legally prohibit the circumvention of such technology, thus creating yet another obstacle to piracy.

The impact of technological measures

Technological measures can have negative effects because they can limit fair uses of a work – such as making a copy for private use – or even make them impossible.

An example of technological measures

You bought a CD in a store that can be listened to with the usual CD players. But you'd also like to have a copy to play on your computer. However, you can only do this if you install the software which came with the CD. You can't copy the CD because it's copy-protected which means you can't make a private copy either. This protection can conflict with the legitimate interests of users and consumers.

What are the requirements of the WIPO Internet Treaties?

Protection of technological measures became an object of international regulation through the Internet Treaties. The treaties oblige the signatory states to guarantee “adequate legal protection and effective legal remedies against the circumvention of effective technological measures.” How effective technological measures is defined is left up to the signatory states. The minimum protection which must be provided is to prevent any acts with protected works and performances for which the rights holder has not agreed and which are also not allowed by law.

In addition to the technological measures, the WIPO Internet Treaties also protect the so-called rights management information. This information, such as contact information about the rights holder, is coded into the digital carriers and may not be changed or suppressed without permission.

Protecting rights management information is not controversial in Switzerland.

The situation in other countries

In addition to Switzerland, numerous other WIPO member states have signed the Internet Treaties and have already partially implemented them in their national law. The EU and its member countries will also join the two treaties.

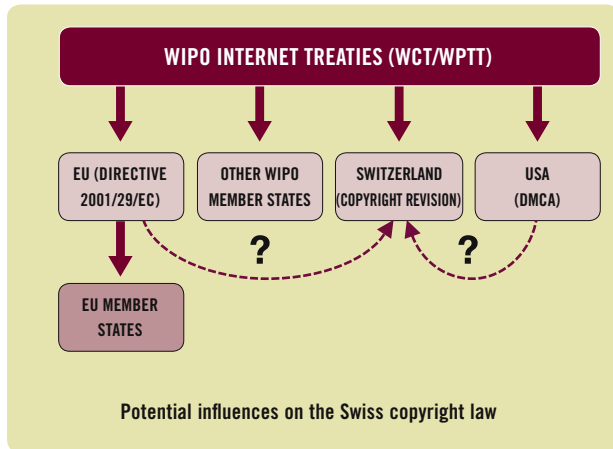
Since the treaties only define a minimum standard of protection, the signatory states are free to implement measures which go further. Two such measures which go beyond the minimum protection have had effect worldwide:

- * *The US Digital Millennium Copyright Act (DMCA). This act also has an impact on free trade agreements signed between the US and other countries.*

* *The EU Copyright Directive (Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society). This directive should assure the most unified implementation of the WIPO Internet Treaties into the legislation of the EU member countries.*

The WIPO Internet Treaties: Must Switzerland join?

Yes. Switzerland signed the WIPO Internet Treaties in 1997 and, as a member of the European Free Trade Association (EFTA) is obligated to implement the provisions.



INTERNATIONAL AND NATIONAL GUIDELINES FOR THE REVISION

International guidelines

In addition to the WIPO Internet Treaties, a postulate by the National Assembly Commission for Legal Affairs has also stipulated that developments in the European Community should be taken into consideration, particularly the EU Copyright Directive. Following the EU regulations would mean more comprehensive protection of technological measures because the EU directive, in contrast to the WIPO Internet Treaties, prohibits not only the act of circumvention (code cracking) but also trade in the tools and technologies which make that act possible. To counterbalance this measure for the interests of consumers and users, the directive also requires member states to assure that certain copyright exceptions can still be taken advantage of even when technological measures are in place.

National guidelines

National guidelines, such as the December 13, 2002 Federal Law on Equal Rights for the Disabled, must also be taken into consideration. Consequently, an exception is being created that will guarantee that works can be formatted (such as for Braille or audio books) to make them accessible to people with disabilities.

