

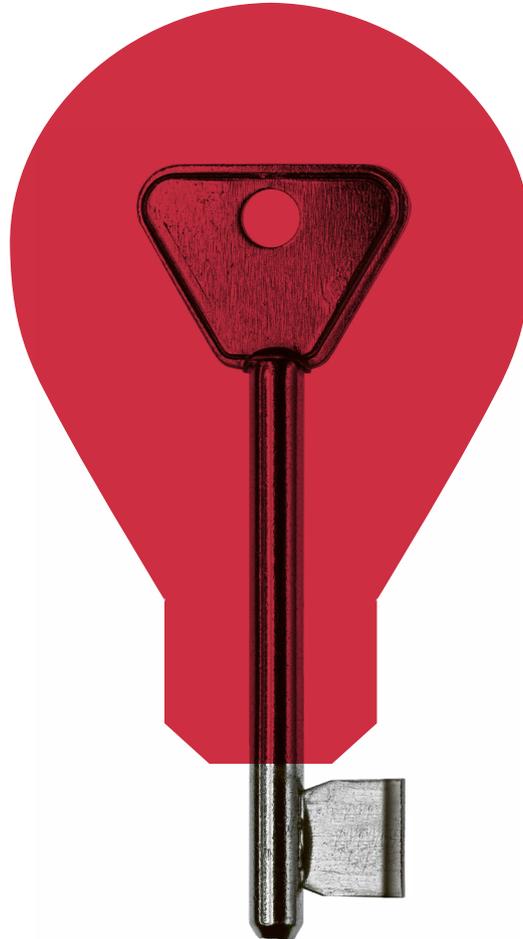
# N

Monthly  
Newsletter  
June 2020

---

Intellectual  
Property

**Schellenberg  
Wittmer**



# Copyright 2.0? The revised Swiss Copyright Act

Philipp Groz and Dr. des. Sarah Leins-Zurmuehle

## Key Take-aways

- 1.** Press photos, product photographs and snapshots are now protected by copyright even if they do not have an evident individual character.
- 2.** The fight against online piracy will become more effective, in particular through stay-down obligations of hosting providers.
- 3.** The use of IP addresses for criminal prosecution of copyright infringements is now permitted by law.

## 1 Not a major breakthrough, but an acceptable compromise

While in the days of Covid-19 regulatory changes seem to occur almost at a daily rhythm, the **latest revision of the Swiss Copyright Act ("CopA")** entered into force almost silently in April 2020 – nearly eight years after a working group for the optimization of the collective management of copyrights and related rights had been formed under the acronym AGUR12. With the planned reform, the legislator set itself **high goals**, seeking to equip copyright for the digital age and to improve the legal protection of authors with regard to online exploitation and internet piracy. Although these aims could **only be partially achieved**, the strongly divergent wishes of the numerous interest groups could be addressed in a compromise acceptable to the majority. Even if the new law does not give Switzerland a "copyright 2.0" with ground breaking innovations, Swiss copyright law remains flexible for new types of use and exploitation and is better equipped for the digital age. This newsletter will address some of the key points of the implemented revision.

## 2 Copyright protection of photographs strengthened

In a controversial decision from 2004, the Swiss Federal Supreme Court denied the work character of a photograph that depicted Christoph Meili, then working as a security guard, with two folios in his hands (DFT 130 III 714). According to the Federal Supreme Court, although the photograph documented a historical moment, it would **not be sufficiently individual** in terms of Swiss copyright and would hence not be copyrightable. By contrast, in a decision issued only shortly before, the Federal Supreme Court had recognized the work character under copyright law of a photograph depicting singer Bob Marley during a concert (DFT 130 II 168).

Since then, authors and right holders who wanted to defend themselves against copyright infringements on photographic works have faced considerable difficulties. In practice, the question of protectability regularly arose with regard to press photos, product photographs and photographs qualified as snapshots. This made the enforcement of copyright protection significantly more difficult.

