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Jenner & Block LLP

Lexology Getting The Deal Through is delighted to publish the fourteenth edition of *Copyright*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Indonesia.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

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Switzerland

Dirk Spacek

CMS von Erlach Poncet Ltd

LEGISLATION AND ENFORCEMENT

Relevant legislation

1 | What is the relevant legislation?

Swiss copyright legislation essentially consists of the Federal Act on Copyright and Neighbouring Rights of 9 October 1992 (FACN) and the Regulation on Copyright and Neighbouring Rights of 26 April 1993 (RCN). The RCN provides more details on matters not governed specifically by the FACN.

The Swiss Federal Council has expressed a need to modernise Swiss copyright law, making it more suitable for the digital age, and, following this, the FACN is currently subject to a comprehensive revision. The Swiss Federal Office of Justice has drafted a revised version of the FACN (NFACN), which was handed over to the Swiss National Council and the Swiss Council of States for further parliamentary debate. The Swiss National Council completed its consultation on the NFACN in December 2018. Currently, the NFACN is being discussed by the Swiss Council of States' science, education and culture committee. It is expected that the legislative procedure will be completed in summer 2019 and that the revised FACN will come into force by the beginning of 2020.

Enforcement authorities

2 | Who enforces it?

Copyright is enforceable by the respective author of a copyrightable work or by his or her successors or assignees (ie, the rights holders of the respective copyright) by way of a civil law action. Certain copyright claims are only enforceable through 'collective societies'. Collective societies are instructed by law to administer and enforce claims on behalf of authors, in particular remuneration claims for particular types of use of copyrighted works (usually the mass use of works).

The FACN also provides for criminal sanctions such as imprisonment or the payment of fines in cases of intentional infringement of copyright. These remedies are enforced by a locally competent criminal authority (usually a state attorney) either upon a prosecution request of an injured party or, in the case of an infringement with commercial intent, in the own motion of the authority (ex officio).

Online and digital regulation

3 | Are there any specific provisions of your copyright laws that address the digital exploitation of works? Are there separate statutory provisions that do so?

The FACN follows a technology-neutral approach. Any forms of reproductions of copyrighted works (physical copies or digital copies as electronic files) and any forms of public performance or 'making available' of copyrighted works (be it physically or by digital means) require the prior permission of the author (article 10, FACN).

The FACN provides for a few explicit provisions on digital technologies, including specific provisions on technical measures to protect copyrighted content from unlawful use (ie, digital rights management (DRM)). The circumvention of DRM tools as well as the possession, production, importation, advertising and introduction of goods or services with the purpose of circumventing DRM are prohibited. The circumvention of DRM tools for the use of duplicating copyrighted works is permitted solely if allowed by law (eg, to use an acquired work in the private sphere (see article 39a, FACN)).

The FACN also provides for provisions allowing temporary reproduction of copyrighted works as a necessary and integral part of an information technology procedure (article 24a, FACN). It also features a provision allowing the temporary reproduction of certain musical works for broadcasting purposes, provided that the right to permit such reproductions can only be claimed and enforced by the respective collective societies (article 24b, FACN).

Finally, the NFACN addresses various new topics related to copyright enforcement in the digital world (eg, royalties with respect to video-on-demand services and stay-down duties for internet hosting providers).

The NFACN is not yet in force and additional details on it will be provided later.

Extraterritorial application

4 | Do your copyright laws have extraterritorial application to deal with foreign-owned or foreign-operated websites that infringe copyright?

Swiss copyright law is applicable to foreign-owned or foreign-operated websites if their offerings are considered to infringe authors or rights holders in Switzerland. This is usually the case if the site addresses customers in Switzerland. In this regard, the NFACN has provided for new provisions, under which Swiss access providers could be instructed to block access to infringing content stored by hosting providers outside of Switzerland. The legislator has expressed concerns and wishes to avoid excessive 'overblocking'. So, the concept of blocking obligations has been dropped in the NFACN. This is in line with one of the latest decisions rendered by the Swiss Federal Supreme Court that confirmed that access providers cannot be compelled to block copyright-infringing content uploaded by third parties on online portals (decision of February 8, 2019, FSC 4A_433/2018).

