

**COUNTRY NAME: SWITZERLAND**

**PART A: COPYRIGHT**

**A1 National Law**

The basis for Swiss copyright law is the Federal Act on Copyright and Neighbouring Rights (Federal Copyright Act of October 9, 1992, as amended by the Act of 16 December 1994, the "Copyright Act") and, promulgated by the Swiss Federal Council on the basis of the Copyright Act, the ordinance on Copyright and Neighbouring Rights of 26 April 1993 (the "Ordinance").

Switzerland is a party to the Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPs"), part of the GATT-Agreement, effective since 1 July 1995, the Berne Convention for the Protection of Works of Literature and Art, revised in Paris on 24 July 1971 ("RBC"), the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, Rome, 26 October 1961, the Convention for the Protection of Producers of Phonograms against Unauthorized Duplications of their Phonograms, Geneva, 29 October 1971, the Convention related to the Distribution of Program-Carrying Signals Transmitted by Satellite, Brussels 21 May 1974, the Convention establishing the World Intellectual Property Organization, Stockholm 1968, and the Universal Copyright Convention ("UCC") of 6 September 1952, revised in Paris on 24 July 1971.<sup>1</sup>

---

<sup>1</sup> But notably not to the WIPO Copyright Treaty ("WCT"), Geneva, 20 December 1996, and to the WIPO Performances and Phonograms Treaty ("WPPT"), Geneva, 20 December 1996; see below D4.

*Mark Schweizer / Reinhard Oertli, in: MacDonald/ Suthersanen/ Garrigues (eds.),  
Copyright: World Law and Practice, London 2004*

The Copyright Act reflects the state of international copyright discussion in the early nineties, with two notable exceptions: The authors do not have an exclusive right regarding the public lending of their works and no right to resale remuneration (*droit de suite*).<sup>2</sup>

Several bilateral treaties are still legally in force, but have lost most of their importance because of the growing number of countries that belong to the UCC or the Berne Convention. The Copyright Act also not stipulate reciprocity as a condition for protection.<sup>3</sup>

## **A2 Protected Subject Matter**

### *Literary and artistic works of an individual character*

Literary and artistic creations of the mind that possess an individual character are protected by the Copyright Act (Art. 2 para 1).<sup>4</sup>

As a creation of the mind, the work has to be the result of intentional human activity, the expression of a thought process (decision of the Federal Supreme Court, sic! 5/2004, 2004, p. 398, Bob Marley).

The terms “literary” and “artistic” are construed so broadly that they do not define the object of protection any more than “writing” and “form” (as opposed to ideas, methods, inventions of a commercial, technical or scientific nature, and anything that is determined by pure logic or the laws of mathematics or physics, or as objects of thought and reflection not released to the outside world in any perceivable form).

---

<sup>2</sup> See below A.12.1.

<sup>3</sup> Even the Resolution of the Swiss Federal Council regarding reciprocity between Switzerland and the US regarding Copyright in Works of Literature and Art of 26 September 1924, although still legally in force, has lost its importance since the US joined the Berne Convention, effective as from 1 March 1989.

<sup>4</sup> Reference to Articles without other indication are references to Articles of the Copyright Act.

As regards individual character, the Copyright Act and Swiss jurisprudence and precedents have cut short the epic discussions on the relationship between the personality of the author and the character of his or her work, which always leads to some form of personal correlation between work and author, looks towards the marks that the personality of the author has left on the work, and makes the work an emanation of the author's personality. Rather, Swiss Law looks for originality in the work itself, which is interpreted as statistical uniqueness (see MAX KUMMER, *Das urheberrechtlich schützbares Werk*, Berne 1968, p. 38 and 80), or rather statistical probability that the work is unique, which cannot be overthrown by evidence that another author has created independently an identical work, and leaves room for forms of artistic expression that rely on ready-mades, technical apparatus, computer programs, happenstance and third-party contribution.

Swiss Copyright Law does not look to artistic purpose or value, appeal to the public, saleability or similar value criteria, so that even worthless creations, works of "naïve art", "art brut" or similar forms are protected; provided only that they are the result of a thought process with individual character.

#### *Categories of works*

The Copyright Act does not contain an exhaustive list of categories into which protected works have to fall, but lists by way of example a) literary, scientific and other works that make use of language, b) works of music and other acoustic works, c) painting, sculpture, graphic works and other works of fine art, d) works with scientific or technical content, such as drawings, plans, maps or three-dimensional representations, e) works of architecture, f) works of applied art, g) photography, cinematographic and other visual or audiovisual works, h) works of dance or mime. Computer programs shall also be deemed works (Art. 2 para 1 and 2).

Protectable are also drafts, titles and parts of works (Art. 2 para 4)<sup>5</sup>, derivative works of all kinds including translations, audiovisual and other adaptations and/or transla-

---

<sup>5</sup> The notoriety of a title does not make it copyrightable, so copyright protection was denied for Mickey Mouse, Decision of the Federal Supreme Court 77 II 377.

tions into other media etc. (Art. 3), collections (Art. 4)<sup>6</sup>, always provided that they are copyrightable works in their own right. The same is true for databases, which are copyrightable only if they possess a degree of individuality sufficient to qualify them as compilations in the sense of Art. 4, see *infra*, D7.

Swiss courts have granted protection to a building (decisions of the Federal Supreme Court 58 II 296; 56 II 417; Cantonal Court of St. Gall, 16 December 1988 and 5 July 1989, RSJ 1991 (87) p. 138, later reversed by a decision of the Federal Supreme Court 117 II 468, see also Appeal Court Ticino, 11 March 2003, sic! 1/2004, p. 20), a catalogue shaped like a silhouette (decision of the Federal Supreme Court 57 I 66), clothing designs (decision of the Federal Supreme Court 60 II 68), a chair designed by Le Corbusier (decision of the Federal Supreme Court 113 II 190, 194 (Le Corbusier), *cf.* also Cantonal Court of the Canton of St. Gall sic! 2001 p. 491; Superior Court of the Canton of Zurich, 22 June 2000, sic! 2001, p. 504), a title of a newspaper (decision of the Federal Supreme Court 64 II 111)<sup>7</sup>, the character of Mickey Mouse (Decision of the Federal Supreme Court 77 II 377), or of a senile professor of a well known Basel family ("Professor Cekadete", decision of the Superior Court of the Canton of Zurich, 18 March 1949, RSJ 45/1949, p. 204 s.)<sup>8</sup>, an article on the psychological effects of colours (decision of the Federal Supreme Court 101 II 105 and of 2 March 1993, JdT 1996 I p. 242, sic!), the transcriptions of an interview (decision of the Federal Supreme Court 9 Oct. 1992, RSPI 1994, p. 64), the writings of a medium dictated by a ghost (with the medium, not the ghost, being the author, decision of the Federal Supreme Court 116 II 354), the Oscarstatuette (Zug Cantonal Court 30 Aug. 1991, RSPI 1992; p. 53), automobile guides (Geneva 26 June 1978, RSPIDA 1978, p. 108, SJ 1977 p.

---

<sup>6</sup> The protection of the works included in the collection remains unaffected.

<sup>7</sup> With a series of decisions rejecting copyright protection, decisions of the Federal Supreme Court 17 753; 26 II 72; 64 II 109.

<sup>8</sup> The defence of parody was rejected, which would have amounted to parody of a parody, Protection was denied for the characters of Sherlock Holmes and Doctor Watson, Decision of the Federal Supreme Court 85 II 120, see also 125 III 328, more restrictive Roland von Büren, "Der Werkbegriff" (The Notion of Work), in Roland von Büren and Lucas David (eds.), *Urheberrecht und verwandte Schutzrechte*, SIWR II/I, Basle 1995, p. 53, 84.

*Mark Schweizer / Reinhard Oertli, in: MacDonald/ Suthersanen/ Garrigues (eds.),  
Copyright: World Law and Practice, London 2004*

433) and catalogues (even of items which are in the public domain, Commercial Court of the Canton of Zurich, 12 April 1926, ZR 1926/25, no. 239).