How the revision came about

The draft of the copyright act was sent to the cantons, political parties and interest groups as part of the consultation procedure on October 1, 2004. All of them agree that the copyright law needs to be modified in view of technological developments. Exactly how this should be affected, however, is far from unanimous.


The artists and performers are in favour of a comprehensive implementation of the WIPO Internet Treaties into the Swiss copyright law.

However, they want to keep the legally permitted uses – namely personal use – as is, as long as they receive adequate compensation for the use of their works.

The entertainment industry is demanding that protection of digital content against illegal copying be improved. It wants an effective circumvention prohibition for technological measures, such as in the EU Copyright Directive, as well as a limitation on copying for personal use. That would lead to the possibility of charging consumers individually with a pay-per-click kind of system – if you use it, you pay; if you don't, you don't pay – in the near future.

Broadcasters feel that the use of new communication technologies is essential to providing their services to all consumers. Among other things, they want a realistic easement for the use of their archived productions.

Consumer and user groups want to know which uses are permissible, and they fear that permissible uses could be massively restricted by prohibiting the circumvention of technological protection. In particular, they fear that the information and documentation possibilities currently permitted for education, research and science would be negatively impacted and are calling for weaker circumvention regulation. In addition, they feel strongly that the royalty system should be revised when the protection of technological measures is introduced. This is so that users won't have to pay more than once – i.e., once to the content provider and once to the collecting society – when digital rights management systems are in place.



We've done it!
Perfect copy protection!
A CD that self-destructs
after one playing...

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SELF-SERVICE OR SUPERVISED USE? RIGHTS MANAGEMENT AND E-COMMERCE

New business models thanks to DRM?

Digital rights management (DRM) refers to systems for electronically administering and marketing the rights for using digital content. DRM systems make it possible for those providing digital content, such as songs, films or ringtones, to create new business models for offering their products online in various qualities, for diverse users and at different prices. Providers can individually calculate and control the length of time and frequency with which a user makes use of the content – whether for listening, watching, printing or saving. Access to such services will be determined and controlled with technological measures.

DRM is revolutionizing the means and ways of circulating content online, although there are still rough spots. For instance, while more and more works are being made available online, there are few technical standards which make equipment and formats compatible. Also, while available online payment systems are diverse (for example, credit cards, ATM cards and systems like Swisscom's "Click & Buy" and "Paypal" from eBay), they also need improvement. Consumers complain about the lack of user-friendliness. However, DRM appears to be increasingly asserting itself on the market.

An example of DRM

The latest album by your favourite band is also available from an online music store. According to the store's business conditions, the song can be streamed for a few cents or it can be downloaded for a little more than a franc. Buying and downloading either the album or individual songs gives the buyer the right to play them on no more than 5 other PC's, to burn no more than 3 CD's, and to put them on a player from a certain manufacturer. Creating additional copies is prevented through copy protection.

Opportunities for DRM

The entertainment industry and, partially, artists and performers as well, feel that DRM will massively simplify the selling of digital content. Contrary to collective management, DRM allows exact accounting: one only pays when works have actually been used. From the entertainment industry's viewpoint this exact breakdown of uses would make collective royalties for copyrighted material superfluous in some areas. Furthermore, in the entertainment industry's opinion, DRM would offer artists and performers a certain degree of autonomy from producers and give them the possibility to sell their works at their own expense over their own websites. The net effect would be greater incentive to create works of art, literature and music.

FILE-SHARING – A LIABILITY FOR AUTHORS?

File-sharing services, or the so-called peer-to-peer (P2P) networks, offer internet users the possibility to transfer content among themselves. In doing so, they create digital copies. Massive amounts of copyrighted content (e.g., music, films, software, literature) are offered for downloading via P2P networks without a license from the copyright holder. This is illegal and impacts the legal online music business.

Numerous studies have shown that file-sharing plays a role in falling CD sales. Phonogram producers alone reckon the loss in Switzerland was approximately 135 million Swiss francs between the years 2000 and 2004. The entertainment industry has decided to take the P2P networks to court. Other analysts think the loss is due more to general economics and the fact that business on the internet was 'dozing' for a long time. Then again, other studies have shown that the P2P users actually buy more CD's on average than others.

