The new swiss copyright law

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1 Evaluation of the proposed ratifications

1.1 WIPO Copyright Treaty

The WIPO Copyright Treaty is a non-executive treaty, which shouldn't be converted to an executive treaty just like that. It must get implemented through national interpretation in the national forms of legislation. The idea is to make the contract fit the national legislation, not the other way around.

Also, the World Trade Organization would be happy to have a word in this matter as well for sure. According to the Marakesh agreements, the competences of the WIPO only comprise «certain aspects of copyright law», and one would have to clarify which aspects those are exactly. This should be done before any implementation actually takes place.

1.2 WIPO Performances and Phonograms Treaty

The same applies here, basically.

2 Evaluation of the currently proposed changes

2.1 Art. 10 Para. 2 letters c and f

The proposed changes are basically just rephrasings of the former legal text. It is basically all about bringing more occasions of the word «works» into the text.

2.2 Art. 33 Para. 1, Para. 2 introduction and letters a and e

The added notion of popular art is rather pointless, while harmless. Popular art hasn't been properly defined, but should in any case also fall under the wording «work».

There are however concerns with the formulation «to make it accessible, so people have access to it to times and from locations of their choice.» This formulation might concur that the author may decide that it is illegal to store the content on the hard disk. This means that the content might be changed due to, for example, the political situation, or due to economical influences.

2.3 Art. 33a (new)

This new article clarifies that every artist according to the definition in article 33 paragraph 1 has the right to recognition of their works. This is however one of the basic features of the european copyright, which has been established in this way ever since. Thus, there is no need to introduce a new article to clarify this.

2.4 Art. 36

The concerns with the formulation «to make it accessible, so people have access to it to times and from locations of their choice.» applies to this paragraph as well. For further details, look at Art. 33.

2.5 Art. 37 letter e (new)

The concerns with the formulation «to make it accessible, so people have access to it to times and from locations of their choice.» applies to this paragraph as well. For further details, look at Art. 33.

2.6 Art. 39 para 1

The protective period after the death of the artist is set to 50 years, which is still way below the proclaimed limit of 70 years. Especially in the digital millenium, this is probably closer to reality.

2.7 Art. 39a (new)

The notion of «technically effective measures for the protection of works» is used in a slightly bizarre context. In fact, if a measure can be circumvented, it probably isn't effective. The second phrase explains that «Effective technical measures in the sense of paragraph 1 are mechanisms such as access or copy control mechanisms, encryption, distortion and other transformation mechanisms which are supposed and appropriate to prevent or limit unauthorized use of works and different objects of protection.»

If, however, there is a way to break an algorithm or device used in this way, it surely can't be said to be an appropriate means of protection. In this case,

the federal council was uncapable of deciding whether to adapt the notions of the Digital Millennium Copyright Act or whether to follow the notions of the technicians who say that this is all nonsense and harms the state of the art in the field of technology.

Also, for a lot of devices and software, it isn't clear at all whether it is used «mainly» to circumvent technical measures, or whether this is just a side effect.

Additionally, this is a very serious subject. Forbidding people to circumvent arbitrary devices of protection isn't really useful for anyone. Most copyright mechanisms have proven to be uneffective, and the problem which remains wasn't even that a lot of people circumvented it in order to commit a criminal act. In fact, the biggest problem people had with these protection measures was that they were actually preventing them from consuming the works at all.

It does in fact become a serious problem that the way in which we can use our property is more and more governed by the reselling company, rather than ourselves. Originally, any works we bought were basically our property and we could use them in any odd way we like. These days, there are a lot of companies who are executing a de-facto dictatorship over how a work may be enjoyed, for no apparent reason.

Additionally, there wasn't a significant rise in the figures of the content companies after the DMCA was introduced in the United States. This is also not because the circumvention was so easy, but rather because a lot of people are only consuming content that is easy to get for free, or none at all. These people can't be counted as losses to a content provider, because they wouldn't buy their content anyway.

Another point that has been left out of scope is the number of people who use file sharing and other mechanisms in order to get an overview of the works that are on the market, and that only ever **start** buying content because they tried it on the Internet and liked it.