### **A3 Excluded Subject Matter**

Excluded from copyright protection (Art. 5) are:

- a) laws, ordinances, international treaties and other official documents, including collective employment agreements which apply to an entire industry by governmental act, but not commentaries, explanatory notes or privately drafted contracts or standards.
- b) means of payment (bills and coins and other legal tender, but not "Goldvreneli", checks issued by banks and private organizations, or non-Swiss-currency). It is controversial whether this exception applies also to postage stamps.
- c) decisions, minutes and reports of public authorities and administrations (but not arbitration awards or expert opinions, nor legal briefs and pleadings submitted by parties). There is no general exception for works issued by public authorities, so that geographical maps, school books, information material and advertisements issued by public authorities enjoy copyright protection.
- d) patent specifications and published patent applications.

Compilations and translations of excluded works are not protected insofar as the compilation or translation has been made by a public authority or mandated by law. Private compilations and translations are not subject to the exception.

### **A4 Conditions of Protection**

#### *A4.1 Primary Conditions*

Copyright protection does not depend on any formal requirements such as filing, pub-

lication (with or without a notice), embodiment or fixation in a tangible medium.

The only conditions are of a substantive nature, *i.e.*, in order to be protected by the Copyright Act, the work has to be a literary and artistic creation of the mind that possesses an individual character (Art. 2 para 1)<sup>9</sup>.

The requirement of individuality is interpreted differently depending on the leeway the author enjoys; where the circumstances leave little room for artistic expression, as in architecture and photography, the required degree of individuality is lower than with other types of work.<sup>10</sup> On the other hand, Swiss courts seem to require a high level of individuality for works of applied art, for which protection under the new Swiss Design Law<sup>11</sup> would be available, albeit with some formal requirements. This seems to be particularly the case where design protection has been sought, but has expired.

With regard to photography, it is for example unanimously agreed that the use of a technical apparatus (the camera) does not preclude copyrightability (see explicitly Art. 2 para 2.g), but that protectability depends on the individual character of the photo, as determined by choice of subject, framing, light design, choice of lens, filters and type of film, sharpness, exposure, treatment of the exposed film, etc. Where none of these factors, except the first, militate for protection, a protected work may still be found where the object or scene chosen for the picture is of an individual character, expressive and interesting (decision of the Swiss Federal Supreme Court regarding a picture of Bob Marley in concert, sic! 5/2004 p. 395 *ss.*, 399).<sup>12</sup>

---

<sup>9</sup> See above A2.

<sup>10</sup> On the other hand, precedents speak for a presumption that the threshold is higher where forms of protection other than copyright are available, e.g., for titles of newspapers and periodicals, and works of applied art.

<sup>11</sup> SR 232.12, in force since 1 July 2002.

<sup>12</sup> The decision did not address the relationship between copyright in the picture and copyright of Bob Marley's heirs in his stage performance, which would make the picture a derivative work.

#### *A4.2 Fixation*

A protected work has to have taken some perceivable presence at least at one moment in time, and such presence can be evidenced in whatever form (witnesses, recordings). The very character of copyright protection as protection of form rather than of ideas and concepts requires that the work must have taken form rather than stayed within the mind of its author. Fixation on a physical medium (and even less publication) is no condition for protection.

### **A5 Authorship & Ownership**

#### *A5.1 Authors*

The Copyright Act protects works in favour of their authors, artistic performances in favour of performers, and phonograms and videograms (neighbouring rights, see Part B below) in favour of their producers (Art. 1). Copyright in a protected work originally vests in the natural person that creates the work (Art. 6)<sup>13</sup>.

It is assumed that the person identified as author on copies of the work is the author until otherwise proven (Art. 8 para 1). With regard to works of anonymous or pseudonymous works, the editor or the publisher may exercise copyright *in lieu* of the author (Art. 8 para 2).

#### *A5.2 Employee Works*

Swiss law does not provide for a standard solution regarding works created by employee authors<sup>14</sup>. An exception applies to computer programs that are created by employee developers under an employment relationship in the exercise of their service activities or in the performance of contractual duties, where the employer is entitled to exercise the exclusive right of use (Art. 17). Exactly which rights are not transferable

---

<sup>13</sup> This is true irrespective of nationality, age or state of mind of the author, so that also inmates of mental health clinics acquire copyright in the works of “*art brut*” they create..

<sup>14</sup> Cf. Art. 323 Code of Obligations regarding patents and designs created by employees on the job, the rights in which are assigned to the employer.

to the employer or to what degree the employment contract may provide that the employee refrains from exercising them is subject to some controversy (arguably the right to be recognized as author (Art. 9 para 1) remains inalienably with the employee, but not the publication right (Art. 9 para 2) or the right to prevent changes to the work (Art. 11 para 2) or the creation of derivative works (Art. 3)).

#### *A5.3 Commissioned Works*

Swiss Copyright Law does not know the Anglo-American concept of works-made-for-hire. The only situation where a similar rule applies is the situation where works are created subject to the editorial discretion of a publisher (Art. 393 para 2 Code of Obligations). In such a situation the editor, not the individual contributing author, obtains copyright in the resulting work. The provision is rarely applied.

Swiss doctrine and court precedents show no inclination to extend the concept laid down in Art. 17 Copyright Act, or Art. 332 and 393 Code of Obligations beyond their narrow statutory scope. Under both employment and agency relationships, the aim of the contract determines the scope and extent of the rights transferred ("*Zweckübertragungstheorie*"). New uses that were not considered when the contract was entered into and thus were either not included or excluded by the very aim of the contract, belong to the author. So Swiss doctrine and precedents stay away from both the French dualist theory which breaks down copyright into economic rights and moral rights, and German monist theory that does not allow for transfer of copyright, but only for license-like rights of use (but *cf.* Art. 17).

#### *A5.4 Others*

##### *Works of joint authors*

Two or more persons who have contributed as authors to the creation of a work become joint holders of the copyright in the work. Use depends on the consent of all joint authors, not to be withheld contrary to good faith, but each of the joint authors may individually enforce the rights against infringers. Where individual contributions can be separated, they may be used by each of the co-authors individually, provided



such individual use does not impair the exploitation of the joint work (Art. 7).<sup>15</sup>

## **A6 Duration of Protection**

### *A6.1 Economic Rights*

Protection starts with the creation of the work (Art. 29 para 1) and ends on the 31 December (Art. 32) following the 70<sup>th</sup> anniversary of the death of the author (Art. 29 para 1 lit a). Software programs are protected until the 31 December that follows the 50<sup>th</sup> anniversary of the death of the developer (Art. 29 para 1 lit b). In case of joint authorship, death of the last surviving author is decisive (Art. 30 para 1). Protection in works by anonymous authors expires on the 31 December after the 70<sup>th</sup> anniversary of publication (Art. 31 para 1).

### *A6.2 Moral Rights*

Moral Rights enjoy the same duration as economic rights. According to the majority of legal writers and court decisions in Switzerland, heirs may assert protection of a deceased author's interests only insofar as their own personality rights are affected by the violation of the deceased's moral rights.

## **A7 Assignments & Transfers**

### *A7.1 Assignment rules and procedures*

Assignment of copyright by contract, change of marital property regime or inheritance is possible without any formal requirements. Assignment may take place in writing, orally, implicitly or explicitly, even by implication. There remains however a "kernel" of moral rights that is inalienable except, within limitations, by inheritance or marital property regime. Assignment may also take place by way of seizure and forced sale in a bankruptcy or similar procedure, but with regard to the right of use (Art. 10 para 2 and 3) and alteration and creation of derivative works (Art. 11) only for published works (Art. 18).

---

<sup>15</sup> *E.g.*, the composer of film music may use the tunes separately, but presumably not for a competing movie.

### *A7.2 Partial Assignment*

Partial Assignment is possible, but assignment of fractural rights broken down according to geography or person of the licensee in view of partitioning markets may raise antitrust concerns. Partial assignment (“sale”) of copyright is often preferred over licensing for tax reasons.

### *A7.3 Future Assignment*

Assignment of copyrights in works not yet created is possible; provided that the scope of copyrights assigned is demarcated in some way allowing an anticipation of what is being assigned at least in principle, and may not go as far as cutting into the protected inalienable personality rights of the author (Art. 27 Civil Code).<sup>16</sup> Although there is no statutory provision or precedent in that regard, it has to be concluded from Art. 1 that the copyrights arise in the person of the author-assignor upon creation even when they have been assigned previously.

### *A7.4 Special Provisions*

The theory of the aim of the contract (*Zweckübertragungstheorie*) continues to dominate doctrinal discussion and precedence regarding scope and extent of assignment of copyrights caused, although its utility has recently been questioned.