For consumers, the primary question is whether they can use file-sharing or not. Most experts assume that downloaded copyrighted content is for making a private copy for personal use, which is permissible under current law. Courts have not yet decided on this. What is not permissible is making copyrighted data stored on your own hard disc available to other users for downloading (uploading).

CREATIVE COMMONS LICENSES

Creative Commons, founded in the USA, is a non-profit organization promoting adequate exploitation of copyright. It has been providing standard licenses since 2001. The so-called Creative Commons licenses (CC licenses) are, in legal terms, somewhere between a restrictive use of copyright (all rights reserved) and public domain (no rights reserved). CC licenses are used worldwide and have been translated and adapted to national legislation in many countries, including Switzerland. In Switzerland, however, people who already transferred their rights to a collecting society cannot simply release their work under a CC license. In granting a CC license, the author retains his copyright but gives users irrevocable permission to use his work (text, picture, music or film) for the entire period of protection for free in a non-commercial context (some rights reserved). CC licenses are modularly designed for flexibility and are identified by simple icons which inform users and consumers of the conditions under which the works can be used.

www.creativecommons.ch

Risks in DRM

Many artists and performers fear that the providers will profit from DRM systems while they themselves will earn nothing. Numerous artists could not even afford DRM systems and would be dependent on large, online portals, making it difficult or even

impossible to collect royalties for their works and performances. Open source developers believe that DRM systems could be used to prevent both installation of their software on particular hardware or operating systems and access to particular content, which would exclude them from the market.

The technological measures which control access to many DRM services are particularly controversial among users and consumers. These groups suspect that such measures could be abused and ironically refer to DRM as 'Digital Restriction Management.' In addition to limited access to existing works, they fear multiple royalty collection, more expensive content and insufficient protection of the personal data collected by DRM.

The opportunities and risks involved in DRM need solid regulation, not only in terms of copyright but particularly in areas concerning data protection and fair competition.

• ONLINE MUSIC STORES

In 2003, iTunes became one of the first legal online music stores in the USA. This business offers DRM-supported services which are very popular.

In the meantime, countless music providers have sprung up throughout the world. In Switzerland, there are more than 10 on the market including iTunes, Sony Connect, Ex Libris, iM (from the chain store Migros) and MSN Music. Instead of buying a CD, users can select songs individually online and download them onto their PC or MP3 player. They pay the provider 1 to 2 francs per song for this service, or about 15 francs per album. This business model has practically no limits.

Magnatune, for example, offers individual songs for free under Creative Commons licenses, but to download a whole album costs money.

DRM versus a blank recording media levy

Certain uses of copyrighted material cannot be directly and individually calculated, even today. Copies for private use are an example. Copying is legally allowed, but to compensate a levy is paid on the blank recording media. This remunerates authors for the reproduction of their works for private use. Today, large providers can directly calculate single uses with DRM. This raises the question whether such a levy is justified when works are downloaded from the internet with a computer or cellular telephone because, in the end, the user is already paying the provider for downloading.

Many authors, related rights holders, as well as the collecting societies want to keep the blank recording media levy, even in the case of paid downloading. In their view, the levy covers the copies the consumer makes from his own storage medium. The money an internet provider collects from the

consumer is to pay for his license to make a copy and make this copy accessible on his server. Since these are two different acts, they argue, one cannot talk about double or even multiple royalties. The goal is for the rights holder to receive an appropriate amount for every use. Saving on a blank recording media is a 'use' whether it is made possible through an internet provider or some other means. Many consumer representatives and user groups think that paid downloads of music or film is like buying a CD or DVD in a store. They do not understand why they should have to pay a levy on the blank recording media in addition to paying for the digital purchase. With DRM, use of a work can be broken down and managed exactly. An additional collective royalty would not be justified for one and the same use in their view.