Agency

5 | Is there a centralised copyright agency? What does this agency do?

Switzerland currently has five established copyright collective societies: Suisa, ProLitteris, Suisseimage, Société Suisse des Auteurs and Swissperform.

These collective societies are established and act under governmental permission and supervision. Collective societies enforce specific copyright claims governed under statutory provisions in the FACN and so collect royalties on behalf of the authors. For certain types of copyright claims, enforcement is exclusively reserved to collective societies. For other types of copyright claims, an author may entrust the collective society with such activities on a voluntary basis (a rights administration agreement). Each of the collective societies is in charge of different categories of copyrighted works:

- Suisa acts for non-theatrical musical works;
- ProLitteris acts for works of literature, photography and fine art;
- Suisseimage acts for visual and audiovisual works;
- the Swiss Society of Authors acts for theatrical and musical theatrical works; and
- Swissperform acts for neighbouring rights (rights of performing artists, broadcasters and producers of sound and video recordings).

All Swiss collective societies have undertaken reciprocal agreements with foreign collective societies so as to ensure that members will receive their royalties for the use of their works abroad.

SUBJECT MATTER AND SCOPE OF COPYRIGHT

Protectable works

6 | What types of works may be protected by copyright?

The FACN provides for protection of literary, artistic intellectual creations with an individual character, irrespective of their value or purpose (article 2, FACN). These include:

- literary, scientific and other works that make use of language;
- musical works;
- fine art, in particular paintings, sculptures and graphic works;
- works with scientific or technical content;
- works of architecture;
- applied art (eg, furniture or jewellery);
- photographic, cinematographic and other visual or audio-visual works;
- choreographic works and works of mime; and
- computer programs (software).

The Swiss Federal Supreme Court has recently held that even a simple chair may enjoy copyright protection if it is sufficiently individual that it clearly differentiates itself from pre-existing forms and shapes (FSC 143 II 373).

The FACN explicitly provides for protection of software as a recognised work category (article 2, paragraph 3, FACN).

The NFACN is expected to introduce a new category of copyrighted works, namely photographic reproductions and three-dimensional images produced similarly to photography, but which do not necessarily have an individual character (article 2, paragraph 3-bis, NFACN).

Rights covered

7 | What types of rights are covered by copyright?

The author or respective rights holder has an exclusive right to use a copyrighted work and to authorise such use by others, in particular the right to publish, reproduce, perform or make available his or her work (article 10, FACN). Further, an author has the exclusive right to allow modifications of his or her work, such as adaptations or derivative works (for example, a film version of a copyrighted novel (article 3, FACN)). Since computer programs enjoy copyright protection under the FACN as well (see question 6), the latter also applies to adaptations made to a particular software code created by a software developing

author. An author of a computer program also has an exclusive right to lease such a program to third parties (article 10, paragraph 3, FACN).

Excluded works

8 | What may not be protected by copyright?

Anything that does not meet the general requirements of a copyrighted work under article 2 of the FACN, that is, anything not qualifying as an intellectual creation or not bearing an individual character (see question 6) is not protected. For instance, products of coincidence or created by nature do not qualify as creations. Or, according to Swiss case law, a telephone book CD or a compendium of medicines does not bear an individual character.

The FACN explicitly provides that official documents of the type including statutes, regulations, treaties and other administrative statutes, means of payment, judicial decisions, protocols and reports of governmental authorities, patent specifications and published patent applications are not protected under copyright (article 5, FACN).

Fair use and fair dealing

9 | Do the doctrines of 'fair use' or 'fair dealing' exist, and, if so, what are the standards used in determining whether a particular use is fair?

No. There is no fair use doctrine or similar (equity-like) limitation under Swiss law. In contrast to the Anglo-American copyright system, Swiss copyright provides for a limited amount of copyright restrictions precisely enumerated in the FACN. Restrictions may apply to the use of published works in the private or domestic sphere, within enterprises or for educational purposes (see article 19, FACN). These restrictions do not abolish copyright protection. The FACN permits a statutory right of use in these areas, but such use might still be subject to the payment of statutory royalties that are collected and distributed by collective societies (see question 5). The FACN also provides for other restrictions, for example, concerning citations (short excerpt references) or news reportings on current events.