## **A8 Licensing**

### *A8.1 License rules and procedures*

Swiss Copyright Law does not contain any rules on copyright licensing. License contracts are governed only by the general provisions of the Swiss Code of Obligations. There are no form requirements. Licensing may take place in writing, orally, implicitly or explicitly, even by implication. There remains the "kernel" of inalienable moral rights, that can also not be licensed out.

---

<sup>16</sup> The Federal Supreme Court in decision 104 II 116 has declared invalid a contract signed by a would-be pop singer, that would have given her business manager full legal, economic and artistic control over her carrier.

### *A8.2 Partial Licenses*

Partial Licenses are possible within the limitations of antitrust law (cf. A.7.2).

### *A8.3 Future Licenses*

Future Licenses are possible within the limitations of demarcation and personality rights (cf. A.7.3).

### *A8.3 Assignment of Licenses*

Both the position of licensor and of licensee can be subject to an assignment. Assignment for either position has to be in writing, and requires the consent of the other contract party if the entire contract is being assigned, or if the rights assigned have been granted in consideration of the person of the assignee.

### *A8.5 Special Provisions*

Licenses can be exclusive licenses, sole licenses (with the rights of the licensor remaining unrestricted) or non-exclusive licenses.

## **A9 Compulsory Licensing**

Swiss Copyright Law knows four types of limitations that can be construed as forms of compulsory licensing:

1. Limitations to the right to exclusive use of the author (see infra A12): Third parties have the right to use the copyrighted work without permission and without obligation to pay remuneration, in the following circumstances: private use<sup>17</sup> (Art. 19 para 1 lit a, without copying by other persons), obtaining information on interfaces (Art. 21 para 1), renting out a copy of a copyrighted work if done without charge (Art. 22 para 2), and re-broadcasting works over

---

<sup>17</sup> Private use can take place within a group of closely related physical persons, but not employees of an enterprise, members of a club, political party, trade union or church. Whether an entry fee is being charged or not is irrelevant.

technical installations that are intended to serve a small number of receivers<sup>18</sup>  
(Art. 22 para 2)<sup>19</sup>.

2. Statutory licenses: Third parties have the right to use the copyrighted work without permission of the copyright holder, but are obliged to pay remuneration, in the following circumstances: use of a work by teacher or students for teaching in class (Art. 19 para 1 lit b), reproduction of copies of a work in enterprises, public administrations, institutions, commissions or similar bodies for internal information and documentation purposes (Art. 19 para 1 lit c), having copies made by other parties (including libraries) destined for private use (Art. 19 para 2 in conjunction with Art. 20 para 2), importation of blank cassettes and other phonogram and videogram carriers, which are presumed *ex lege* to be put to such uses (Art. 20 para 3), or renting out a copy of a copyrighted work if a remuneration is being charged for making the copy available (Art. 13, with the limitations set forth therein).
3. Compulsory or mandatory licenses: If a musical work has been recorded and has been offered for sale, established Swiss manufacturers of phonograms may request an authorization to do the same against remuneration (Art. 23).
4. Mandatory collective exercise of rights: The right to make broadcast works perceivable simultaneously and unaltered or to rebroadcast them within the framework of the rebroadcast of a transmitted program may only be asserted through the approved collecting societies (Art. 22 para 1).

---

<sup>18</sup> Although Art. 22 para 2 refers to a small number of recipients, it cites as examples a multi-family home and a closed group of houses. According to the Federal Supreme Court, the geographic area covered, not the number of individual recipients is decisive (110 II 67 Altorf), so that a free re-transmission was found regarding the Hotel Noga Hilton in Geneva (119 II 62 CNN). A collective antenna with strictly private use falls under Art. 19 para 1 lit a or b. See also below D2. The rule does not apply to subscription television programs or programs that can otherwise not be received in Switzerland (Art. 22 para 3).

<sup>19</sup> The Swiss Federal Counsel referred to this right, when it was introduced, as a royalty free statutory license.

There is no compulsory licensing provision that would require approved collecting societies to grant licenses to prospective users; the approved collecting societies are under an obligation to administer and exploit the rights in their field of activity and to treat authors in accordance with the principle of equal treatment (Art. 44 and 45 para 2), so that in practice they may refuse to license to prospective users only for good reasons.

## **A10 Economic Rights**

### *A10.1 Types of Economic Rights*

The author has the exclusive right to manufacture copies of the work, to offer copies of the work for sale or other forms of distribution to deliver or perform his or her work, to broadcast the work, to re-broadcast broadcasted works by cable or other means of conduction to make broadcast and re-broadcast perceivable (Art. 10). The author also has the exclusive right to decide about alterations of the work and about the use of a work to create a derivative work (Art. 11 para 1) or to let it be included in a collection (Art. 4 para 2, except in catalogues of public collections, Art. 26).

In cases of compulsory licenses of type b) (statutory licenses), c) (compulsory licenses), and d) (mandatory collective exploitation), the economic rights of the author are restricted to collecting the remuneration.

Under Swiss copyright law, the authors do not have an exclusive right regarding the public lending of their works<sup>20</sup>, except with regard to computer programs (Art. 10 para 3).

The Copyright Act also does not provide for a resale remuneration right (*droit de suite*).<sup>21</sup>

---

<sup>20</sup> Incompatibility with European Directive 92/100 of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of Intellectual Property, OJ No.1346/61.

<sup>21</sup> And is insofar incompatible with EU Directive 2001/84/EC of 27 September 2001 on the resale right for the benefit of the author of an original work, OJ No.1272/44; cf. also Berne Convention, Art. 14.

#### *A10.2 Secondary/Contributory Infringement*

Swiss copyright law does not contain any specific provisions against making available copies of copyrighted works or devices used by other parties for the purpose of violating copyrights. The only provision in that regard is the obligation of manufacturers or importers of blank cassettes or other phonogram or videogram carriers to pay a remuneration to the approved collecting societies in accordance with a uniform tariff (Art. 20 para 3). Swiss Copyright law does also not contain a specific prohibition against circumvention of digital rights management systems (see *infra*, D4).

Acts of secondary or contributory infringement are dealt with on the basis with of aiding and abetting, instigating or contributory participation of ordinary tort law. Claims for damages and compensation or moral damage for violation of copyright law require a demonstration of negligence or wrongful intent by the perpetrator so that acts of secondary or contributory infringement give rise to claims for violation of copyright if the infringer's knowledge that the relevant act has been committed with regard to an illicit use of a copyrighted work can be proven.

#### **A11 Moral Rights**

Swiss Copyright Law does not clearly distinguish between moral and economic rights. All rights that could be characterized as moral rights also have an economic aspect. The main moral right of the author is to be recognized as author, to decide whether, when, how and under what name his own work may be published (Art. 9). The author may also prevent alterations to a work or the creation of a derivative work even where he has authorized alterations if such alteration or derivative work would tarnish his personality (Art. 11 para 2). Even after he or she has sold the product, the author has the right to gain access to it; provided that access is necessary for the author to exercise his copyrights and does jeopardize justified interests of the proprietor. The author may also require that a copy of the work be lent to him or her for exhibition if he demonstrate sufficient interest (Art. 14).

The proprietor of an original work of which no further copies exist may not destroy such work without first offering to return it to the author against payment of its mate-

rial value, at least if the owner has no reason to assume that the author has no longer any interest in the copy of the work. Where returning the copy is not possible, the proprietor must allow the author to reproduce it in an appropriate manner (Art. 15 paras 1 and 2), With regard to architecture, the right is limited to a photograph and to possession of the plans (Art. 15 para 3; *cf.* also Art. 12 para 3).

### **A12 Permitted Acts**

What is dealt with in Anglo-American law as fair dealing or fair use is under Swiss Copyright Law the subject of a series of limitations to copyright. The lawful owner of a copy of a copyrighted work may resell or otherwise re-distribute it (Art. 12 para 1 and 2) and rent it out (except computer programs, Art. 13, see above A.9). The most important limitations relate to private, educational and enterprise uses.

Personal use means:

- a. any use of a work in the personal sphere or within a circle of persons closely connected to each other, such as relations or friends (“private use”);
- b. any use of a work by a teacher for teaching in class (“educational use”);
- c. the reproduction of copies of a work in enterprises, public administrations, institutes, commissions and similar bodies for internal information or documentation (“internal use”).

