

Switzerland

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1. Copyright, database rights and design rights

1.1 Overview

Internet content can be protected by copyright law in Switzerland; however, there are almost no specific provisions for internet content.

In summary, copyright law in Switzerland covers two objects of protection: works (ie, creations of the mind that possess an individual character and pass the threshold of originality); and neighbouring rights for certain content-related activities and results of such activities without any further threshold that must be passed (ie, activities and results of activities by broadcasters, performers and other relevant parties in relation to content with and without copyright protection).

Works in Swiss copyright law are legally defined as literary and artistic creations of the mind – irrespective of their declared purpose or economic value – that possess an individual character (ie, that are original). Originality is used as a threshold for copyright protection with the statistical uniqueness of a work often used as a practical test. Any content that passes the threshold of originality – including internet content – is covered by copyright protection in Switzerland. Trivial creations on the other hand remain in the public domain. In practice, the threshold is low with higher requirements only for certain categories of works. For visual works for example, a distinction is made between copyright-protected photographs and snapshots without copyright protection; however, even the case law thereto is inconsistent.

As a rule of thumb in legal practice, internet content can be considered copyright protected under Swiss copyright law if the threshold of originality is not obviously missed or no copyright exemption applies. Only a small number of works are excluded from copyright protection, in particular court decisions, legislative texts such as laws and ordinances, patent documentation and published patent applications, and administrative and official texts such as minutes and reports by public authorities.

A work is protected under Swiss copyright law as soon as it has been created. The copyright owner is the creator, who can assign his/her intellectual property rights to third parties.

Switzerland has no official register for copyrighted works, nor is it mandatory publicly to declare copyrighted works as such. Copyright notations such as © do not affect copyright protection in Switzerland, although they might be useful as deterring information to third parties, in particular abroad.

In assessing copyright law in Switzerland, it is important to consider that although the German term *Urheberrecht* is translated as copyright in English, copyright stands for a predominantly common law concept with many essential differences to the concept of *Urheberrecht* in the German legal sphere.

(a) *Literary works and artistic works*

Swiss copyright law does not have a *numerus clausus* of works protected by copyright. Common categories of literary and artistic works – including literary, scientific and other works of language, works of music and other acoustic works, works of visual art, works with scientific or technical content, architectural works, works of applied art and visual or audio-visual works – are listed as examples.

Copyright protection does not depend on the communication or publishing medium used to create works and internet content is therefore copyright protected if it meets the general requirements for copyright protection in Switzerland. In addition, computer programs (ie, software), are explicitly mentioned as copyright protected and Swiss copyright law contains several special provisions on copyrighted software. The first sale doctrine is applicable to computer programs while the right to rent software out remains exclusively with the software creator.

Software under Swiss copyright law must meet the threshold of originality for copyright protection. In practice, this threshold is met by novelty or absence of triviality in comparison to existing software. Software copyright covers source code and the object code, but not the underlying ideas and principles. Algorithms, formulas and ideas used in and for software for example are not copyright protected in Switzerland.

(b) *Films, sound recordings and broadcasts*

Copyright protection in Switzerland applies to films, sound recordings and broadcasts on the Internet. Neighbouring rights are in particular relevant in this context. Performers, for example, have the moral right of recognition for their status as performers and the right to make their performances perceivable in other places than those in which they were performed (eg, through download and streaming platforms such as Google's YouTube or internet television offers by Swiss internet providers).

(c) *Typographical arrangement of a published edition*

Swiss copyright law does not protect the typographical arrangement of a published edition; nor are typefaces specifically protected by copyright. Swiss courts have been very reluctant to grant copyright, design or any other legal protection to typefaces. The name of a typeface, however, can be protected as a trademark and the typographical arrangement of a published edition might in theory be protected under unfair competition law.

(d) *Protection of the user interface*

The look and feel of graphical user interfaces (GUI) of any kind of software including web applications can be protected under Swiss copyright law if the threshold of

originality is met. An alternative or cumulative intellectual property protection under Swiss design law is possible if the design law-specific requirements are met, in particular the requirements of originality and novelty. In addition, only registered designs are protected while copyright protection does not require a registration. GUI registered and protected as designs are rare in Switzerland.