A further aspect to be considered a restriction of copyright under Swiss law is the principle of exhaustion (first sale doctrine). It provides that if an author or rights holder has consented to the sale of a copy of his or her work, this copy may be re-sold or re-distributed without the author's or rights holder's consent. Computer programs may only be re-sold 'as is', since an author has an exclusive right to lease computer programs (see question 6). Based on a relatively recent court decision in Switzerland, the principle of exhaustion is also applicable to computer programs distributed online (via download) provided that the acquirer is granted a permanent right to use such file against the payment of a singular one-time fee and in the event of a further re-sale, the original file on the acquirer's computer is irreversibly deleted (see preliminary injunction decision of the court of the canton of Zug, 4 May 2011, Az ES 2010 822).

In the context of computer programs, copyright also allows the decompiling of computer programs (ie, the reverting of machine code into its original source code) if such procedure is necessary to establish interoperability with independent third-party software or systems (article 21, FACN).

Finally, copyrighted works may generally be used for the creation of parodies or similar adaptations of a work (article 11, paragraph 3, FACN).

Architectural works

10 | Are architectural works protected by copyright? How?

Yes, works of architecture are a recognised work category protected by copyright provided that they have an individual character (see question

6). An author (or architect) has a right to object to any distortion or modification of the work if this would be harmful to his or her reputation or personality (article 11, FACN).

Performance rights

11 | Are performance rights covered by copyright? How?

Performance rights as such are protected as 'neighbouring rights' for performing artists under the FACN (see question 12).

Neighbouring rights

12 | Are other 'neighbouring rights' recognised? How?

The FACN provides for separate protection of 'neighbouring rights'. Neighbouring rights consist of rights of performing artists, producers of sound recordings and films, as well as broadcasting organisations (article 33 et seq, FACN).

The protective scope of 'neighbouring rights' is smaller than the claims conferred under copyright. For example, performing artists only have an exclusive right to make their performance available to the public outside of the location in which it originally took place (including to broadcast and transmit or to make recordings and copies and sell them). The producer of a sound recording or audiovisual recording only has an exclusive right to copy and sell the physical carriers (article 35, FACN). Furthermore, broadcasting organisations only have the exclusive right to retransmit their broadcasting programme, make it available to the public, or to produce recordings and copies thereof and to sell it (article 37, FACN). The duration of 'neighbouring rights' is 50 years from 31 December of the year in which the performance, the production of the sound recording, audiovisual recording or the dissemination of the original broadcasting programme took place (article 39, FACN). The NFACN is expected to provide for new duration periods for neighbouring rights (ie, 70 years).

Integrated circuits are not specifically protected under copyright, but under a separate statute, the Swiss Federal Act on the Protection of Semiconductors.

'Hot news' – in the sense of current topicalities – is not protected under copyright law, unless the concrete form of presentation (in terms of language or audiovisual arrangement) amounts to a copyrighted work. The Swiss Federal Act on Radio and Broadcasting (FARB) provides for certain provisions on exclusive reporting. If broadcasters hold exclusive agreements with third parties on the reporting on certain public events, other broadcasters are entitled to short reports on the same topics as well (article 72, FARB).

Moral rights

13 | Are moral rights recognised?

Moral rights are recognised under Swiss copyright law. An author may prohibit any distortion, mutilation or modification of his or her work that is prejudicial or harmful to his or her reputation or personality (article 11, FACN). A further moral right to be considered is the author's rights to be identified as an author and to decide on the manner and date of the first publication of his or her work (article 9, paragraphs 1 and 2, FACN).

Moral rights are non-assignable by nature. They are considered inextricably connected to an author's personality. Nonetheless, frequently authors waive the exercise of their moral rights on a contractual basis. This is permitted under Swiss law as long as such waiver does not appear inequitable, that is, an excessive restriction with regard to the author's own personality (article 27, paragraph 2, Swiss Civil Code).

COPYRIGHT FORMALITIES

Notice

14 | Is there a requirement of copyright notice?