Persons entitled to make copies of a work for use for private, educational or internal purposes may also have them manufactured by other persons, e.g. copy shops. However, the copy shop may only produce the copy upon specific request of the person entitled to personal use and may not keep a stock of copies.

The following is not be permissible outside the private circle:

- the complete or extensive reproduction of copies obtainable commercially;
- the recording of the delivery, performance or presentation of a work on pho-

nograms, videograms or data carriers.

There is considerable controversy as to the extent to which companies are allowed to reproduce newspapers and magazines for internal information and documentation. Firstly, the reproduction of an entire article from a newspaper is not a reproduction of a complete copy, it is the newspaper/magazine as a whole that is considered the complete copy of the work (decision by Berne Court in sic! 2001, 620; Basle Court in sic! 2003, 222). For some courts, a newspaper is not “commercially available” after the day of its issue, since most newsstands only stock the current edition (Berne Court in sic! 2001, 620). The percentage of a work that constitutes “extensive” reproduction is also controversial; some courts consider only the reproduction of more than 90% of the editorial content of the newspaper as “extensive” reproduction (Berne Court, in sic! 2001, 620), for others less than 50% can be “extensive” (Basle Court in sic! 2003, 222). A decision by the Federal Supreme Court should soon clarify the law.

The authors are compensated for the permitted uses under the personal exemption by a levy on data carriers and photo copies, see *infra*, C2, for details.

It is permissible to use existing works for the creation of *parodies* or other comparable variations on the work. According to leading doctrine, the parody must have a humorous intent, which would exclude particularly mean and scathing parodies from the exemption. The parody must not necessarily make fun of the parodied work or author, it may make fun of other targets.

Published works may be *quoted* if the quotation serves as an explanation, a reference or illustration and the extent of the quotation is justified for such purpose. The quotation must be designated as such and the source given. For the purposes of information on current affairs, short extracts from press articles or from radio and television reports may be reproduced, distributed and broadcast or rebroadcast. Where the source gives the name of the author, that name must also be given. The quotation must not necessarily serve a scientific purpose. It is controversial whether the right to quote also applies to photographs and works of fine art. While the language of the Act does not limit the right to quote to literary works, the legislative history seems to sug-



gest that photographs should be excluded from the right to quote.

Where necessary for *reporting on current events*, works perceived in so doing may be recorded, reproduced, presented, broadcast, distributed or otherwise made perceivable.

A work forming part of a collection accessible to the public may be reproduced in a *catalogue* issued by the administrators of the collection; the same applies to auction catalogues.

A work permanently located in a *place accessible to the general public* (or visible from such a place) may be reproduced; such reproduction may be offered for sale, sold, broadcast or otherwise distributed. The reproduction may not be three-dimensional and may not be utilized for the same purpose as the original.

The rebroadcasting of works over technical installations that are intended to serve a small number of receivers, such as installations in houses with more than one occupier or in a private building, is permitted. Although Art. 22 para 2 refers to a small number of recipients, according to the Federal Supreme Court, the geographical area covered, not the number of individual recipients is decisive (110 II 67 Altorf), so that a free retransmission was found regarding the Hotel Noga Hilton in Geneva (119 II 62 CNN). A collective antenna with strictly private use falls under Art. 19 para 1 lit a or b.

The permitted acts regarding a computer program are limited to resale (Art. 12 para 2), use (including making one back-up copy, Art. 24 para 2) and decoding for the sole purpose of obtaining information on its interface (see *infra*, D6, for details).

Finally, a compulsory license can be obtained for the manufacturing of phonograms based on published musical works, see *supra*, A9.

## **PART B NEIGHBOURING & RELATED RIGHTS**

### **B1 National Law**

Title III of the Act grants neighbouring rights (“verwandte Schutzrechte”) to performers (Art. 33), phonogram and videogram producers (Art. 36) and broadcasting organizations (Art. 37). The Swiss national law is based on the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, adopted 1961, to which Switzerland acceded in 1993, at about the same time as the Act currently in force was adopted. However, the protection afforded by the Act goes beyond the minimal requirements of the Rome Convention.

### **B2 Protected Subject Matter**

#### Performances

Art. 33 protects the performer of a work in the sense of Art. 2 against unauthorized distribution of his or her performance. A performance is any recital, declamation, enactment etc. of a work with the intent to make the work perceivable by others. The performance does not need to be public as long as there is an intent to make it perceivable to others; e.g. the performance in a studio for recording purposes is also protected.

#### Phonogram and videogram producers

Art. 36 protects producers of phonograms and videograms against unauthorized reproduction of the phono- or videogram. A phono- or videogram is the fixation of sound or video in any medium, irrespective of the technology used. The phono- or videogram is protected irrespective of the qualification of the recorded signals as work(s) in the sense of Art. 2. Neighbouring rights may therefore subsist, e.g., in a recording of bird songs or a soccer match.

#### Broadcasting Organizations

Art. 37 protects Broadcasting Organizations against unauthorized distribution, transmission or recording of a broadcast. A broadcast is any transmission of images,

signs and/or sounds to the public, be it by electromagnetic waves, cable or other means of conduction. Encoded transmissions (pay TV, pay per view) are considered to be public. Transmissions directed at specified receivers are not public and therefore unprotected. The broadcast is protected irrespective of the qualification of the transmitted signals as work(s) in the sense of Art. 2.

### **B3 Excluded Subject Matter**

#### Performances

The performance of a piece that does not qualify as a work in the sense of Art. 2 is not protected by neighbouring rights. It is not, however, a condition that the duration of the copyright in the work has not expired. The performances of acrobats or athletes are for example unprotected by Art. 33 .

### **B4 Conditions of Protection**

#### *B4.1 Primary Conditions*

The only condition of protection is the qualification of the performance, phono- or videogram or broadcast as protected subject matter. The citizenship or domicile of the owner of the rights is irrelevant; Switzerland grants neighbouring rights irrespective of reciprocity (exception: right to remuneration for the use of phonograms and videograms, see infra, B 10.1). Protection is granted without formalities; no registration or notice is required.

#### *B4.2 Fixation*

Fixation is inherent in phono- and videograms. Performances and broadcasts enjoy protection without fixation in a tangible medium.

### **B5 Authorship & Ownership**

#### *B5.1 Phonogram and/or Videograms*

The rights in a phono- or videogram are owned by the producer, that is the

person legally responsible for the production of the recording. This may be a legal entity. Only the first producer is granted neighbouring rights; the reproduction of an existing recording does not create any rights. If several persons or legal entities produce the recording together, each one of the producers owns the rights in the phono- or videogram. In other words, unlike co-authors, co-producers do not become joint or common owners.

### *B5.2 Performances*

The rights in a performance are initially owned by the natural person performing the work and jointly with any person that makes an artistic contribution (“künstlerische Mitwirkung”) to the performance of the work. No rights are owned by persons that are merely providing technical assistance. Only natural persons can be performers in the sense of Art. 33.

If several persons perform a work together, they own the rights in the performance jointly. This makes the realization and enforcement of the rights burdensome, as all the owners must agree on any legal act concerning the jointly owned rights.

The law provides an exception for choir, orchestra and stage performances. For these performances, the consent of the soloist(s), conductor, director and the representative of the ensemble is sufficient to *license* the rights in the performance. However, the consent of all the performers is necessary to *enforce* the rights in court.

### *B5.3 Broadcasts & Cable Programmes*

The rights in the broadcast are owned by the broadcast organization, *i.e.*, the entity responsible for the content of the broadcast. This is usually a legal entity, but may be a natural person. No rights are owned by the provider of the technical means for the transmission of the signals.

### *B5.4 Others*

*B5.5 Employee / Commissioned Works*

Employed performers own the neighbouring rights in their performance unless the rights are implicitly or explicitly assigned to the employer; see supra, A5.2 for further discussion.

**B6 Duration of Protection**

The duration of protection for performances, broadcasts, phono- and videograms is 50 years, starting from 31 December of the year (i) of the performance; (ii) of the transmission to the public of the broadcast; (iii) of the production of the phono- or videogram.

**B7 Assignments & Transfers**

*B7.1 Assignment rules and procedures*

Neighbouring rights may be freely transferred by assignment, testamentary disposition or by operation of law. There are no requirements regarding the form of the assignment; an oral or implied agreement is sufficient.

*B7.2 Partial Assignments*

The same rules as to copyrights apply, see supra, A7.2.