(e) **Computer-generated works**

Computer-generated works are protected under Swiss copyright law if the threshold of originality is met. Such works must in particular be the results of creative human activity, for example computer-generated music by a composer. Randomly computer-generated works – for example paintings – are copyright protected if randomness was explicitly used by the creator.

(f) **Websites protected as databases**

Swiss copyright law does not provide for *sui generis* database protection, unlike for example the European Union and its member states; therefore, a legal definition of ‘database’ does not exist. Databases might be copyright protected as compilations if the selection and presentation of the data used is particularly individual and original. Protection might in theory also be provided under Swiss unfair competition law.

(g) **Compilations**

Compilations are protected under Swiss copyright law if the selection and presentation of the data used results from a creation of the mind that possesses an individual or original character. The data compiled does not need to consist of protected works. ‘Sweat of the brow’ compilations are not known in Swiss copyright law. Swiss intellectual property law in general does not use a sweat of the brow criterion as a threshold for protection.

1.2 Infringing acts

Swiss copyright law grants the creator of a copyrighted work or the copyright holder the exclusive right to decide whether, when and how a copyrighted work may be used. Common uses of copyrighted works such as reproduction, translation, editing, distribution, sale, performance, broadcast and transfer of works are listed in Swiss copyright legislation without the copyright protection being limited thereon.

Any use of copyrighted works by third parties without permission by the creator or the copyright holder constitutes an infringing act if no copyright exemption or defence is applicable. Specific infringing acts listed in Swiss copyright law include using a work under a false designation or a designation that differs from that decided by the creator, publishing a work, altering a work, using a work to create a derivative work, manufacturing copies of a work in any matter, selling or otherwise distributing copies of a work, making a work perceivable in any way either directly or with the help of any type of means, broadcasting a work by radio, television or a similar process, making a broadcast or rebroadcast perceivable, hiring out software and omitting to state the source of a work.

The concept of secondary infringement – for example by file hosting services – is

possible under Swiss copyright law while there exists no legal definition of 'secondary infringement'. The case law on secondary infringement is rare and inconsistent. From a criminal copyright law perspective, secondary infringement results from complicity in copyright-infringing acts such as listed above with knowledge and intent on the part of the secondary infringer.

1.3 Test for copyright infringement

The *de facto* test for copyright infringement under Swiss copyright law is to assess the originality of a work (ie, any infringing act with regard to a work that passes the threshold of originality and is therefore a copyrighted work, constitutes a copyright infringement). A copyright infringement under Swiss copyright law requires neither substantial reproduction nor repeated copying of an insubstantial part of copyright-protected works. Any infringing act with regard to a copyrighted work constitutes a copyright infringement if no copyright exemption or defence is applicable.

1.4 Exemptions/defences to copyright infringement

(a) *Format shifting*

Format shifting of licensed copyrighted works – with the exception of copyrighted works with technological protection measures (TPM) such as digital rights management (DRM) for software – is not considered a copyright infringement under Swiss copyright law. The circumvention of TPM is prohibited in principle; however, there is a notable exception as the prohibition does not apply to circumventing TPM for the purpose of lawful use (eg, back-up copies of computer programs or within the broad exemption of personal use). Providing knowledge and services on the circumvention of TPM on the other hand is prohibited.

(b) *Personal copying rights*

The Swiss copyright law exemption relating to personal use grants various mandatory use permissions for any copyrighted content with the exception of computer programs. Any use of copyrighted content except for software is permitted as personal use in the personal sphere and among closely related persons – for example, among friends or relatives – including such use through the Internet. The same exemption applies for educational purposes such as teaching in class. In companies as well as in the public administration and in similar institutions, the reproduction of copyrighted works for internal documentation and information is permitted.

Third parties are allowed to act on behalf of beneficiaries of personal use permissions. Such third parties include, for example, companies and libraries providing copy machines for use by their customers and visitors, or online service providers that enable digital variants of personal use permissions as long as such variants are limited to partial reproductions.

The use of copyrighted content for personal use is free in principle; however, indirect (and therefore hidden) copyright levies often apply. Third parties acting on behalf of beneficiaries of personal use permissions are subject to copyright levies, for

example on copy machines, printers and computer networks. Also subject to copyright levies are manufacturers and importers of so-called blank recording mediums as required for most personal use. The definition for blank recording mediums applies not only to traditional storage mediums such as compact discs and hard disk drives, but also to mobile phones and tablets capable of playing music and other content. Copyright levies are collected by five private collective administration societies under federal supervision.