There is no requirement for a work to feature a copyright notice under Swiss law. A copyright notice has no legally binding effect under Swiss law. However, it may sometimes create the assumption of a copyrighted work and its ownership as well as destroy a copyright infringer's good faith.

Switzerland is a member state of the Universal Copyright Convention (UCC) and therefore recognises the marking requirements under article III, paragraph 1 of the UCC. Under this provision, any contracting state which, under its domestic law, requires as a condition of copyright, compliance with formalities (such as deposit, registration, notice, notarial certificates, payment of fees, etc) in that contracting state, shall regard these requirements as satisfied with respect to all works protected in accordance with the UCC and first published outside its territory and the author of which is not one of its nationals, if from the time of the first publication all the copies of the work published with the authority of the author or other copyright proprietor bear the symbol © accompanied by the name of the copyright proprietor and the year of first publication.

15 | What are the consequences for failure to use a copyright notice?

There are no legal consequences for failure to display a copyright notice in Switzerland.

Deposit

16 | Is there a requirement of copyright deposit?

No. There is neither a requirement nor an institution in charge of accepting copyright deposits in Switzerland. A deposit of a copyrighted work may, theoretically, be sought with a public notary providing a certain degree of proof with regard to the seniority of a copyrighted work.

17 | What are the consequences for failure to make a copyright deposit?

Since there is no requirement for copyright deposits, there is no consequence for failure to make such deposit.

Registration

18 | Is there a system for copyright registration, and, if so, how do you apply for a copyright registration?

There is no system for copyright registration under Swiss law. Copyrights come into existence automatically upon the creation of a copyrighted work (article 6, FACN).

19 | Is copyright registration mandatory? If voluntary, what are the benefits of registration?

No. There is no copyright registration system under Swiss copyright law.

20 | What are the fees to apply for a copyright registration?

Not applicable (see questions 18 and 19).

21 | What are the consequences for failure to register a copyrighted work?

Not applicable (see questions 18 to 20).

OWNERSHIP AND TRANSFER

Eligible owners

22 | Who is the owner of a copyrighted work?

Copyrights are vested in the author who created the work. An author is always considered to be the natural person who created an individual work (not, for example, a legal entity hiring such authors to work for them; article 6, FACN). If multiple authors have contributed to the creation of the work, the copyright is owned jointly by them. In the latter case, ownership may only be exercised with the consent of all other co-authors, unless they have agreed otherwise. However, if the individual contributions can be separated and the authors have not agreed otherwise, each co-author may use his or her contribution independently (article 7, FACN).

Employee and contractor work

23 | May an employer own a copyrighted work made by an employee?

In Switzerland, there is no 'work for hire' doctrine. Nor does an automatic transfer of copyright occur within an employment relationship provided under statutory law. Copyrights are only transferred from an employee to the employer by virtue of contractual assignment. A substantial majority of Swiss scholars hold the view that monetary exploitation rights of copyright can sometimes be transferred implicitly to the employer if this is required by the purpose of the employment relationship (purpose assignment theory). However, the theory is controversial. Thus, it is recommended to use explicit assignment language to transfer copyright to the employer.

With regard to computer programs created by employees in the course of their employment and as a part of their contractual duties, article 17, FACN provides that the employer alone is entitled to exercise monetary exploitation rights and the exclusive right of use of any copyright in such computer programs.

24 | May a hiring party own a copyrighted work made by an independent contractor?

Copyrights are always vested in the author who created the work (see question 22). Therefore, a hiring party will not automatically acquire ownership of copyright in a work made by an independent contractor. The copyright must be assigned to the hiring party with respective provisions in the hiring contract. To achieve effectiveness, the hiring contract and assignment need not be in writing. However, a written contract will always provide more certainty and conclusive proof. To the extent that the hiring relationship qualifies as a publishing contract, article 381 of the Swiss Code of Obligations provides that copyright is assigned by law from the author to the publisher to the extent and for the duration necessary to carry out the publishing contract, unless otherwise agreed between the parties.

Joint and collective ownership

25 | May a copyrighted work be co-owned?