Also, security can't be achieved through forbidding circumvention. Real security can only be achieved by steady development and progress of techniques used in the security sector. Any informatician out there will be able to tell you that security is a process rather than a state. If it would now be forbidden to circumvent security mechanisms, this would deal the security industry a great blow.

On the other hand, these newly introduced protective measures could be used to effectively lock competitors out of a market. If a competitors product is capable of reading copyright protected content produced by the application of a big player, the competitor could possibly be sued for infringement of Art. 39a. This way, one might use an application specific key to prevent competitors from reading documents produced by a specific program.

Another last point to consider is that the idea of being able to sue people

for circumventing protection measures is causing a kind of false hope to the creator of the work. The security which the devices may seem to offer is mostly based on the assumption that noone would risk to get sued for violating Art. 39 URG. Most violations however are committed by minors, that is: children and adolescents. The kind of people who a) wouldn't have the money to buy the works anyway, and b) doesn't know nor care about infringing on this specific law. The effect is a child who possibly gets punished for lifetime for a stupidity he or she did in his or her youth, while the rights holder doesn't have any particular advantage other than the certainty to have destroyed a young child's life.

There is already a methodology given to us by the current laws which allows us to sue people who commercially copy and resell works created by us. This is more than enough of a protection, there is no point in adapting this type of legislation, which is ineffective and tends to hit the wrong people in the vast majority of cases anyway.

2.8 Art. 39b (new)

In this article, the Federal Council tries to establish an authority which is supposed to handle isolated cases where the new regulations are actually harmful. This is already a lot more end user friendly than the regulations that are in place in the other countries which adapted DMCA compatible legislation, but it isn't quite good enough yet. The case which would have to be ruled by this authority aren't isolated cases. They will be the rule, not the exception.

2.9 Art. 39c (new)

The right to remove or invalidate tags from files is highly questionable, especially in consideration of privacy rights. There is a huge corporate interest in tracking customer behavior, which could be realized through tags like this if they were supposed to be introduced. This is not in the interest of the citizens.

2.10 Art. 62 para. 1bis (new)

This adapts the defensive measures of the author and producer to the new DRM measures. It doesn't do anything other than that.

2.11 Art. 67 para. 1 letter g^{bis} (new) and i

This is basically a continuation of the current practice. However, the formulation is a bit unclear here, the same concerns as in Art. 33 apply here. Especially letter i is very weird and needs further examination by a legal expert.

2.12 Art. 69 para. 1 letter e, e^{bis} (new) and e^{ter} (new)

The same applies here. Letter e is weird in the same way as 67i and letter e^{ter} repeats the formulations from Art. 33a.

2.13 Art. 69a (new)

This article is harmful in the same way that Art. 39 is, so basically the same criticism can be applied. However, it is to be noted that this formula contains a very problematic notation: Para. 1 letter c says that «Any advertisement of tools or services concerned by letter b» are subject to this article. This is very problematic, since there might be difficulties in assessing whether or not these tools or services are advertised.

There was a case in the USA about a website which was sued for mentioning the name of a tool which could be used to watch DVDs under OpenSource operating systems in a technical report. While there is no doubt that companies would disagree, it is necessary for the rights holders, the companies and the swiss people to be able to conduct research, also in the area of security. This might be significantly hindered by companies that are afraid that these tools might become known to people who might potentially use them in an infringing way.

2.14 General remarks

- The notion of «so people have access in places and at times of their choice» is ambigous. It isn't clear whether the subject in the main sentence or in this parallel sentence is supposed to decide when and where to access the works.

3 Proposed amendments

3.1 Art. 33 para. 1, para. 2 introduction and letters a and e

3.1.1 Amendment 1: Restriction to claims on publication

para. 1 unchanged

2 The performing artists have the exclusive right:

a. to make their presentation consumable or **publically** available in a way that permits **members of the public** to access it from locations and times of their choice, using any tool;

e. to make their presentation **publically** consumable while it is being broadcasted, rebroadcasted or made available.

