



ICLG

The International Comparative Legal Guide to:

Copyright 2018

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A practical cross-border insight into copyright law

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Switzerland

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1 Copyright Subsistence

1.1 What are the requirements for copyright to subsist in a work?

Irrespective of its value or purpose, a work enjoys copyright protection if it consists of a literary or artistic intellectual creation with an individual character, which somehow requires a certain degree of originality (Art. 2 of the Federal Act on Copyright and Related Rights, “CopA”). There are no formal requirements such as registration.

1.2 On the presumption that copyright can arise in literary, artistic and musical works, are there any other works in which copyright can subsist and are there any works which are excluded from copyright protection?

Art. 2 (2) CopA provides a non-exhaustive list of works deemed as “literary” or “artistic”. Those include, amongst others, scientific works, works with technical content, works of architecture and choreographic works. Computer programs are also considered as “works” and hence qualify for copyright protection.

Works that do not fall within the meaning of literary or artistic intellectual creation with an individual character are excluded from protection. The following works are expressly excluded from copyright protection: acts, ordinances, international treaties and other official enactments; means of payment; decisions, minutes and reports issued by authorities and public administrations, patents specifications and published patent applications.

1.3 Is there a system for registration of copyright and if so what is the effect of registration?

There is no system for copyright registration in Switzerland. Copyright protection arises as soon as the work is created and meets the requirements for copyright protection (Art. 2 (1) CopA). To prove the date of creation, one may wish to have it stamped by a notary public or sent to oneself by registered letter, which should remain sealed.

1.4 What is the duration of copyright protection? Does this vary depending on the type of work?

The duration of copyright protection varies depending on the type

of work. For computer programs, protection expires 50 years after the author’s death. For all other works, protection expires 70 years after the author’s death. In case of joint authorship where the individual contributions may not be separated, the relevant time is the death of the last surviving joint author. In cases where the author is unknown, protection expires 70 years after the publication of the work or, if it has been published in instalments, 70 years after the final instalment.

1.5 Is there any overlap between copyright and other intellectual property rights such as design rights and database rights?

There can be overlaps between copyright and trademark and/or design rights. Indeed, some copyrightable works can also benefit from other intellectual property rights. For example, under certain circumstances, logos can enjoy both copyright and trademark protection, luxury jewellery creations can enjoy both copyright and design protection. In some instances, copyrightable works can also be enforced through the Federal Act against Unfair Competition (“UCA”).

1.6 Are there any restrictions on the protection for copyright works which are made by an industrial process?

There is no restriction, provided that the work is created by a human being. The author can use any available tools, as long as there is a human influence on the result. Without any human activity, there can be no copyrighted work.

2 Ownership

2.1 Who is the first owner of copyright in each of the works protected (other than where questions 2.2 or 2.3 apply)?

The initial copyright owner of a work is the author, defined as the natural person who has created the work. There is a presumption that the author is the person whose name, pseudonym or distinctive sign appears on the copies or the publication of the work (Art. 8 (1) CopA).

Swiss law also grants copyright-related rights (so-called “neighbouring rights”, see question 4.1) to performers, broadcasters and producers of sound and video recordings.

2.2 Where a work is commissioned, how is ownership of the copyright determined between the author and the commissioner?

Since copyright initially vests with the author, the commissioner will not automatically acquire ownership of the copyright on the work created by the author. However, copyright is assignable and the parties can agree (orally or in writing) that the copyright on the commissioned work be assigned to the commissioner (see question 3.1). If there is no agreement governing the ownership or the use of the copyright, the commissioner shall, however, be entitled to limited rights in accordance with the purpose of the agreement (“principle of assignment limited to the purpose”).

2.3 Where a work is created by an employee, how is ownership of the copyright determined between the employee and the employer?

There is no “work for hire” concept in Switzerland. Therefore, contrary to designs and patents, copyright vests with the employee who has created the work. However, copyright can be assigned to the employer by contract (in the employment agreement or another contract). See also question 3.1.

There is an exception for computer programs created by an employee under an employment contract as part of his/her duties or contractual obligations. In this case, although ownership vests with the employee, the employer alone is entitled to exercise the exclusive rights of use (Art. 17 CopA).

2.4 Is there a concept of joint ownership and, if so, what rules apply to dealings with a jointly owned work?

The concept of joint authorship does exist under Swiss law (Art. 7 CopA). In case of joint ownership, copyright belongs to all the authors jointly. Unless they have agreed otherwise, the joint authors may only use the work with the consent of all joint authors. Such consent may not be withheld for reasons contrary to the good faith principle. The individual contributions can be separated and the authors have not agreed otherwise, each joint author may use his/her own contribution independently, provided that such use does not impair the exploitation of the joint work.

In case of copyright infringement, each joint author may bring an action independently, but may only ask for relief for the benefit of all.

3 Exploitation

3.1 Are there any formalities which apply to the transfer/assignment of ownership?

There is no formal requirement for the transfer/assignment of ownership, which may even be concluded orally. The only exception is where the transfer/assignment arises in the framework of the splitting of a company or a transfer of assets within the meaning of the Swiss Merger Act. In such cases, the agreement must be made in writing and approved by the shareholders meeting.