Yes, a copyrighted work can be owned by more than one person if multiple authors (natural persons or legal entities) have jointly contributed to one creation (see question 22). Alternatively, this may also come

about if copyright has been assigned to multiple persons or in the event of a legal succession (eg, inheritance of copyright to multiple heirs).

Transfer of rights

26 | May rights be transferred? If so, what rules and procedures apply?

Yes, copyright is transferable by assignment and by legal succession. Copyrights can also only be transferred partially. However, there is a 'core fragment' of moral rights, which always remains with the author. Moral rights are inextricably connected to an author's personality (ie, the right to be named as an author; the right to prohibit any distortion of his or her work prejudicial or harmful to his or her personality; and the right to decide on the manner and date of the first publication of his or her work (see question 13)).

Licensing

27 | May rights be licensed? If so, what rules and procedures apply?

Yes, copyright can be licensed. There are no specific rules or provisions on licensing in the FACN or in the Swiss Code of Obligations generally applicable to contracts. Copyright licence agreements are considered 'contracts' (ie, contracts not governed under a specific statute). Therefore, provisions on various statutory contract types under the Swiss Code of Obligations will apply in a fragmented manner or by analogy. Copyright licences can be exclusive, sole, non-exclusive, complete or partial. The parties to a copyright licence are free to determine the scope they wish to license. Copyright licences are not subject to any prescribed form. However, a written agreement will provide conclusive proof for the existence of a copyright licence.

The NFACN provides for extended collective licences (article 43a, NFACN). Collective societies may be authorised to enter into licensing agreements with users on the mass use of published and copyrighted works in areas that are not subject to collective management by law. Rights holders may, however, object to the use of their works through this channel (and may ask for the exclusion of their rights managed through an extended collective licence (ie, opt out)).

28 | Are there compulsory licences? What are they?

There is one compulsory licence for the manufacturing of phonograms (audio recordings; article 23, FACN). The compulsory licence grants phonogram producers with a place of business in Switzerland the right to claim a licence for recorded musical works that have been offered for sale, transferred or otherwise distributed with the consent of an author in Switzerland or abroad. Unlike the statutory licences (see questions 5 and 9), the compulsory licence does not permit the use of a copyrighted work against the payment of a statutory royalty under a tariff established by a collective society. Instead, the authors or rights holders are required to enter into individual licence agreements with the respective user.

A limited number of restrictions to copyright apply in the form of a right to make specific uses of a copyrighted work under specific circumstances free of charge or against the payment of royalties under a statutory licence (see question 9). Technically, these restrictions are not compulsory licences. Yet factually, their effect can amount to the same.

29 | Are licences administered by performing rights societies? How?

Swissperform, the collective society for performing rights, administers licences for performing artists. It enforces the mentioned neighbouring

rights of performing artists (see question 12) and collects the payment of royalties for the grant of such rights. The enforcement of these rights may be reserved to the collective society by law or may be entrusted to it on a voluntary basis by the performing artists by means of a contract (a 'rights administration agreement').

Termination

30 | Is there any provision for the termination of transfers of rights?

No. There are no provisions on the termination of transfers of rights (in the sense that transfers are terminated by law and copyright is thereby re-assigned to the author).

Recordal

31 | Can documents evidencing transfers and other transactions be recorded with a government agency?

No, there is no government agency in charge of recording copyright transfers in Switzerland. As copyright is not registrable in Switzerland, transfers or similar transactions related to copyright is not registered publicly either.

DURATION OF COPYRIGHT

Protection start date

32 | When does copyright protection begin?

Copyright protection begins when a work is created by an author (article 6, FACN). Even parts of a copyrighted work may already enjoy copyright protection if they bear the basic requirements such as a creative act with individuality (article 2, paragraph 4, FACN). Thus, copyright protection may even begin before a work is fully completed by an author.

Fixation of a work in a tangible medium is not a necessary formal requirement, but the work must somehow be perceptible to human senses.

Duration

33 | How long does copyright protection last?