3.1.2 Amendment 2: Deletion of the word «consumable»

para. 1 unchanged

2 The performing artists have the exclusive right:

a. to make their presentation available in a way that permits people to access it from locations and times of their choice, using any tool;

e. to make their presentation **available** while it is being broadcasted, rebroadcasted or made available.

3.2 Art. 36

3.2.1 Amendment 1: Insertion of the word «public» into letter a

1 The producer of sound or video storage media has the exclusive right to:

a. reproduce the recordings and offer, sell or otherwise distribute reproduced exemplars **to the public**;

b. make the recordings available in a way that permits people to access it from locations and times of their choice, using any tool.

3.2.2 Amendment 2: Insertion of the word «public» into letter b

1 The producer of sound or video storage media has the exclusive right to:

a. reproduce the recordings and offer, sell or otherwise distribute reproduced exemplars;

b. make the recordings **publically** available in a way that permits **members of the public** to access it from locations and times of their choice, using any tool.

3.3 Art. 37

3.3.1 Amendment 1: Insertion of the word «publically»

1 The broadcasting corporation has the exclusive right to:

e. make the broadcast **publically** available in a way that permits **members of the public** to access it from locations and times of their choice, using any tool.

3.4 Art. 39a (new)

3.4.1 Amendment 1: Deletion

Deleted.

Reasoning:

For the reasons outlined in section 2.5, this article is doing more bad than good.

3.4.2 Amendment 2: Deletion of generic circumvention prohibition

1 *Deleted.*

2 *Deleted.*

3 Production, import, offering, selling or other distribution, rental, lend for use and the possession for acquisitive reasons of apparati, products or parts as well as the provision of services, which only have a limited economical value or use beyond the circumvention of technical measures, are prohibited, if they are

a. part of a promotion or advertisement campaign aimed at the circumvention of technically effective measures ensuring the protection of works or other objects of protection; or

b. mainly designed, produced, tuned or provided in order to allow or ease the circumvention of technically effective measures.

4 This prohibition of circumvention cannot be used against people which are only performing the circumvention due to a legally permissible use of the work.

Reasoning:

A general provision against circumventions of protection devices probably isn't going to do any good.

3.4.3 Amendment 3: Commercial form

1 Technically effective measures aimed at the protection of works and other objects of protection mustn't be circumvented.

2 Technically effective measures in the sense of paragraph 1 are technologies and devices such as access or copy controls, encryption, distorsion and different methods of manipulation, which are meant and appropriate to prevent or limit unauthorized use of works and other objects of protection.

3 Production, import, offering, selling or other distribution, rental, lend for use and the possession for acquisitive reasons of apparati, products or parts as well as the provision of services, which only have a limited economical value or use beyond the circumvention of technical measures, **in commercial form**, are prohibited, if they are

a. part of a promotion or advertisement campaign aimed at the circumvention of technically effective measures ensuring the protection of works or other objects of protection; or

b. mainly designed, produced, tuned or provided in order to allow or ease the circumvention of technically effective measures.

4 This prohibition of circumvention cannot be used against people which are only performing the circumvention due to a legally permissible use of the work.

Reasoning:

Circumventions on private grounds shouldn't be followed for the reasons outlined in section 2.5. The same applies to circumventions conducted for reasons of research, science or education.

3.4.4 Amendment 4: Introduction of new term «technically functional»

1 Technically **functional** measures aimed at the protection of works and other objects of protection mustn't be circumvented.

2 Technically **functional** measures in the sense of paragraph 1 are technologies and devices such as access or copy controls, encryption, distorsion and different methods of manipulation, which are meant and appropriate to prevent or limit unauthorized use of works and other objects of protection.

3 Production, import, offering, selling or other distribution, rental, lend for use and the possession for acquisitive reasons of apparati, products or parts as well as the provision of services, which only have a limited economical value or use beyond the circumvention of technical measures, are prohibited, if they are

a. part of a promotion or advertisement campaign aimed at the circumvention of technically **functional** measures ensuring the protection of works or other objects of protection; or

b. mainly designed, produced, tuned or provided in order to allow or ease the circumvention of technically **functional** measures.