BROADCASTERS AND THE INTERNET

Modern communication technologies have a great impact on radio and television and the ways in which programs are circulated. Today, many broadcasts are even available simultaneously or as replay over the internet. Since consumers are increasingly on the road and have broadband internet access at home, they are making more frequent use of this option. What they consider simply an online option is referred to by copyright experts as simulcasting, webcasting, on-demand or podcasting:

- * **Simulcasting** (simultaneous broadcasting) refers to radio or television broadcasts which are simultaneously made available by streaming through the internet.
- * **Webcasting** refers to programs which are formatted as streams on the internet, for example in internet radio or web-TV.
- * **On-demand services** are websites offering programs which can be consumed or downloaded at the user's convenience.
- * **Podcasting** is a special form of on-demand content for the internet. The term comes from the infamous iPod (a kind of MP3 player) and the word 'broadcasting.' Simply put, it is a broadcast-to-go. Podcasts are primarily produced by small artists, consumers and broadcasters, and offered for free as MP3 files for downloading.

Broadcasters are demanding a copyright legislation that makes these new forms of use possible under appropriate conditions.

There's
no trouble
reading his old data,
it's the entering
that's not going
so well...



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OUTTAKES:

OPINIONS FROM THOSE CONCERNED

EXCEPTIONS TO PROTECTION IN THE DIGITAL AGE

**What exceptions should there be to copy-
rights? Are the current ones up-to-date?**

Do we need new ones?

“Musicians also have to be business people. We want to be able to decide ourselves how much our music costs and not have the law tell us what we can earn. The modest royalties paid out by the Swiss collecting societies are not at all congruent with the intensive consumption of music.”

Gotthard – The band

“The internet and the new media are a challenge for Swiss broadcasters in their role as significant investors in audiovisual content. Existing, important exceptions to protection need to be transferred to the digital age to assure the freedom of speech and the right of access to information in the future. The revision must not lead to more obstacles, for example, to accessing broadcasted programs which used phonograms.”

*Dr. Günter Heuberger
President, Association of Swiss Private Radios (VSP)*

“The legal exceptions to royalty payments must not be changed – they have proved themselves. The fact that my text can be used for personal use in the digital age and that I receive a royalty payment is more acceptable to me than a prohibition which a clever hacker can circumvent anyway and I receive nothing.”

*Hugo Loetscher
Writer*

“Copy-protected works cannot be preserved and made accessible in a meaningful way in the long run. Copy protection will make it impossible to digitally archive. Putting in copy barriers means wilfully condemning a work to obscurity.”

*Andreas Kellerhals
Director, Swiss National Archives*

CIRCUMVENTING TECHNOLOGICAL MEASURES

If someone is using a work in a legally permissible way (for example, educational purposes), should they be allowed to circumvent technological measures?

“Copy protection measures should not restrict consumer rights to personal use. Otherwise, there’s a danger that every act of copying could be forbidden – whether it’s a teenager copying music or a student copying a technical article. The motto ‘free flow of information’ has to be for everyone.”

*Fabiola Monigatti
Business manager, Consumer Forum (kf)*

“Protecting technological measures against piracy has to be the rule; exceptions should be made only for a limited number of special cases. Here’s a checklist: 1) respect for the usual author rights; 2) no excessive restrictions of rights; 3) piracy prevention stays in the foreground.”

Dr. Peter Studer

Journalist and lecturer, impressum – Swiss Journalists

“Private copies from pirated copies is like money laundering! I don’t understand why the Institute of Intellectual Property won’t create the conditions for only one legal private copy to be made from a legal original.”

Victor Waldburger

T.B.A. Music Publishing AG

“The entertainment and media industry can’t be blamed for wanting to protect their content with technological measures like copy protection and to have recourse to legal remedies. But it can’t go so far that CD’s and DVD’s for private use can’t be copied anymore. Artists are remunerated for such uses today anyway.”