Computer programs are protected until the end of the 50th year following the death of the author. All other types of works are protected until the end of the 70th year following the death of the author (article 29, FACN). For co-authored works where an individual contribution cannot be separated, copyright protection lasts until the end of the 70th year (and, for computer programs, the 50th year) following the death of the last surviving joint author. If the individual contributions are separable, copyright protection of each singular contribution lasts until the end of the 70th or 50th year following the death of the respective author. As for audiovisual works, copyright protection lasts until the end of the 70th year following the death of the sole director or the death of the last joint co-director (article 30, FACN). If an author of a copyrighted work remains unknown, copyright protection lasts until the 70th year following the year of publication or, if the work was published in portions, at the end of the 70th year following the year of the final portion of the work (article 31, FACN). Please note that it is controversial whether this last term also applies to computer programs or whether the appropriate term should rather be 50 years.

The NFACN is expected to introduce a new category of copyrighted work, namely photographic reproductions and three-dimensional images produced similarly to photography, but which do not necessarily have an individual character (article 2, paragraph 3-bis, NFACN). It is envisaged that these works without an individual character will be

protected for 50 years after their production (article 29, paragraph 2, letter a-bis, NFACN).

34 | Does copyright duration depend on when a particular work was created or published?

If an author remains unknown, copyright duration depends on when a particular work was published (see question 33). Aside from this particular case, copyright duration is calculated from the date of death of the author, not when a particular work was created or published (for a detailed analysis, see question 33).

Renewal

35 | Do terms of copyright have to be renewed? How?

Duration of copyright need not and cannot be renewed.

Government extension of protection term

36 | Has your jurisdiction extended the term of copyright protection?

The current duration of copyright was established with the entering into force of the FACN on 9 October 1992. It has remained unchanged ever since.

COPYRIGHT INFRINGEMENT AND REMEDIES

Infringing acts

37 | What constitutes copyright infringement?

The use of a copyrighted work covered by the exclusive rights of the copyright owner provided under FACN (see questions 6 to 10) not authorised by the author or rights holder, provided that the copyright is still under a valid duration term (see questions 32 and 33), constitutes a copyright infringement. However, an infringement does not exist if such action is covered by the exhaustion principle (first sales doctrine) (see question 9) or if a restriction of copyright applies (see question 9). An author's or rights holder's copyright does not only extend to identical works of an infringer. Imitations that make use of the essential creative features of a copyrighted work can also constitute an infringement.

Vicarious and contributory liability

38 | Does secondary liability exist for indirect copyright infringement? What actions incur such liability?

Yes, the notion of secondary or contributory infringement exists under Swiss copyright law. The FACN provides a claim for injunctive relief against any copyright-infringing acts. In principle, this claim is applicable against anyone who engages in the same infringing activity, including secondary aiders and abettors (article 62, FACN). With regard to monetary compensation claims, the FACN and Swiss liability law principles under the Swiss Code of Obligations provide for damage claims only under specific circumstances. According to article 50 of the Swiss Code of Obligations and Federal Supreme Court practice, the cooperation of multiple parties directly or indirectly causing copyright infringements, each participant subjectively acting with thought (ie, wilfully or negligently), may lead to joint liability of these parties for the damages caused. There are, however, no clear guidelines as to how far the scope of involved persons can reach. Case law provides for various (and also inconsistent) decisions.

In a relatively recent decision, the Swiss Federal Supreme Court held that a hosting provider of a blog platform can be ordered to take down infringing user-generated content and may be ordered

to pay procedural court fees irrespective of his or her knowledge on the infringing content (decision of the Swiss Federal Supreme Court 5A_792/2011 of 14 January 2013; please note, however, that this case is based on the infringement of personality rights and not copyright).

In a more recent decision, the Swiss Federal Supreme Court held that access providers cannot be ordered to block infringing content uploaded by third parties on foreign web portals (decision of the Swiss Federal Supreme Court 4A_433/2018 of 8 February 2019). This decision made clear that the provision of technical infrastructure facilitating internet access alone does not contribute or aid infringement of copyright in a sufficiently causal manner (as required under platform liability principles under Swiss law).

Available remedies

39 | What remedies are available against a copyright infringer?

Swiss copyright law provides for various remedies against copyright infringement.