This uncertainty has now been eliminated by Art. 2 para. 3<sup>bis</sup> CopA. From now on, **all photographic depictions** and depictions of three-dimensional objects produced by a process similar to that of photography are **considered works under copyright law**, even if they do not have individual character. The only condition for protection is that the image depicts a three-dimensional object and represents an intellectual creation, i.e. that it was created by a human being and not by a machine. This means that the **consent of the copyright holder** must now always be obtained before using a photograph, as otherwise an action for copyright infringement is possible.

The image creators are entitled to all regular **copyrights and moral rights**. For example, they may decide whether a picture may be edited and whether the name of the author must be mentioned. However, photographs without an

individual character are treated differently with regard to the **duration of the protection period**: While copyright works are generally protected for 70 years (50 years for computer programs) after the death of the author, the protection of photographs without an individual character is limited to 50 years from the date of creation.

The revised CopA also applies to works (and thus also to photographs) which were created prior to the entry into force of the revised act (1 April 2020). However, for the purposes of a transitional regulation, the use of a work that has already begun before that date remains permissible if such use was previously permitted. Accordingly, **licenses do not have to be obtained retroactively** for the period before 1 April 2020.

## 3 Measures to combat online piracy

In 2016, as part of its *Special 301 Report*, the United States placed Switzerland on a watch list for countries that allegedly offer insufficient legal protection for intellectual property. As part of the copyright revision, various measures have now been taken to combat **online piracy** in Switzerland more effectively and to facilitate the enforcement of copyright protection.

### 3.1 Legal responsibility of hosting providers introduced

Art. 39d CopA now obliges so-called hosting providers (service providers who provide their customers with a server infrastructure in order to offer content on the internet) to take technically and economically **reasonable measures** to ensure that third party works which have been published illegally before and were subsequently removed remain so in the future. This is intended to prevent that the copyright infringing contents are **uploaded elsewhere** after their deletion and made illegally accessible again. Until now, there was no corresponding legal provision on the **stay-down or keep-down obligation of hosting providers** in Switzerland. Instead, they pursued a so-called notice-and-take-down approach within the framework of a *HOSTING CODE OF CONDUCT* self-imposed by the trade association Swico (formerly simsa). Under this approach, after having received a notification from an alleged copyright holder, the hosting providers checked whether there was a high probability that illegal content was affected by the service and then, at their own discretion, blocked access to the affected website in whole or in part. With the new stay-down obligation, the copyright holder can now additionally request through civil action that the copyright infringing content be deleted from a specific website. However, the new regulation only affects hosting providers which, due to their technical functioning or their economic orientation, create a particular risk of such infringements and do not properly become active despite notification of the copyright holder. It is noteworthy that, after parliamentary deliberations on the draft revisions of the CopA, the initial additional proposal to oblige access providers to block websites was dropped.

### 3.2 Identification of IP addresses permitted

Copyright infringing content is not only exchanged via servers of hosting providers but also via so-called peer-to-peer networks (P2P). Here the responsibility of hosting providers does not

apply, as they are not involved in the process. In this case, the copyright holder can only initiate criminal proceedings in order to meaningfully curb a copyright infringement. If, however, the infringing third parties do not make themselves known via a website imprint or by their domain registration, the **copyright holder must be able to access the IP address** in order to identify them. In the Logistep decision (DFT 136 II 508), the Swiss Federal Supreme Court held in 2010 that the collection of IP addresses of P2P network participants was unlawful under data protection law. Even if the IP addresses were used to prosecute copyright infringements, there was no legal foundation for the use of recorded IP addresses in criminal proceedings. With the revision of the Copyright Act, a new **legal basis** for the processing of personal data was created in Art. 77i CopA. Copyright holders may now process and use IP addresses to which they have lawful access, provided that this is necessary for the purposes of criminal or related civil proceedings.

In contrast, the **downloading** of copyright-protected works (with the exception of computer programs) from the internet **for private purposes** remains legal. IP addresses may not be processed in this context.