*B7.3 Future Assignments*

The same rules as to copyrights apply, see supra, A7.3.

*B7.4 Special Provisions*

**B8 Licensing**

*B8.1 Licensing rules and procedures*

Neighbouring rights can be licensed in the same way as copyrights, see supra, A8.1.

*B8.2 Special Provisions*

**B9 Compulsory Licensing**

There is no compulsory licensing in the strict sense for neighbouring rights; the limitations applicable to copyrights apply mutatis mutandis also to neighbouring rights, see infra, B12.

The compulsory license for the manufacturing of phonograms (Art. 23) is not applicable to the rights of phonogram producers and performers, although the Act provides that chapter 5 of title II (limitations and compulsory licenses) shall apply mutatis mutandis to the rights enjoyed by performers, phonogram and videogram producers and broadcasting organizations. If the compulsory license of Art. 23 was applicable to the rights of phonogram producers, those rights would be essentially void. The reference to chapter 5 of title II is therefore construed as not to include a reference to Art. 23.

**B10 Economic Rights**

*B10.1 Types of Economic Rights*

*In Performances*

Performers have the exclusive right:

- a. to make their performances perceivable in places other than those in which they were performed;
- b. to broadcast their works by radio, television or similar process using electromagnetic waves, cable or other means of conduction, and to re-broadcast the broadcast performance by means of technical installations not operated by the original broadcasting organization;
- c. to record their performances on phonograms, videograms or data carriers and to reproduce such recordings;
- d. to offer for sale, sell or otherwise distribute reproduced copies of the ma-

terial on which their performances are recorded;

- e. to make their performances perceivable when they are broadcast or rebroadcast.

If commercially available phonograms or videograms are used for the purpose of broadcasting, rebroadcasting or public presentation, the performers have a right to remuneration; the producer of the medium thus used is entitled to an equitable share of the remuneration of the performers. Claims to remuneration may only be asserted by the approved collecting societies (SWISSPERFORM for the neighbouring rights of performers, [www.swissperform.ch](http://www.swissperform.ch)). Foreign performers who do not have their habitual residence in Switzerland only have a right to remuneration if the state of which they are nationals affords a corresponding right to Swiss nationals. Nationals of member states of the Rome Convention which have not opted out of Art. 12 of the Rome Convention have a right to remuneration (decision of the Federal Supreme Court in sic! 1998, 36 seq.).

#### *In Phonogram and Videograms*

A producer of phonograms and videograms has the exclusive right to reproduce the recordings and to offer for sale, sell or otherwise distribute the reproduced copies.

#### *In Broadcasts*

A broadcasting organization has the exclusive right:

- a. to rebroadcast its broadcasts;
- b. to make its broadcasts perceivable;
- c. to record its broadcasts on phonograms, videograms or data carriers and to reproduce such recordings;
- d. to offer for sale, sell or otherwise distribute the reproduced copies of its

broadcasts.

#### *B10.2 Secondary/Contributory Infringement*

The usual rules regarding secondary/contributory infringement apply, see supra, A10.2.

### **B11 Moral Rights**

No moral rights are afforded to performers, phono- and videogram producers and broadcasting organizations; however, the personality of the performer is protected by the general rules on personality protection (Art. 28 seq. Civil Code).

### **B12 Permitted Acts**

The Act provides that chapter 5 of title II of the Act shall apply mutatis mutandis to the rights enjoyed by performers, phonogram and videogram producers and broadcasting organizations.

- Therefore, published performances, phono- and videograms and broadcasts may be used for private purposes within the limits explained supra, A12.

The neighbouring right owners are compensated for the permitted uses by a share of the levy on data carriers, see infra, C2, for details.

Of practical importance for neighbouring rights owners are the right to re-broadcast works over technical installations that are intended to serve a small number of people, supra A9, and the right to make broadcast works perceivable simultaneously and unaltered or to rebroadcast them within the framework of the rebroadcast of a transmitted program (Art. 22 para 2). The remuneration for the latter may only be asserted through the approved collecting society.

## **PART C- ADMINISTRATION & INFRINGEMENT PROCEDURE**

### **C1 Collecting Societies**

The administration of exclusive rights for the performance and broadcasting of non-



theatrical works of music and the production of phonograms and videograms of such works and the assertion of the claims to remuneration provided for in Art. 13 (rental right), 20 (personal use) and 35 (use of commercially available phonograms or videograms for broadcast or presentation) is subject to federal supervision. Any person who administers rights subject to federal supervision requires an authorization from the Federal Intellectual Property Office.

Authorization is granted only to collecting societies that: (i) have been established under Swiss law, have their headquarters in Switzerland and conduct their business from Switzerland; (ii) have the administration of authors' rights or neighbouring rights as their main purpose; (iii) are open to all owners of rights; (iv) afford an appropriate right of participation in the decisions of the society to authors and performers; (v) afford a guarantee of compliance with statutory provisions, particularly on the basis of their statutes; (vi) may be expected to conduct effective and economic administration. As a rule, authorization is granted to one society only for each category of works and to one society for neighbouring rights.

The following collecting societies are currently approved in Switzerland:

- SUISA for non-theatrical music ([www.suisa.ch](http://www.suisa.ch));
- ProLitteris for literary, photographic works and works of fine art ([www.prolitteris.ch](http://www.prolitteris.ch));
- Société Suisse des Auteurs (SSA) literary and musical theatrical works ([www.ssa.ch](http://www.ssa.ch));
- SUISSIMAGE for audiovisual works ([www.suissimage.ch](http://www.suissimage.ch));
- SWISSPERFORM for the neighbouring rights ([www.swissperform.ch](http://www.swissperform.ch)).

Authors may also mandate a collecting society with the enforcement of their exclusive rights beyond the scope of Art. 40. The administration of these rights is not subject to federal supervision. A collecting society may therefore be subject to federal supervi-

sion only for a part of its activities.

The collecting societies have an obligation to the owners of rights to administer the rights belonging to their field of activity; *i.e.*, they must enter into agreements with these right owners. They must administer the rights in accordance with fixed rules and with the requirement of equal treatment and may not aim to make a profit.

The collecting societies draw up tariffs for the remuneration that they collect; these tariffs have to be submitted to the Federal Arbitration Board for approval. Where more than one collecting society operates in the same field of utilization, they draw up for the same utilization of works or performances a joint tariff applying uniform principles and designate one of their number as the joint office for payment (e.g., SUISA for the audiovisual data carrier levy).

The proceeds of exploitation collected by the collecting societies are distributed to their respective members annually according to the distribution regulation approved by the Federal Institute for Intellectual Property (cf. Art. 48 para 1). The collecting societies are required to distribute the proceeds of exploitation in proportion to the revenue from the individual works and performances. They must do all that may reasonably be expected of them to identify those who are entitled to such proceeds. If such distribution entails unreasonable expense, the collecting societies may estimate the extent of revenue; the estimates have to be based on factors that are capable of verification and are appropriate. The proceeds are to be divided between the original owners of rights and other entitled persons in such a way that an equitable share falls to the authors and performers. This provision aims to safeguard the interests of the creators of works; however it does not require that the authors receive the larger part of the proceeds of exploitation.

## **C2 Private Copying/Tape Levy System**

### General

Private copying is permissible, within the limits set forth in Art. 19, see supra, A12, for details. The rights owners are compensated for the private copying by a levy on

audiovisual data carriers and a compensation due by teachers making copies for teaching in class and enterprises, public administrations, institutes, commissions and similar bodies reproducing a work for internal information or documentation.

#### Compensation for personal use copies

No compensation is due for any use of a work in the personal sphere or within a circle of persons closely connected to each other, such as relatives or friends (Art. 20 para 1, Art. 19 para 1 lit a), unless an audiovisual data carrier subject to the levy of Art. 20 para 3 is used to make personal use of the work.

Any enterprise, public administration, institute, commission and similar body reproducing a work for internal information or documentation and teachers making copies for classroom use are required to pay remuneration to the rights holder. The same applies to third parties manufacturing the copies for the entity entitled to personal use.

The remuneration may only be collected by approved collecting societies. The designated joint office for payment is ProLitteris, Zürich ([www.prolitteris.ch](http://www.prolitteris.ch)).

ProLitteris and the user associations have agreed on two Joint Tariffs, approved by the Arbitration Board according to Art. 59 para 1. The Joint Tariffs are binding for the courts (Art. 59 para 3).

