

Revisions to the Swiss Copyright Act

The growth of the Internet and rapid changes to technology have led to creative content being produced, distributed and accessed in myriad new ways. Copyright rules had to adapt to this new frame. Last year, EU institutions issued the EU Copyright Directive (2019/790), which must be incorporated into EU countries' national laws by 7 June 2021. At the same time, Switzerland revised its Federal Act on Copyright and Related Rights, which entered into force on 1 April 2020. The main amendments are outlined below.

Online piracy

The new provisions have brought much-awaited changes to legislation to combat online piracy. The revised law compels hosting companies (ie, entities that offer storage space on their servers to host data) to ensure that violating content that has already been taken down through their servers is not made available again (Article 39d). Previously, hosting providers were required to remove infringing content from their servers at the request of the rights holder through the so-called 'take down obligation'. Now, if content is reintroduced, they must remove it even if not requested to do so.

However, the scope of this obligation is limited. First, it applies to content that has already been withdrawn from the server as per the 'stay down' principle. Second, neither web access providers nor all hosting providers are included – only those offering services that create a "particular risk of such infringements, specifically due to a technical mode of operation or an economic orientation which encourages infringement" (Article 39d(1)(c)).

Worth noting is the authorization given to processing personal data in criminal proceedings based on copyright infringements and for rights owners to access these data in this frame (article 77i).

Photographs

Photographs have been afforded a much broader scope of protection as they are now considered to be copyrighted works, even if they do not have individual character (Article 2-3bis). Previously, 'individual character' meant that they should demonstrate a certain degree of originality – a rather subjective factor left to the discretion of the courts. With this amendment, all photographs fall under copyright, including those taken by amateur photographers (eg, holiday photos on Facebook cannot be uploaded elsewhere without the author's permission).

The duration of protection is 50 years from when the picture was taken and 70 years after the death of the author if individual character can be shown (Article 29).

Performers' rights

Performers will also benefit from the amendments. The entitlement to remuneration is now granted not only to authors, but also to performers when they contribute to an audio-visual work (Article 35a). The work must be made in Switzerland or in a country that applies the same remuneration rights. Performers will therefore receive remuneration for the use of their works on online platforms (ie, video on demand). In this respect, the existing practice of collective rights management is now laid down by law along with the operating rules (Article 40 et seq).

Further, the term of protection for performers' rights has increased from 50 to 70 years starting from the date of performance.

Memory institutions

Memory institutions are now allowed to show the cover page, index or abstract for academic works (physical or online). As a result, libraries, museums and archives are entitled to reproduce short excerpts of films or music in their indexes, which makes them easier to find.

Further, extended collective licences have been put in place. This allows collective rights management organisations to conclude agreements with intermediaries on a huge number of copyrighted materials and rights holders to receive remuneration in return. Of course, they can opt out of the licence. This option is not afforded in the case of commercial use (eg, offers of commercial music or films via online platforms). In practice, this provision targets museums, which can now more freely depict their collections in various formats.

It used to be possible to use orphan works when they relate to phonograms and audiovisual fixations in publicly accessible archives and broadcasting organisation archives. Now, this use applies to works located in the collections of memory institutions, which widens access to cultural heritage. Remuneration would still be due in case the identity of the author is determined later on.

Scientific fields

In scientific industries, authors can no longer prohibit the automatically created copies that are necessary for analysis. This allows researchers to lawfully analyse data through the modern technologies in which the information is copied on a separate server (ie, text and data mining).

General considerations

The revision to Swiss copyright rules share the same objective as the EU Copyright Directive (2019/790), the purpose of which is to ensure remuneration for all authors of copyrighted works used online but also to allow digital use in the fields of research, education and the preservation of cultural heritage.

The anti-piracy measures may sound modest but they are a welcome step in the fight against online copyright issues. They pave the way for the active involvement of hosting providers, which are major internet actors, endowed with the technical means to efficiently exclude violating content. In comparison, the EU Copyright Directive (2019/790) goes further as it expressly obliges online content-sharing service providers to obtain authorisation from rights holders before publishing protected works, or at least to be able to prove that they did their utmost in view of the best practices of the sector to get this prior consent. This comes with the pitfall that content-sharing service providers are led to implement automatic system like digital fingerprints in order to anticipate storage and/or publication of infringing contents. But are automatic systems able to distinguish real infringements from authorized use of protected works, such as the parody exception for instance? This may lead to censorship situations. In this light, the Swiss provisions appear as a consensual solution in taking more into account the interests of hosting providers.

All in all, it is a good thing that the copyright framework is more protective now and aligned with today's world. Maybe it would have made Mark Twain change his mind that: "Only one thing is impossible for God; to find any sense in any copyright law on the planet." How the new rules will be followed on the field remains to be seen, but it is better to know and respect them than to fall into a costly infringement trap.

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