---

## Measures to combat internet piracy were strengthened.

---

### 4 Extended collective licensing with the possibility of opting out

Following the example of the Scandinavian countries, the **model of the extended collective licensing** has been introduced in Switzerland under Art. 43a CopA. This means that representative collective rights management organizations such as SUISA, ProLitteris and SUISSIMAGE can now also grant licenses for works that are not legally subject to collective management. Especially when a license-seeking party wishes to use works of different copyright holders, this has until now required individual verification of the respective copyright ownership. Often, however, it has not been possible to identify the copyright holders (so-called orphan works), so that ultimately the use of these works was avoided altogether. The new model is intended to prevent such time-consuming enquiries and at the same time facilitates the use of works. In principle, parallel collective exploitation does not interfere with the normal exploitation of the protected works by the copyright holders, as they also have to be financially compensated. However, copyright holders and holders of an exclusive license in Switzerland are free to have a particular work excluded from collective licensing by the collective rights management organization by means of a so-called opting-out. In this case, the applicability of the collective licensing model for the particular work ends upon receipt of the opting-out notice.

### 5 Video-on-demand remuneration claim for authors of audio-visual works

Streaming and video-on-demand platforms such as Netflix, Sky and Disney+ are very popular not only in times of COVID-19. In practice, filmmakers such as scriptwriters, directors and actors regularly transfer their exploitation rights to the producers in return for a fixed fee for their participation in the film production. The further decision regarding online exploitation of the works is then up to the producer, who negotiates with the platform operators. The remuneration for these online rights, on the other hand, is subject to statutory collective rights management, which means that it may only be demanded from the platform operators by the collective rights management organizations. In the past, the competent Swiss organizations have, in accordance with consistent practice, also recognized **remuneration claims of film-creating authors** even though there was no legal basis for doing so. The previous industry practice is now legally enshrined in Art. 13a CopA and at the same time **extended in Art. 35a CopA to performers**, who previously had no additional claim for compensation beyond their fixed fee salary. Thus, a new remuneration claim for collective rights management has been created, which is intended to give filmmakers a greater share of the rising revenues from online services. This claim is limited by law to certain categories of works and applies only to films made by Swiss producers and to films from countries which also provide for a collective remuneration claim.

### 6 Further modernization of Swiss copyright law

The copyright revision includes numerous **other substantive changes**, such as strengthening the possibilities of using orphan works, extending the term of protection of related rights to 70 years, and adding further legal exemptions to copyright by including a limited right to text and data mining. At the same time, the *Beijing Treaty on Audiovisual Performances* and the *Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities* were ratified. The revision also introduced some **procedural changes**. For example, for international matters, jurisdiction of Swiss courts was created for actions concerning statutory remuneration claims for the lawful use of an intellectual property right. In addition, the procedure before the Federal Arbitration Commission (*Eidgenössische Schiedskommission / Commission arbitrale fédérale*) for the exploitation of copyrights and related rights was streamlined.

On the other hand, some amendments initially provided for in the draft CopA were ultimately not implemented, such as the extension of the personal use exemption to hotels and holiday apartments, restrictions on replay TV, and the establishment of an ancillary copyright for press publishers.



**Philipp Groz**  
Partner Zurich  
philipp.groz@swlegal.ch



**Roland Mathys**  
Partner Zurich  
roland.mathys@swlegal.ch



**Dr. Samuel Klaus**  
Partner Zurich  
samuel.klaus@swlegal.ch



**Dr. des. Sarah Leins-Zurmuehle**  
Associate Zurich  
sarah.leins@swlegal.ch

The content of this Newsletter does not constitute legal or tax advice and may not be relied upon as such. Should you seek advice with regard to your specific circumstances, please contact your Schellenberg Wittmer liaison or one of the persons mentioned above.

Schellenberg Wittmer Ltd is your leading Swiss business law firm with more than 150 lawyers in Zurich and Geneva, and an office in Singapore. We take care of all your legal needs – transactions, advisory, disputes.



**Schellenberg Wittmer Ltd**  
Attorneys at Law

**Zurich**  
Löwenstrasse 19  
P.O. Box 2201  
8021 Zurich / Switzerland  
T +41 44 215 5252  
www.swlegal.ch

**Geneva**  
15bis, rue des Alpes  
P.O. Box 2088  
1211 Geneva 1 / Switzerland  
T +41 22 707 8000  
www.swlegal.ch

**Singapore**  
Schellenberg Wittmer Pte Ltd  
6 Battery Road, #37-02  
Singapore 049909  
T +65 6580 2240  
www.swlegal.sg