First, an author or rights holder may seek injunctive relief before the civil courts against an infringer prohibiting an imminent infringement, a judgment ordering the removal of ongoing infringements as well as, in particular cases, a declaratory judgment holding that a particular action infringes the author's or the rights holder's copyright (articles 61 and 62, paragraph 1, letters a and b, FACN). Injunctive relief claims may also be obtained in the form of a preliminary injunction which provides for an accelerated, simplified procedure (article 65, FACN).

Second, an author or rights holder may seek a civil court action for disclosure of the origin of infringing items against any person who is in possession of such items and for the confiscation and destruction of such items (article 62, paragraph 1, letter c, FACN).

Finally, an author or rights holder may claim damages against any infringer before a civil court (article 62, paragraph 2, FACN). Monetary compensation claims may be based on different notions of the law (ie, specific market reputation damages and reasonable attorneys' costs, restitution of (lost) profits, restitution of unjust enrichment or the payment of an adequate licence fee (by analogy)). In addition, a court may always order the publication of the judgment upon request of the claiming author or rights holder (article 66, FACN). Such publication may help to mitigate ongoing effects of a copyright infringement. Please note that Swiss law also provides for criminal law remedies against copyright infringement (article 67, FACN; see also questions 2 and 45).

Limitation period

40 | Is there a time limit for seeking remedies?

There is no statutory time limit for seeking injunctive relief or declarative judgments against copyright infringements. An author's or rights holder's claim may, however, be considered forfeited if he or she has, during an extensive time period, tolerated ongoing infringements (which were known to him or her or which he or she should have known). As for monetary compensation claims linked to copyright infringements, such claims are based on the notion of tort, agency of necessity or unjust enrichment and are therefore subject to a relatively short statute of limitation of one year from the knowledge of the infringing act (articles 60 and 67 of the Swiss Code of Obligations).

As for criminal law remedies, time limits for taking action are considerably longer (ie, usually seven years from the occurrence of an infringement (article 97 of the Swiss Federal Criminal Code; see also questions 2 and 43)).

Monetary damages

41 | Are monetary damages available for copyright infringement?

Yes, monetary compensation claims are available for copyright infringement (see question 39). In Switzerland, the term 'monetary compensation claims' is used more frequently as it is broader than 'damages'. It comprises all forms of monetary compensation triggered by copyright infringements. The legal basis of such compensation claims can vary from genuine damage claims to restitution of profits or unjust enrichment claims as well as the payment of an adequate licence fee (by analogy).

Attorneys' fees and costs

42 | Can attorneys' fees and costs be claimed in an action for copyright infringement?

Yes, according to Swiss case law, reasonable attorneys' fees can under particular circumstances be enforced as damage claims to the extent proven that they were necessary for the prevention of an infringement. In addition, court fees and a fragment of the attorneys' fees are awarded to the party who wins on the merits of the infringement action (based on court tariffs).

Criminal enforcement

43 | Are there criminal copyright provisions? What are they?

The FACN provides for criminal penalties imposed on copyright infringements. The wilful infringement of copyright is punished with imprisonment of up to five years or a fine, or both. Fines may range from one Swiss franc up to a maximum of approximately 1 million Swiss francs, depending on the degree of fault and the personal and economic circumstances of the infringer (article 67, FACN). In regular practice, the sentences typically imposed are significantly lower.

Online infringement

44 | Are there any specific liabilities, remedies or defences for online copyright infringement?

There is no specific statute or act addressing liabilities or defences against online copyright infringements. The current Swiss copyright act does not have a provider-specific legislation in place as for example the US (with the Digital Millennium Copyright Act) or the European Union (with the European E-Commerce-Directive 2000/31/EC) providing liability shields for hosting providers. Instead, the general rules and principles of Swiss copyright and liability law apply including the notions on secondary and contributory infringement (see question 38).

All civil law and criminal law remedies listed under questions 39, 41 and 43 are also available against online copyright infringements. However, the strategic enforcement of such claims is more challenging as it requires interaction with internet service providers or similar intermediaries supportive to online copyright infringement. Some internet service providers provide for voluntary, standardised takedown procedures (eg, 'piracy cops') while others do only act on a case-by-case basis. It is noteworthy that large providers (such as Google or Facebook) have a tendency to unify their anti-piracy policies on a regional level. Thus, practices required under EU law for such providers are often also applied in Switzerland as it is easier to administrate them on a broad geographic level even though Switzerland is not a member of the EU.