Mathias Gnädinger

Actor

“DRM treats its users as attackers. Moreover, keep in mind: DRM systems are at odds with the copyright law. Every DRM system unilaterally reshapes the copyright bargain in favor of rights holders and to the detriment of the public. There is no DRM system that attempts to reflect copyright law.”

Cory Doctorow

European Affairs Coordinator, Electronic Frontier Foundation (eff.org)

“The consumer is able to legally download his favourite song for an attractive price without buying the whole CD. In addition, the user may generate a limited number of copies of the song track.”

Roger Brustio

Country Manager for Switzerland, Apple Computer AG

DIGITAL RIGHTS MANAGEMENT AND PRICES

Does the consumer pay more than once for the same thing with DRM?

Does the coexistence of individual and collective royalty collection lead to multiple payments?

“The Swiss Chamber of Commerce is demanding greater restraint and less bureaucracy in collecting copyright royalties. Unfortunately, the number of copyright remunerations is still increasing and the revision of the copyright law will reinforce this tendency towards multiple payments, which the Swiss Chamber of Commerce categorically opposes.”

Dr. Pierre Triponez

*National Council member and Director,
Swiss Chamber of Commerce*

“Digital technology is creating a huge potential for possible uses and, with that, also consequences for remuneration. The public administration is dependent on the copyright law to regulate royalties so they are collected only for actual use. In addition, multiple payments for the same use should be avoided.”

*Dr. Marcel Guignard
Mayor of Aarau and President, Swiss Union of Cities*

“DRM may be good and just. But nothing assures that artists will be able to participate in this income. And private copying will increase in spite of, or because of, DRM. When collective royalties are collected and distributed to us, it isn’t a multiple payment; it’s justified remuneration.”

*George Gruntz
Musician*

THE RIGHT TO ACCESS AND PROTECTION OF RIGHTS HOLDERS

Does the right to have access to information have priority over copyright?

“The constitutional right for education, science, research and culture to refer to our intellectual legacy without restrictions must be preserved, even in the age of information technology with content which is protected by technological measures.”

*Prof. Dr. Jean-Marc Rapp
Chancellor, University of Lausanne*

“As artists, we want all people to have access to our works and performances at reasonable prices. The various competing interests involved in copyrights need to be fairly balanced. Constitutional rights shouldn’t be abused to force access or to promote free access.”

Dj BoBo

“The free flow of information is vital to publishers and journalists. Preparing quality information, however, costs money and journalistic works need to be protected. Free access to information doesn’t mean free access to journalistic works.”

*Norbert Neiningger
Publisher and Editor-in-Chief,
Schaffhauser Nachrichten*

ARCHIVES

Do copyrights need a new exception to keep archived works publicly available? Which archives should be included in the exception?

“Works are archived because they are evidence of the past and, as such, are an indispensable and integral element of a collective memory which needs to be preserved, reflected on, and passed on. Validating claims to royalties for such preserved traces of the past contradicts the basic right to information which is guaranteed.”

*Dr. Markus Zürcher
Secretary General, Swiss Academy of Humanities and
Social Sciences (SAGW)*

“SRG SSR has archival productions which can be made available through on-demand services to the public. Innumerable legal obstacles, however, make it impossible for them to be used. The presence of culturally and socially valuable Swiss content has to be promoted in the new media: The revision must ease access through a practical, legal solution.”

*Dr. Theo Mäusli
President, Network, Documentation and Archive,
SRG SSR idée suisse*



Of course
I'm the artist!
Look how
I sign!

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OTHER ISSUES

The revision of the copyright law raises questions primarily in regards to the ratification of the WIPO Internet Treaties, although other issues are being discussed as well.

Public lending right

The copyright act contains a provision regarding the rental of works. Whoever rents out books, CD's, DVD's, etc. must pay author royalties. However, under the current law, loans through institutions such as public libraries are exempt from paying royalties. This is not the case under the new European law where the public lending right has already been implemented. Should Switzerland follow suit?