Joint Tariff 8 regulates the compensation for photocopying by business entities and schools. Any business owning a photocopy machine must pay the remuneration due under Joint Tariff 8, irrespective of whether copies of protected works are made (decision by the Federal Supreme Court 125 III 141).

The amount due under Joint Tariff 8 depends on the industry and the number of employees of the business or students of the school, respectively. The minimum amount due for small firms is CHF 30 per year. For large corporations, the compensation is calculated according to the actual number of copies made, and the corporations are obliged to inform ProLitteris of the number of copies made. The remuneration due by copy shops making copies for third parties is calculated taking into account the num-

ber and capacity of the copying machines owned by the copy shop.

The collection of the remuneration due under Art. 20 is very costly. The 1997 draft for the amendment of the Copyright Act provides for the remuneration to be levied upon the copying machine and collected from the importer/manufacture, similar to the current law on audiovisual data carriers.

Joint Tariff 9 regulates the compensation due for the storage and making accessible of copies of works on internal networks (intranets). Any business operating an internal network capable of storing and making accessible copies of works must pay the compensation due under Joint Tariff 9, irrespective of whether the internal network is actually used for making available protected works. The compensation due is defined as a fraction of the compensation due under Joint Tariff 8 (30% for businesses, 20% for schools up to ninth grade).

An additional compensation is due for internal press reviews that appear at least four times per year, whether the press review is distributed as a hardcopy or made accessible on an intranet. Several publishing houses have filed suit against ProLitteris for granting the rights to make press reviews accessible on an intranet. In their opinion, the private copying exemption does not cover electronic press reviews, and permission must therefore be obtained from the individual rights owners. One may expect a Federal Supreme Court decision on the issue in 2005 unless the parties settle their dispute.

For uses not covered by the personal, teaching and internal use exemption, permission from the individual rights holder must be obtained.

#### Audiovisual data carrier levy

Any person who manufactures or imports blank cassettes or other phonograms and videograms suitable for the recording of works is required to pay a remuneration to the author for uses of works under the private use exemption (Art. 20 para 3). The remuneration is collected from the manufacturer if domiciled in Switzerland, otherwise from the importer.

*Mark Schweizer / Reinhard Oertli, in: MacDonald/ Suthersanen/ Garrigues (eds.),  
Copyright: World Law and Practice, London 2004*

The remuneration is due on any audiovisual data carrier capable of recording protected works, unless such carriers are not usually used for the private recording of protected works, such as cassettes for dictaphones and answering machines and films for still and cine cameras (Betacam, Betacam SP, Betacam Digital, 8 mm SHG, Hi 8, 8 mm DVC, U-matic).

A remuneration is due for the production or import of music cassettes, DAT tapes, minidiscs, CD-R Audio, CD-RW Audio, MP3 recorders, VHS Analog Tapes and any kind of recordable DVD.

The amounts due are calculated according to Joint Tariff 4a-c:

- for analogue audio data carriers, CHF 0.33 per hour of recording capacity;
- for analogue audiovisual data carriers, CHF 0.46 per hour of recording capacity;
- for CD-R/RW, CHF 0.06 per 525 MB storage capacity;
- for DVD Write Once, CHF 0.55 per disc;
- for re-recordable DVDs, CHF 1.05 per disc.

The remuneration is collected by SUIISA who acts as the joint office for payment and then distributes the proceeds to the other collecting societies. If an importer shows that it has sold audiovisual data carriers to customers using them for professional purposes, it may reclaim the remuneration paid for these data carriers.

### **C3 Civil Proceedings & Remedies**

#### *C3.1 Civil Proceedings*

Jurisdiction of the Swiss Courts may be established on the basis that infringement takes place in Switzerland, or that either the plaintiff or the defendant has his/her domicile here or his/her residence or place of business in Switzerland (Statute of Private International Law, SPIL, Art. 5 para 3).

Authors and their heirs and assignees have standing to sue for copyright infringement. Likewise the editor or publisher with regard to works of anonymous or pseudonymous works (Art. 8 para 2), and the employer with regard to the right to use in a software developed by an employee in the exercise of his or her service (Art. 17). The majority of court decisions (decision of the Federal Supreme Court 113 II 91, 194 (Le Corbusier) and legal writers also give the exclusive licensee the right to sue in his/her own name, at least if such right has been explicitly granted to him/her in the license agreement. This practice has been put in doubt by a recent decision of the Supreme Court (decision of the Federal Supreme Court 129 III 715,7 121).

Each canton has to designate a sole court to be competent for copyright matters within that canton (Art. 64 para 3). This does not apply to criminal proceedings brought on the basis of copyright law or to civil litigation on the basis of contracts that deal with copyrights. Court system and procedural rules are determined by cantonal law. This applies also to the rules for the preliminary taking of evidence (“vorsorgliche Beweisabnahme”), which differ from canton to canton and may be the only way to obtain evidence prior to filing an action.

Different procedural rules apply for preliminary matters (often injunctions), which are rendered in a summary proceeding, and permanent court decisions (including claims for damages and injunctions), which are rendered in an ordinary proceeding.

The designated sole cantonal court is normally a superior court,<sup>22</sup> so that no intra-cantonal appeal is possible, except for cantons with a cantonal court of cassation<sup>23</sup>. The only civil remedies are an appeal to the Federal Supreme Court, for violation either of provisions of the Copyright Act (*Berufung*, irrespective of the amount at stake, Art. 45 para A Federal Procedural Act), or of constitutional rights (*staatsrechtliche Beschwerde*)

### *C3.2 Civil Remedies*

---

<sup>22</sup> The Cantons of Zurich, Berne, Argovie and St. Gall have designated

<sup>23</sup> E.g., Kassationsgericht of the Canton of Zurich

The legal remedies provided by the Act are:

- Declaratory remedies: declaration as to whether a specific right or legal relationship exists (Art. 61)
- Executory remedies: prohibition of an imminent copyright violation, or removal of an existing violation (Art. 62 para 1), order to disclose the origin of unlawfully manufactured or marketed copies in one's possession (Art. 62 para 1 lit c), and to confiscate, destroy or render unusable unlawfully manufactured or utilized copies (Art. 63), and publication of the judgment (Art. 66).
- Compensatory remedies: Payment of compensation for actual monetary damages or moral damages (*Genugtuung*) or recovery of any profits of the infringer that are attributable to the infringement (including expenses saved) on the basis of agency without authority (Art. 62 para 2).

Compensation for monetary damages and moral damages requires proof that the person knows that the act committed violates third party copyrights. The same is not required with regard to the claim for recovery of illicit gains made by the infringer (including expenses saved) on the basis of agency without authority (*Geschäftsführung ohne Auftrag*, Art. 419 Code of Obligations), although this has been put in doubt by a recent Supreme Court decision which required bad faith on part of the infringer for recovery of profits (decision of the Federal Supreme Court of 17 July 2003, sic! 2003/2, 130. In the said case, receipt of a warning letter was held insufficient to create bad faith on the part of the infringer). All other claims of the copyright holder do not depend on perpetrator's knowledge or bad faith.

The Copyright Act explicitly provides for precautionary measures, requiring that the copyright holder provide reasonable evidence that his or her copyright or neighbouring right is infringed or is likely to be infringed and that the infringement is likely to result in a prejudice for him or her that may not readily be made good. The copyright holder may request that precautionary measures be ordered (Art. 65).

#### **C4 Criminal Offences & Sanctions**

#### *C4.1 Criminal Proceedings*

Prosecution and court system and procedural rules are determined by cantonal law. (Art. 73 para 1). Criminal prosecution requires a formal request by the person whose rights have allegedly been infringed (Art. 67 para 1), except if the perpetrator acts by way of a trade<sup>24</sup> (Art. 67 para 2).

#### *C4.2 Criminal Offences and Sanctions*

Imprisonment for up to one year or a fine is the penalty for intentionally publishing, altering or using a work to create a derivative work, manufacturing copies of a work, offering for sale, selling or otherwise distributing copies of a work, performing or presenting a work or making a work perceivable in any other way either directly or with the help of any type of means, broadcasting or re-broadcasting a work, refusing to give information on the origin of copies of a work in one's possession that have been unlawfully manufactured or marketed, or renting out a computer program, in each case without the consent of the copyright holder<sup>25</sup> (Art. 67 para 1). The penalty shall be imprisonment and a fine of up to CHF 100,000 if the perpetrator acts by way of a trade (Art. 67 para 2).