4 This prohibition of circumvention cannot be used against people which are only performing the circumvention due to a legally permissible use of the work.

Reasoning:

The only way to keep such a system secure is to ensure that it really works, not to claim away everyone who breaks it. Thus, it is to be ensured that the system was actually functional.

3.4.5 Amendment 5: Generic exception for science and interoperability

1 Technically effective measures aimed at the protection of works and other objects of protection mustn't be circumvented.

2 Technically effective measures in the sense of paragraph 1 are technologies and devices such as access or copy controls, encryption, distorsion and different methods of manipulation, which are meant and appropriate to prevent or limit unauthorized use of works and other objects of protection.

3 Production, import, offering, selling or other distribution, rental, lend for use and the possession for acquisitive reasons of apparati, products or parts as well as the provision of services, which only have a limited economical value or use beyond the circumvention of technical measures, are prohibited, if they are

a. part of a promotion or advertisement campaign aimed at the circumvention of technically effective measures ensuring the protection of works or other objects of protection; or

b. mainly designed, produced, tuned or provided in order to allow or ease the circumvention of technically effective measures.

4 This prohibition of circumvention cannot be used against people which are only performing the circumvention due to a legally permissible use of the work, **or for the reason of research, science, education, security engineering, interoperability or the protection of privacy**.

Reasoning:

Prevent vendors from trying to lock their market through protection measures.

3.4.6 Amendment 6: Unintended circumvention

1 Technically effective measures aimed at the protection of works and other objects of protection mustn't be circumvented.

2 Technically effective measures in the sense of paragraph 1 are technologies and devices such as access or copy controls, encryption, distorsion and different methods of manipulation, which are meant and appropriate to prevent or limit unauthorized use of works and other objects of protection.

3 Production, import, offering, selling or other distribution, rental, lend for use and the possession for acquisitive reasons of apparati, products or parts as well as the provision of services, which only have a limited economical value or use beyond the circumvention of technical measures, are prohibited, if they are

a. part of a promotion or advertisement campaign aimed at the circumvention of technically effective measures ensuring the protection of works or other objects of protection; or

b. mainly designed, produced, tuned or provided in order to allow or ease the circumvention of technically effective measures.

4 This prohibition of circumvention cannot be used against people which are only performing the circumvention due to a legally permissible use of the work.

5 **This prohibiton also cannot be used if the circumvention wasn't conducted with the aim of infringing on the author's rights.**

Reasoning:

Eliminate a lot of shot noise caused by the broadness of possible claims.

3.4.7 Amendment 7: Definition of functional measures 1

5 **A technically functional measure is a measure which was, at the time it was infringed on, state of the art. A measure loses its legal protection once it is proven to be insufficient for the purpose of copyright enforcement.**

Reasoning:

Security cannot be achieved by means of forbidding securty research. A steady development is the only way to achieve real protection, even against people who don't care about legal issues.

3.4.8 Amendment 8: Definition of functional measures 2

5 **A technically functional measure is a measure for which no method of circumvention was known at the time of the infringement.**

Reasoning:

Security cannot be achieved by means of forbidding securty research. A steady development is the only way to achieve real protection, even against people who don't care about legal issues.

3.5 Art. 39b (new)

3.5.1 Amendment 1: Deletion for cleanup purpose

Deleted.

Reasoning:

In certain circumstances when Art. 39a is heavily changed or deleted, this institution will not be required. If Art. 39a remains in place however, this article is of course an absolute necessity.

3.6 Art. 39c (new)

3.6.1 Amendment 1: Deletion

Deleted.

Reasoning:

In consideration of the fundamental right to privacy, this article isn't acceptable.

3.6.2 Amendment 2: Provisions for privacy

1 Informations for the execution of copyright and related protective rights may **only** be removed or changed **in order to execute the right to privacy as granted by the constitution**.

2 Electronic informations for the identification of works and other objects of protection or modalities and conditions for their usage as well as numbers or codes signifying this type of informations are protected if such an element is:

a. attached to an audio, auiovisual or data medium, or

b. appearing in connection with an immaterial performance of the work or a different object of protection.