Those in favor of the public lending right see it as a fair balance between the interests of the rights holders, who want to be appropriately remunerated for the use of their work, and the interest of the public to information. Books which are borrowed are not purchased, and that is exactly why authors of fiction and poetry are at a greater disadvantage than other authors. They are not remunerated for their works.

Those who are against the public lending right see further financial burden for libraries and greater impediments to the dissemination of knowledge. They feel that contrary to hurting the author, the

library's royalty-free loans are free advertising for the author's work. They also argue that at university libraries, the works which are loaned out tend to be by authors who have already been paid by the university for their research activity. Additional remuneration would be unjustified.

Right to resale

The right to resale is meant to assure painters, sculptors and graphic artists a portion of the economic profit whenever their works are resold on the fine arts market. The EU implemented this right in the year 2001. In Switzerland, this right is heavily contested.

Artist lobby groups are demanding this right. They argue that fine artists are disadvantaged in relation to other authors because they are allowed to profit only once from the sale of their original work under today's law. In addition, they are in a worse position than EU artists.

Investors, art dealers, and those otherwise involved, as well as some artists, object to the artists resale right. The Swiss art market is economically important and holds a leading position internationally. Implementing a right to resale would endanger its position and generally damage Switzerland's economic standing.

Copy machine levy

Up until now royalties have been owed only for blank recording media (e.g., CD's and DVD's) and for photocopying in schools, libraries and businesses. The copy machine levy would mean that royalties would have to be paid for machines which can be used for reproduction, such as photocopiers, CD burners, or PC's.

Artists and performers would welcome implementation of a (combined) copy machine levy in the hopes of being adequately remunerated for the digital use of their works as well. They point out

that the way the work is used would be considered in the calculation of the remuneration and multiple royalties would not be a danger.

Producers of such equipment are against creating a copy machine levy because it would make the machines more expensive and would not be specific to the reason for the levy.

Users and consumers are afraid of multiple royalty payments because remuneration would be compulsory for both blank recording media and the recording machines. In addition, they wouldn't take the storage of personal, non-copyrighted content into consideration.

Rights to works made for hire

According to the current law, natural persons who create or perform a work are entitled to copyrights or related rights. Employers or commissioning bodies must contractually cede these rights.

Broadcasters and industry find this regulation inappropriate because it does not take into account the party which takes the financial risk for the production of a work. In addition, the small and medium-sized enterprises which are often the ones involved do not have the necessary juridical knowledge to regulate the issue contractually. They are demanding the so-called rights to works made for hire, which automatically creates rights for employers, commissioning bodies and producers.

Authors and performing artists view this right as abandoning contractual freedom unnecessarily and as an encroachment on the standard collective contract used by the cultural and entertainment

branches. In addition, it is a disadvantage to weaker employees and contractors, especially freelance artists and authors, and leads to disentitlement of the authors and performers.

Recording for purposes of time shifting

Broadcasters do not need authorization for using phonograms and videograms under related rights in today's law; they simply pay royalties. If the phonograms and videograms are not directly used for a broadcast – as commonly occurs today – but stored on a server, according to the federal court the broadcaster is required to get permission from the performers and audio producers to store the work in addition to paying the royalty for broadcasting. However, the federal court views this as unsatisfactory. It has therefore requested parliament to include a regulation setting a single tariff with the responsible collecting society for the right to record and broadcast work at a later time. Music authors and publishers are critical of such a solution. The phonogram producers reject it because in their opinion it is a disentitlement.

Temporary (ephemeral) copies

In transferring digital content, many copies are technically necessary (such as in caching) but represent no financial significance. Access providers are exposed to a considerable risk of being charged with copyright infringement through this because it is practically impossible to prevent unauthorized reproduction. An exception for such copies, based on the EU solution, would limit provider responsibility in the interest of the efficient use of modern communication systems.