Since the internet can serve as a suitable tool for anonymity, criminal law remedies gain considerable relevance as they are frequently the only way to enforce the procurement of evidence and reveal an online-infringer's identity. New legislation on copyright is expected in Switzerland and the NFACN provides for additional obligations of

internet hosting providers to take measures against copyright infringements conducted over the internet (article 39d, FACN). (See also 'Update and trends'.) Hosting providers may be obliged to ensure that infringing content removed from their servers stays removed from their servers (stay-down duty).

Prevention measures

45 | How may copyright infringement be prevented (including, for example, customs enforcement measures and any technological notable developments)?

The use of the copyright notice is not required under Swiss law, but it may be helpful for preventing infringements. Mandating a collective society with the enforcement and collection of copyright fees can also help to prevent infringements as these societies monitor and enforce monetary compensation claims (see question 5). Technical measures (DRM) to administer and control copyrighted digital content may also contribute to prevent infringement (see question 3). In addition, it is also possible to file a request with the Swiss custom authorities to temporarily retain suspected items entering the border which could infringe an author's or rights holder's copyright in Switzerland (article 75, FACN).

RELATIONSHIP TO FOREIGN RIGHTS

International conventions

46 | Which international copyright conventions does your country belong to?

Switzerland is a member of most multilateral international conventions on copyright and neighbouring rights law:

- the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS, within the establishment of the World Trade Organization, 1994);
- the revised Berne Convention for the Protection of Literary and Artistic Works (Paris version of 1971);
- the UCC (Paris version of 1971);
- the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome 1961);
- the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Geneva 1971);
- the Convention establishing the World Intellectual Property Organization (WIPO) (Stockholm 1967);
- the WIPO Copyright Treaty (Geneva 1996); and
- the WIPO Performance and Phonograms Treaty (Geneva 1996).

47 | What obligations are imposed by your country's membership of international copyright conventions?

Based on the majority of Swiss scholarly opinions, all obligations brought forward in the above-mentioned international treaties are implemented into Swiss national law. There are no obligations pending.



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UPDATE AND TRENDS

Emerging trends and new legislation

48 | Are there any emerging trends or hot topics in copyright regulation in your jurisdiction? Has there been any new copyright legislation passed or proposed within the last 12 months?

The Swiss Federal Council has proposed amending the FACN in various ways. The new proposed legislative draft (NFACN) is primarily aimed at improving anti-piracy strategies. To this effect, the NFACN imposes a 'stay-down duty' (see question 44) on certain internet hosting providers under which they must ensure that copyright-infringing content, once removed, remains off their servers.

The draft also clarifies that rights holders whose copyright is being infringed may process the personal data needed to file a criminal complaint or charge (eg, IP addresses, although there is controversy about whether this constitutes personal data).

The NFACN has refrained from introducing internet blocking obligations for access providers. The new draft does not suggest changing the legality of downloading copyrighted content from the internet for private use.

In addition to anti-piracy measures, the draft contains various reforms for adapting the FACN to the recent technological developments. For instance, researchers and libraries are permitted to use their content inventories without explicit consent of rights holders.

Furthermore, the duration of the protection for performances under 'neighbouring rights' is to be extended from 50 to 70 years, and creative artists are to benefit from broader protection for photography exploitation as well as more efficient management of video-on-demand rights.

Also, new rules on the collective management of copyright is to be introduced in order to facilitate the exchange of copyrighted digital content. Namely, the NFACN provides for extended collective licenses under which collective societies may conclude agreements with users relating to the mass use of copyrighted works, even if such rights are not assigned to the collective societies by law. However, the rights holders have a right to object such use (an opt out).

Finally, the Swiss government has also proposed ratification of the Peking Treaty and the Marrakesh Treaty, both of which are already implemented under the current Swiss legal system.

The NFACN must still be adopted by parliament.

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