For evidence purposes and to avoid possible interpretation disputes, it is advisable to enter into a written agreement.

3.2 Are there any formalities required for a copyright licence?

There are no formalities required for a copyright licence. However, a written agreement is advisable for evidence purposes and to avoid possible interpretation disputes.

3.3 Are there any laws which limit the licence terms parties may agree (other than as addressed in questions 3.4 to 3.6)?

The general limitations to contractual freedom also apply to licence terms. Therefore, the licence terms must not be impossible, unlawful or immoral (Art. 20 of the Swiss Code of Obligations, “CO”). Art. 27 of the Swiss Civil Code (“CC”), which prohibits excessive restrictions, also applies to licence agreements. For example, a free licence of all copyright on any and all works of an author, including any future works for his/her lifetime, would be considered excessive and thus void under Art. 27 CC.

The UCA and antitrust laws can also set limits to the licence terms.

3.4 Which types of copyright work have collective licensing bodies (please name the relevant bodies)?

The main collective licensing bodies in Switzerland include: ProLitteris for literary, photographic and plastic art works; SSA for dramatic, literary and musical works; SUISSIMAGE for audio-visual works; and SWISSPERFORM for related rights of performers, phonogram and audio-visual fixations producers, radio broadcasters.

3.5 Where there are collective licensing bodies, how are they regulated?

Licensing bodies are subject to the supervision of the Swiss Federal Institute of Intellectual Property. Authorisations are granted for five years and are renewable. Licensing bodies are regulated by Art. 40 ff CopA, which provides amongst others that collective licensing bodies have an obligation to the owners of rights to assert those rights that fall within their field of activities. They are non-profit and shall draw up and publish tariffs for the remuneration that they collect. After deduction of costs and funds used for social welfare purposes, the proceeds must be distributed to the rights owners and other beneficiaries in proportion to the revenue derived from the individual works and/or performances.

3.6 On what grounds can licence terms offered by a collective licensing body be challenged?

The tariffs of the licensing bodies must be approved by the Federal Arbitration Commission for the Exploitation of Copyrights and Related Rights (the “Arbitration Commission”). The decision of the Arbitration Commission may be appealed to the Federal Administrative Court and further to the Supreme Court on limited grounds, amongst others violation of the equitableness principle or that the tariffs cover a right that is not to be managed exclusively by the licensing body.

4 Owners' Rights

4.1 What acts involving a copyright work are capable of being restricted by the rights holder?

The rights owner has the exclusive right to decide whether, when and how his/her work is used. The following acts are, in particular, capable of being restricted: producing copies of the work; offering, transferring or otherwise distributing copies of the work; reciting, performing or presenting a work; broadcasting the work by radio, television or similar means; retransmitting the work by means of technical equipment; and making the work available, broadcasted and retransmitted perceptible. The author of a computer program may also restrict the rental of the work.

Swiss law also protects neighbouring rights of performers, broadcasters and producers of sound and video recordings.

4.2 Are there any ancillary rights related to copyright, such as moral rights, and if so what do they protect, and can they be waived or assigned?

Moral rights do exist under Swiss Law. They include the right to recognition of authorship (paternity right), the right of first disclosure, the right to the integrity of the work (alteration of the work, creation of a derivative work, inclusion in a collective work), the right of access and exhibition, as well as the protection against destruction.

As a general rule, moral rights are not assignable. However, the author can waive or allow a third party to exercise certain moral rights, which has the consequences of limiting the scope of these rights. For example, the author can authorise a third party, such as a publisher, to have the work first published. The author can also waive its paternity right or authorise a third party to publish the work under such third party's name. Moreover, the author can authorise a third party to alter his/her work or use it to create a derivative work, with the caveat that the author may oppose any distortion of the work consisting of a violation of his/her personality rights.

4.3 Are there circumstances in which a copyright owner is unable to restrain subsequent dealings in works which have been put on the market with his consent?

According to the international exhaustion principle, physical copies of a work that have been put on the market by the author or with his/her consent can freely circulate. Therefore, copyright owners cannot prevent parallel imports of such physical copies.

An exception to this rule was implemented to protect movie theatres (Art. 12 (*Ibis*) CopA). It provides that, unless authorised by the author, copies of audio visual works such as movies may not be further transferred or rented (including by video on demand) during the first broadcasting period in movie theatres.

5 Copyright Enforcement

5.1 Are there any statutory enforcement agencies and, if so, are they used by rights holders as an alternative to civil actions?

Rights holders enforce their rights through civil or criminal actions or with the assistance of custom authorities. There are no statutory enforcement agencies as an alternative to such actions.

5.2 Other than the copyright owner, can anyone else bring a claim for infringement of the copyright in a work?

The exclusive licensee is entitled to bring a claim for infringement, unless this is expressly excluded in the licence agreement. Collective societies can also file a claim in their field of activity.

5.3 Can an action be brought against 'secondary' infringers as well as primary infringers and, if so, on what basis can someone be liable for secondary infringement?

An action can be brought against anyone who participates to the infringement, which includes secondary infringers such as accomplices and abettors.