Open Source Software

Open source software is distributed under a license granting recipients access to the source code and the right to modify, copy, and distribute the software. This differs from traditional software licensing agreements where copyright is used to restrict the rights of users. Instead, users of open source software have the right to make changes. However, authors keep their copyright precisely to defend the rights granted to users and thereby create new business opportunities.

Your generous offers
will be particularly
appreciated by the
artists with us today!



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A SHORT GLOSSARY OF TERMS

Author

An author is the natural person who has created a work. He/she has an absolute right to the work and to compensation for certain uses of it. The economic right to a work can be bequeathed or transferred but not the moral right. The person or business to whom a copyright is transferred becomes the new rights holder, but not the author. The author can only be the natural person who participated in the creation of the work.

Collecting society

The collecting society is a union of authors and owners of copyrights and related rights. The main purpose is the collective management of these rights and the collection and disbursement of royalties. There are five collecting societies in Switzerland: ProLitteris, SSA, SUISA, SUISSIMAGE and SWISSPERFORM.

Collective management

This refers to the management of copyrights for a group of rights holders, and the collection and distribution of the royalties collected by the societies.

Copyright exceptions

Exceptions to copyright protection are made in order to protect important, third-party interests. For example, protecting uses for the private sphere, uses assisting the handicapped, or certain uses in schools and businesses.

Digital Rights Management

Digital Rights Management (DRM) makes it possible to electronically manage and sell access to digital content and the rights for its use.

Digitalization

Digitalization is transforming analog information such as text, picture and sound into an electronic form which can be saved and edited in any way and without loss of quality.

Intellectual property

The legal protection of industrial property (which includes patents, trademarks, designs and plant varieties) and copyrights and related rights is regulated under the laws concerning intellectual property. These rights basically create an exclusive right to intellectual products, which is why they are referred to as intellectual property.

Interest groups or lobbies

Copyright law distinguishes only between rights holders and users. In the actual public debate on copyrights, however, the interest groups are more varied:

- * *Artists and performers – create works and offer them to the public*
- * *Producers – produce phonograms, videograms, broadcasts and films*
- * *Users and providers – use and further circulate content commercially*
- * *Consumers*

License

A rights holder can permit another person or business to use his work or performance through a contract. Such contracts are called licenses.

Private copies

Copyright allows making private copies; for example, copying a work for personal use on another player or for a close circle of friends. Software falls under other regulations and private copies are not allowed.

Public domain

Public domain refers to content, such as books, music or software, which is freely available. It is not protected by copyright because none ever existed (i.e., the content is not considered a work), because the term of protection has expired (e.g., Goethe's works), or because it is exempt under copyright (e.g., legislative texts).

Related rights

Related rights, also known as performing or neighboring rights, are the rights guaranteed to performing artists, phonogram and videogram producers and broadcasters. Because they are close to copyrights, they are regulated under the same law.

Technological measures

Technological measures refers to specialized hardware and/or software technology designed to prevent users from gaining unauthorized access to digital content or making unauthorized copies of content. Copy protection on audio CD's, regional codes on DVD's and password protection for on-line music store access are examples.