### **PART D- INTERNET RELATED ISSUES**

When the Copyright Act was enacted, internet as a technical, cultural and commercial phenomenon was not clearly visible yet, so the Copyright Act does not contain any provisions that specifically address internet related copyright issues. There is a debate going on in Switzerland as to whether additional or amended wording would improve the effectiveness the copyright system in light of the challenges posed by e-mail, www, and other forms of electronic data transfer.

---

<sup>24</sup> According to a decision by the Criminal Court Basle-City of 31 Jan. 2003, a net gain of approx. CHF 250,000 is not sufficient for constituting a trade, sic 12/2003, p. 960.

<sup>25</sup> According to a decision by the Criminal Court Basle-City of 31 Jan. 2003, criminal liability ceases to exist if the holder of the infringed copyrights consents after the fact, sic 12/2003, p. 960.



### **D1 Communication to the Public**

The Copyright Act does explicitly addresses the right to authorise or prohibit any communication to the public of the work.<sup>26</sup> The normal right to distribute work copies (Art. 10 para 2 lit b), and also the right to make copies (Art. 10 para 2 lit a) applies to the distribution of copyrighted works through the internet, because any communication to the public through the internet requires copying the work in the form of uploading and downloading. Legal writers further distinguish between simultaneous distribution to a number of recipients (pushing data, broadcasting, in the sense of Art. 10 para 2 lit d) and on-call delivery to recipients pursuant to their request (pulling data, making perceivable in the sense of Art. 10 para 2 lit b), both falling under the exclusive right of the copyright holder.

### **D2 Broadcasts by Satellite**

The normal copyright provisions regarding broadcasting a work (pushing data, broadcasting, in the sense of Art. 10 para 2 lit d)<sup>27</sup> are applicable, since the concept of broadcasting as laid down in the Copyright Act includes the entire transmission process from the original broadcasting organisation to the satellite (up link) and from the satellite (down link) either (in the case of telecommunication satellites, *e.g.*, Intelsat or Eutelsat) to a new broadcast operator who broadcasts to individual recipients, (in the case of high power or broadcasting satellites) directly to individual recipients, or (in the case of medium power or hybrid satellites) to other broadcast operators, with the possibility of being intercepted by individual recipients, always provided the transmitted content is destined eventually to reach simultaneously a great number of individual recipients, is transmitted wirelessly over a certain distance, and a great number of recipients can in fact receive it (decisions of the Federal Supreme Court 119 II 59 CNN).<sup>28</sup> Satellite telephony and citizen band radio do not fulfil these criteria and thus

---

<sup>26</sup> WCT Art. 8; *Cf.* Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ no. L 167/10 22.6.2001, Art. 3 para 1.

<sup>27</sup> *Cf.* Art. 11bis para 1.1 RBC.

<sup>28</sup> See also the European Convention Relating to Questions on Copyright Law and Neighbouring Rights in the Framework of Transfrontier Broadcasting by Satellite, Counsel of Europe, ETS No. 153, 11 May

do not constitute broadcasting, nor does satellite transmission (by telecommunication satellites) that cannot be intercepted by individual recipients except at incommensurate costs.

### **D3 Making Available Right**

The Copyright Act explicitly addresses the right to authorise or prohibit the making available to the public of recordings of performances, of phonograms, of the original and copies of films, or of fixations of broadcasts.<sup>29</sup> The Copyright Act explicitly subjects to the exclusive right of the author the right to deliver, perform, or make the work perceivable in a place other than where it is presented (Art. 10 para 2 lit c). This includes the act of making a copy of the work available in a data bank or web-site, where it can be called up or loaded down by third parties. The making available and the downloading are separate acts, each constituting a violation of copyright if done without permission of the copyright holder, but are conditional for the other insofar as making available is permitted only where downloading can occur exclusively by persons fulfilling the requirements of private use, educational use or use in an enterprise (Art. 19 para 1 lit a, b or c).

### **D4 Anti-Piracy Measures**

#### *D4.1 Anti-Circumvention Devices*

As Switzerland is not a party to the WCT or the WPPT,<sup>30</sup> the Copyright Act does not provide for an explicit right to prevent the making and distribution of devices to be used to circumvent measures that protect against unauthorised or illegal acts regarding

---

1994, Art. 1, and the EU DIRECTIVE 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ no. L 248, 06/10/1993 P. 0015 – 0021, Art. 1 para 2 lit a (Definition of ‘communication to the public by satellite’). An older theory generally did not consider up-links and down-links from telecommunication satellites as broadcasting. Tariffs still rely on such older theory.

<sup>29</sup> Cf. WPPT, Art. 10 and 14; Directive 2001/29/EC of 22 May 2001, Art. 3 para 2.

<sup>30</sup> Cf. Directive 2001/29/EC of 22 May 2001, Art. 6 para 2.

*Mark Schweizer / Reinhard Oertli, in: MacDonald/ Suthersanen/ Garrigues (eds.),  
Copyright: World Law and Practice, London 2004*

their works (rights protection measures), or to enable or assist in receiving programs or transmissions that otherwise would be receivable only for a remuneration. Such devices may be seized, however, on the basis of ordinary penal law (Art. 58 Swiss Penal Law).

#### *D4.2 Rights Management Information*

As Switzerland is not a party to the WCT or the WPPT,<sup>31</sup> the Copyright Act does not provide for an explicit right to prevent the circumvention or removal of rights protection measures and distribution of devices to be used to circumvent rights protection measures, alter rights protection information, or distribution of work copies with the rights protection measures being removed. The Copyright Act would nonetheless allow the prevention of circumvention, removal, or alteration of rights protection measures if these acts were part of an act falling under the exclusive rights of the copyright holder, but not if it were in the context of a permitted act (private use, educational use, enterprise use).

#### *D4.3 Others*

In 2000 the Federal Institute for Intellectual Property presented a pre-draft for an amendment to the Copyright Act that would have reflected the changes required by the WCT, the WPPT and the EU Directive 2001/29, but the time frame for implementation seems to be open.

### **D5 Internet Service Providers**

#### **D5.1 General**

There are no specific provisions in Swiss law addressing the liability of internet service providers for (contributory) copyright infringement such as the provisions of the U.S. DMCA or the European Union Directive 2000/31/EC on Electronic Commerce. The general rules on civil and criminal liability apply to internet service providers.

---

<sup>31</sup> WCT Art. 11 and 12; WPPT Art. 18 and 19; *cf.* also Directive 2001/29/EC of 22 May 2001, Art. 6 para 1 and Art. 7.

## D5.2 Access Providers

### D.5.2.1 Civil liability for contributory copyright infringement

Access providers are not liable for copyright infringing information transmitted by them as long as they have no knowledge of the information being transmitted. It is considered unreasonable to impose a duty on the access provider to verify that no copyright infringing information is being transmitted through its conduits.

It is controversial whether the access provider is liable for contributory copyright infringement if it positively knows of the transmission of copyright infringing information. According to general rules of liability, if it is technically feasible to stop the infringing transmission, the access provider is liable for contributory infringement if it refuses to block the conduit of the data.

Swiss doctrine does not clearly distinguish between “caching” and “mere conduit”. Most authors seem to regard caching, if done for purely technical reasons, as part of the transmission process and apply the same rules to caching and conduit.

### D5.2.2 Criminal liability for contributory copyright infringement

According to a White Paper by the Federal Police (Positionspapier der Bundespolizei, April 2000) the access provider must block access to sites identified by law enforcement agencies as containing illegal information, provided that it is technically possible. The access provider acts with criminal intent if it positively knows of a site containing infringing information and does not block the access to this site (cf. decision by the Federal Supreme Court 121 IV 109 seq.). It is then liable for aiding and abetting in copyright infringement under the general rules of criminal law.

The access provider does not have a duty to actively search for illegal information. It must act upon specific information from trustworthy sources, but is not obliged to act upon vague hints by members of the general public.

## D5.3 Hosting Providers

### D5.3.1 Civil liability for contributory copyright infringement

The storage of copyright infringing material on a publicly accessible server infringes the exclusive right of the author to decide whether, when and how his work is to be used. The hosting provider is liable for the storage if it violates a duty of care and acts culpably.