5.4 Are there any general or specific exceptions which can be relied upon as a defence to a claim of infringement?

Art. 19 ff CopA provides a catalogue of exceptions. Such exceptions are subject to conditions and include amongst others private use, archive and backup copies, temporary copies, quotations, museum catalogues, etc. Creation of parodies can also be relied upon as a defence (Art. 11 (3) CopA).

5.5 Are interim or permanent injunctions available?

Such injunctions are available.

Interim injunctions can be filed prior to or simultaneously with a claim on the merits. Such injunction has to be filed with the competent Court, which rules as sole cantonal instance. The applicant must provide *prima facie* evidence that a right to which he/she is entitled has been violated or a violation is anticipated, and that such violation threatens to cause him/her a harm that cannot be easily repaired, which is usually the case in copyright infringement. In case of special urgency, the Court may order the interim measures immediately without hearing the opposing party.

A permanent injunction can only be ordered within the framework of a claim on the merits.

5.6 On what basis are damages or an account of profits calculated?

Financial compensation is rather difficult to obtain. There are three different legal grounds to claim damages: tort (Art. 41 CO); unjust enrichment by the infringer (Art. 62 CO); and remittance of the profits made by the infringer (Art. 423 CO). Each ground is subject to specific conditions. Loss of profits based on tort law is usually extremely difficult to prove, as even a decrease of the turnover is usually not sufficient. One may therefore prefer to claim the net profit made by the infringer based on unjust enrichment or remittance of the profit. Whatever the legal ground, only the damage or profit that is a direct result of the infringement is relevant. Other factors that may have influenced the customer's decision in buying a counterfeit may negatively impact the calculation of damages or profits claimed: for instance, if the counterfeit is sold under a third party's trademark, the consumer's decision to purchase it may be based on such trademark and have no connection with the counterfeited work.

5.7 What are the typical costs of infringement proceedings and how long do they take?

The costs of infringement proceedings (including Court fees and attorneys' fees) in the first instance vary significantly but can be roughly between CHF 30,000 and CHF 100,000. The amount depends on many factors including the complexity of the dispute, the number and length of submissions and evidences filed by the parties and the number of hearings held by the Court. The Court will usually request the plaintiff to pay an advance of costs. The amount of Court fees depends on the value in dispute. The losing party bears the Court fees and usually has to pay a financial indemnity covering part of the prevailing party's attorneys' fees.

The duration of the first instance proceedings also depends on the above-mentioned factors. It usually takes between one and three years to obtain a judgment in first instance.

The costs of appeal proceedings before the Federal Supreme Court are usually lower than in first instance proceedings. As there are no hearings, appeal proceedings take in general six months to one year.

5.8 Is there a right of appeal from a first instance judgment and if so what are the grounds on which an appeal may be brought?

Since High and Commercial Courts rule as sole instance in intellectual property matters, an appeal may only be brought before the Federal Supreme Court. The grounds of appeal are confined to the violation of federal or international law. The appellant can only challenge the facts if they were established in an "obviously incorrect manner" or in violation of the law by the previous Court.

5.9 What is the period in which an action must be commenced?

An action on the merits for injunctive relief or declaratory judgment can be filed at any time, subject to the rights not being forfeited. There is no specific time period for the forfeiture of rights, which may however happen if the plaintiff has tolerated the infringement for an extensive period of time (several years).

Whereas there is no time limit for filing interim measures, such request is subject to the condition of urgency, which requires that the applicant acts promptly upon discovery of the infringement.

Damages claims related to copyright infringement become time-barred one year from the date on which the plaintiff became aware of the damage and of the identity of the infringer, but in any event 10 years after the date on which the damage was caused.

6 Criminal Offences

6.1 Are there any criminal offences relating to copyright infringement?

Copyright infringement is considered a criminal offence (Art. 67 CopA). Other related criminal offences include omission of source, infringement of related rights, offences relating to technical protection measures and to rights-management information and unauthorised assertion of rights.

6.2 What is the threshold for criminal liability and what are the potential sanctions?

The infringer must have acted wilfully. Depending on the relevant offence, the sanctions can be a custodial sentence of up to five years and/or a fine.

7 Current Developments

7.1 Have there been, or are there anticipated, any significant legislative changes or case law developments?

The Swiss Federal Council has expressed the need to modernise Swiss copyright law and has appointed a working group which proposed a series of recommendations, including the implementation of "stay down" obligations for the host providers in order to prevent infringing uploads. The processing of data for the prosecution of copyright infringement should also be permissible. The report also includes a series of other measures, such as the extension of the protection period for neighbouring rights, a royalty-free exception for scientific purposes and the use of orphan works.

The Federal Department of Justice should provide the Federal Council with its proposed amendments by the end of 2017. The date of entry into force of the revision, if any, has not been set yet.

7.2 Are there any particularly noteworthy issues around the application and enforcement of copyright in relation to digital content (for example, when a work is deemed to be made available to the public online, hyperlinking, etc.)?

Once a copyrighted work is disclosed with the consent of the author(s), its downloading is legal and cannot be restricted.

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