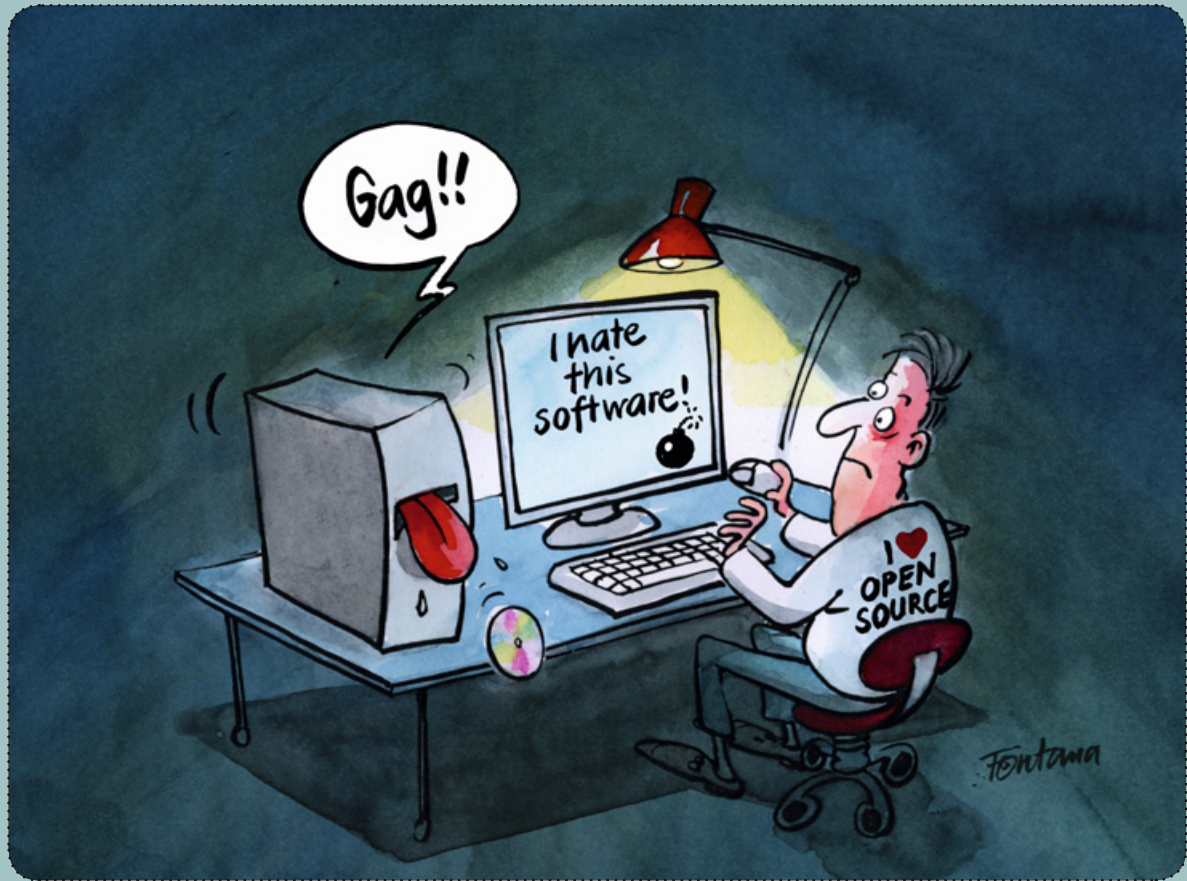
WIPO

The World Intellectual Property Organization, commonly known as WIPO, is a subsidiary organization of the UN. Its headquarters are in Geneva. Its primary task is to promote the protection of intellectual property worldwide through international agreements and treaties and to supervise the UN member states which have signed the intellectual property agreements. In copyrights, WIPO administers various treaties including the revised Bern Convention, the Rome Convention and the WIPO Internet Treaties.

Work

In order for a product of intellectual work to qualify for protection under copyright, certain legally defined conditions must be met. Protection only applies to intellectual creations of literature or art which possess an individual and unique character and, thusly, the quality of a work. Software is also protected under copyright, although under other conditions.





EXTERNAL LINKS

Public forum for copyright project

www.urheberrecht.ch

**Swiss Federal Institute of Intellectual
Property (IGE)**

www.ige.ch

**World Intellectual Property Organization
(WIPO)**

www.wipo.int

**Organisation for Economic Co-operation
and Development (OECD)**

www.oecd.org

**European Union Gateway to the
Information Society**

www.europa.eu.int

→ **Information Society**

About this brochure

The revision of the copyright law is complex and involves many issues. At the initiative of the Federal Institute of Intellectual Property, representatives of the concerned interest groups met to discuss the goals, consequences, and challenges of the revision. This brochure is the result of the debate. It includes not only the most important facts and terms used in copyright, but also the opinions of those involved in their own words.

www.swiss-copyright.ch
for more information