(c) ***Time shifting***

Time shifting directly by consumers – for example with a digital video recorder (DVR) at home – is considered personal use under Swiss copyright law. Manufacturers and importers of DVRs and similar devices with digital storage capacity, or other blank recording mediums, are subject to copyright levies.

Time shifting offered by third-party providers – in Switzerland predominantly by telecommunications providers such as UPC Cablecom (cable television) and Swisscom (internet television) or internet streaming providers such as Wilmaa and Zattoo – is subject to copyright levies and limited to seven days according to a recent decision of the Swiss Federal Arbitration Commission on Copyright. Representatives of the US entertainment industry had originally argued for single licence agreements, but finally accepted the arbitration commission's decision.

(d) ***Fair use***

Fair use, or an equivalent doctrine, does not exist in Swiss copyright law. Personal copying rights are more comprehensive but limited to certain environments such as the personal sphere for personal use.

News aggregators such as Google News operate in Switzerland mainly under the right of quotation and a copyright exemption for media reports on current events. In addition, many news articles – in particular headlines and intros – do not reach the threshold of originality for protection under Swiss copyright law. A dedicated neighbouring right for print publishers such as exists in Germany has not been implemented in Switzerland to date.

(e) ***Caching/temporary copies as part of communication process***

Temporary caching and non-permanent reproduction of licensed copyrighted works are explicitly permitted under Swiss copyright law if necessary as part of communication processes in electronic networks and if they do not have any independent economic significance. Examples are a user's browser cache, random access memory (RAM) in a computer or a proxy server in a network.

(f) ***Hosting***

There are no specific provisions in Swiss law regarding hosting. There are accordingly no exemptions, safe harbours or defences to copyright infringement for hosting (and other) internet providers in Switzerland. General administrative, civil and criminal Swiss law provisions are applicable to hosting.

(g) ***Back-up copies***

One back-up copy of a published copyrighted work is permitted under Swiss copyright law if such copy is clearly designated as a back-up copy and stored in an archive that is not publicly accessible. In a digital context, more than one copy is considered lawful, for example through versioning or the necessity of backups on-site as well as off-site. Back-up copies are also permitted for software and the right to create a back-up copy of a computer program cannot be excluded by contract.

Libraries, archives, educational institutions and museums are permitted to make copies of published copyrighted works if necessary to maintain and secure their stocks and if they do not pursue an economic or commercial interest.

(h) ***Reverse engineering***

Lawful owners of a computer program in Switzerland are granted the right to obtain information on the computer program's interfaces by reverse engineering of the computer program's source code themselves or by commissioning a third party to obtain such information. The use of information obtained by reverse engineering is legally limited to the development, maintenance and use of interoperable (ie, interactive) computer programs and must not affect the normal exploitation of the computer program, or the legitimate interests of the intellectual property rights owners in the computer program.

(i) ***Parody defence***

Published copyrighted works may be used to create parodies or comparable variations of works.

(j) ***Incidental inclusion***

The defence of incidental inclusion does not formally exist under Swiss copyright law. From a criminal copyright law perspective, only intentional acts of copyright infringement are punishable. Civil actions for damages due to copyright infringements are mostly based on actual loss for the rights holder – in lieu of reasonable royalties (licence analogy) – and profits by the infringer. Incidental inclusion might therefore *de facto* be used as a defence to copyright infringement claims.

1.5 **Remedies available for copyright infringement**

Swiss intellectual property law offers various administrative, civil and criminal actions against copyright infringers and relevant third parties such as internet access, content and hosting providers. The remedies available are identical or very similar for copyright, design, patent and trademark infringements.

Civil actions include actions for declaratory judgment on whether a copyright claim or a legal relationship with regard to copyright subsist under Swiss copyright law, actions for execution such as cease and desist orders for imminent or existing copyright infringements, and actions for information on copyright infringements such as their duration in order to assess damages. Swiss intellectual property law further refers to general Swiss civil law to institute proceedings for the compensation