While it is technically feasible that the hosting provider only hosts information after prior inspection and approval, leading doctrine considers it unreasonable to impose a duty of inspection on the hosting provider. A hosting provider therefore does not violate a duty of care by hosting copyright infringing information if it is unaware of the contents being hosted. If the access provider positively knows of the infringing information, it is liable for infringement unless it removes the infringing information from its servers.

If the hosting provider inspects the information being hosted (moderated message boards and similar services) it is liable for any copyright infringing information if the infringement is evident.

### D5.3.2 Criminal liability for contributory copyright infringement

According to the White Paper of the Federal Police, the hosting provider has the following duties under criminal law:

- it must act upon specific information about illegal websites and newsgroups. If the hosted content is illegal, the content must be deleted or the access to the content must be blocked;
- because the hosting provider has a closer relationship to the content provider than the access provider, it must check suspicious content providers even without specific knowledge about infringing acts;
- specific information about illegal files hosted on FTP servers must be verified if the files are readable by standard software.

## **D6 Computer Programs**

### *D6.1 National Law*

According to Art. 2 para 3, computer programs shall also be deemed works.

### *D6.2 Protected Subject Matter*

Both the source code and the object (executable) code of a computer program are protected if the program has individual character in the sense of Art. 2 para 1. The same requirements for protection as for any other literary work apply for computer programs.

### *D6.3 Excluded Subject Matter*

Excluded from copyright protection is the underlying idea, i.e. the problem-solving algorithm, implemented by the computer program.

Computer programs or parts thereof that lack individual character are not protected. A computer program namely lacks individual character if

- it is the most efficient and simple implementation of a given problem-solving algorithm;
- it is trivial in the sense that any programmer would have arrived at the same solution.

The threshold of individuality for computer programs is low, because the ways of expressing individual character in the design of a computer program are limited. For practical purposes, most computer programs, except for very short ones, are protected by copyright law.

### *D6.4 Conditions of Protection*

See *supra*, A4.

### *D6.5 Authorship & Ownership*

The copyright in a computer program is owned by the natural person(s) creating the program. For the rules regarding co-authorship, see A5.1. Where a computer program has been created under an employment relationship in the exercise of service activities or in execution of contractual duties, the employer alone is entitled to exercise the exclusive exploitation rights (Art. 17). The exploitation rights of the employer include the right to alter the program and to create derivative works based on the program. The employed programmer remains, however, owner of the copyright in the program unless it is explicitly or implicitly assigned to the employer.

Art. 17 is only applicable if the programmer is an employee in the sense of the Code of Obligations. The rights in computer programs made under other contractual arrangements (work made for hire, free-lance) remain with the author unless explicitly or implicitly assigned. Art. 17 is also not applicable to persons employed according to public law (public servants).

#### *D?.? Duration of protection*

In the case of computer programs, protection expires 50 years after the death of the author (Art. 29 para 2 lit a). See supra, A6, for calculation in the case of joint or unknown authorship.

#### *D6.6 Economic and Moral Rights*

See supra, A10 and A11.

#### *D6.7 Permitted Acts*

##### *D6.7.1 Reverse Engineering/decompilation provisions*

Reverse engineering/decompilation of a computer program is permissible to obtain information about the interface of the program if

- the person decompiling (personally or through another person) the program may lawfully use the program; and

- the information about the interface of the decompiled program is not reasonably accessible to the user of the program without reverse-engineering; and
- the interface information obtained by decoding the program code is only used for the development, maintenance and use of computer programs interoperable with the decompiled program, provided that neither the normal exploitation of the program nor the legitimate interests of the owner of the rights are unreasonably prejudiced.

The reverse engineering of a computer program to develop a program using essentially the same expressive form as the decompiled program is considered a prejudice to the normal exploitation of the decompiled program.

The right to decompile a program within the limits of Art. 21 cannot be waived.

#### *D6.7.2 Back-up copies*

Any person entitled to use a computer program may make a back-up copy thereof; this right may not be waived by contract (Art. 24 para 2; according to some commentators, only the *owner* of the program is entitled to make a back-up program). It is not permissible to make several back-up copies of the same program.

There is no case law or unanimous doctrine on whether the right to make a back-up copy permits the lawful user to circumvent technical copy protection devices.

MELCHIOR CADUFF, Die urheberrechtlichen Konsequenzen der Veräußerung von Computerprogrammen, Berne 1997, 173, regards technical copy protection as unlawful since Art. 24 para 2 is cogent



and the copyright owner may not deprive the user of its right to make a back-up copy.

#### *D6.7.3 Study/research exceptions*

The permitted use of a computer program includes the right to observe the functioning of the program, the analysis and testing of it to obtain information about the underlying ideas and principles, provided that such observation, analysis and testing is carried out in the course of the intended use of the program. It is not permissible to reverse-engineer a computer program to obtain information about the underlying ideas and principles, although the principles are not protected by copyright.

#### *D6.7.4 Others*

The private use exemptions (Art. 19, see A12 supra) are not applicable to computer programs (Art. 19(4)). A lawful user of the program may only make one back-up copy, see D6.7.2 supra, and no copies for any other purpose, private or not. Copies that are made incidentally when putting the program to its intended use (RAM copies, caching) are permissible, cf. Art. 17 para 1 lit a Ordinance.

#### *D6.8 Patent protection*

Swiss patent law does not specifically exclude computer programs from the patentable subject matter. However, mere instructions to the human mind that could, at least theoretically, be executed without the aid of any machine or tool are not considered inventions in the sense of patent law because they are not technical in nature (decision of the Federal Supreme Court 98 Ib 396 seq.). Computer programs “as such” are therefore not patentable. Due to the lack of case law in Switzerland, it remains rather unclear what constitutes a computer program “as such” and what technical effect is sufficient to render the program patentable, provided that the other requirements for patentability, namely novelty and inventive step, are met. The Federal Institute for Intellectual Property

(Swiss Patent Office) basically applies the principles developed by the European Patent Office to Swiss national patent applications.

## D7 Databases

### D7.1 National Law

Copyright protection applies to databases if the database qualifies as a work in the sense of Art. 2 para 1 or a compilation in the sense of Art. 4..

### D7.2 Copyright Protection

#### *D7.2.1 Protected Subject Matter*

Collections enjoy independent protection where they are creations with individual character with regard to their selection or arrangement (Art. 4; cf. decision of the Federal Supreme Court 107 II 87, see also Berne, 21 May 2001, sic! 2001, p. 613, and Chairman of the Civil Court of the Canton Basel-city, 20 Jan 2004, sic! 6/2004, p. 490). The structure of a database is therefore protected by copyright law if the criteria for inclusion in the database or the arrangement or relation of the included items are individual. The structure of a database is protected irrespective of the character of the database entries as works.

An individual item included in the database is protected if it qualifies as a work in the sense of Art. 2 para 1.

#### *D7.2.2 Excluded subject matter*

The structure of a database is not protected by copyright if it lacks individual character. This is the case where the database aims to be as complete as possible and arranges the entries in alphabetical order or in another logical way which allows easy retrieval.

The individual items contained in the database are not protected if they lack individual character, for example if they are merely factual infor-

mation. See supra, A3, for details.

#### *D7.2.3 Conditions of Protection*

See supra, A4.

#### *D7.2.4 Authorship & Ownership*

See supra, A5.

#### *D7.2.5 Other Salient Features*

Protection under the Statute against Unfair Competition is available where entire part of databases are copied by technical means, see infra, A7.4

### *D7.3 Sui Generis Database Protection*

There is no sui generis database protection in Switzerland. Arguably Swiss law can be considered falling short of the requirements of the EU Directive 96/9 on the legal protection of Databases of 11 March, 1996 OJL 77/20 of 27 March 1996.

### *D7.4 Unfair Competition Law*

Art. 5 lit c of the Statute against Unfair Competition provides that it constitutes an act of unfair competition if anyone

- (a) takes the marketable results of work of another person;
  - i. by means of technical reproduction processes;
  - ii. without a corresponding effort of his own; and
- (b) exploits them.

The conditions (a) and (b) must be cumulatively met. A database constitutes the marketable result of another person's work. If it is copied by technical

*Mark Schweizer / Reinhard Oertli, in: MacDonald/ Suthersanen/ Garrigues (eds.),  
Copyright: World Law and Practice, London 2004*

means and exploited without the corresponding effort on the part of the person copying the database, the copier commits an act of unfair competition.