3 It is also forbidden to replicate, introduce, offer, sell or to distribute or broadcast, to make perceptible or accesible works or other objects of protection in a form where information for the execution of copyright or related protective rights have been removed or changed.

Reasoning:

In consideration of the fundamental right to privacy, tags must be removable.

3.6.3 Amendment 3: Prohibitions for commercial removal

1 Informations for the execution of copyright and related protective rights may not be removed or changed **on a commercial scale**.

2 Electronic informations for the identification of works and other objects of protection or modalities and conditions for their usage as well as numbers or codes signifying this type of informations are protected if such an element is:

a. attached to an audio, auiovisual or data medium, or

b. appearing in connection with an immaterial performance of the work or a different object of protection.

3 It is also forbidden to replicate, introduce, offer, sell or to distribute or broadcast, to make perceptible or accesible works or other objects of protection in a form where information for the execution of copyright or related protective rights have been removed or changed **on a commercial scale**.

Reasoning:

Removing tags in a private scale is necessary in order to be able to enjoy one's right to privacy as granted by the constitution.

3.7 Art. 39d (new)

1 Every citizen can demand a preliminary injunction requesting a provider of technical measures to offer informations necessary interoperability, under fair and nondiscriminatory conditions described in this article.

2 The providers of technical measures may only demand financial recompensation for expenses in providing the informations necessary for interoperability which have been caused by printing, transmission and storage of data in transmission over a physical medium.

Reasoning:

If technical measures are imposed, competition is only granted if all information which is necessary for interoperability are freely available.

3.8 Art. 62 para. 1bis (new)

3.8.1 Amendment 1: Deletion

Deleted.

Reasoning:

If article 39a and 39c aren't left in place, there is no reason for this paragraph.

3.8.2 Amendment 2: Deletion of references to 39c

1bis A special threat to copyright or related protection rights is imposed by acts following paragraph 39a paragraph 1 and 3.

Reasoning:

In case 39c is deleted.

3.8.3 Amendment 3: Deletion of references to 39a

1bis A special threat to copyright or related protection rights is imposed by acts following paragraph 39c paragraph 1 and 3.

Reasoning:

In case 39a is deleted.

3.9 Art. 67 para. 3 (new)

3.9.1 Amendment 1: Exceptions for disabled people and interoperability

3 This regulation shall not apply if the infringement is done in order to provide the work to people with disabilities, in case they weren't capable of consuming it in its original form, or for the reason of interoperability.

Reasoning:

It should be possible to make a work available to disabled people without facing legal sanctions. Also, the interoperability clause is necessary in order to prevent companies from trying to lock their consumers to their products.

3.10 Art. 69 para. 3 (new)

3.10.1 Amendment 1: Exceptions for disabled people and interoperability

3 This regulation shall not apply if the infringement is done in order to provide the performance to people with disabilities, in case they weren't capable of consuming it in its original form, or for the reason of interoperability.

Reasoning:

See the ammendment adding Art. 67 para. 3.

3.11 Art. 69a (new)

3.11.1 Amendment 1: Deletion

Deleted.

Reasoning:

In case Art. 39a and 39c are deleted, these definitions are useless.

3.11.2 Amendment 2: Introduction of term «functional measures»

1 On request by the person whose right was infringed on, any person committing the following acts voluntarily and unrightfully will be charged with detention or fines:

a. circumvention of technically **functional** measures according to Art. 39a paragraph 2, with the intention to commit unauthorized use of works or other objects of protection;

b. production, import, offer, sale or any other type of distribution, rental, lend for use or possession for acquisitive reasons of devices, products or parts or the offer or provision of services that don't have a particular purpose or use besides the circumvention of **functional** technical measures and that are

   1. part of a promotion, advertisement or marketing campaign with the aim of circumvention of **functional** technical measures; or
   2. mainly designed, produced, adapted or provided in order to permit or faciliate the circumvention of technical measures;

c. advertisement of tools or services concerned by letter b;

d. removal or change of electronic information for attention to copyright and related protection rights according to article 39b paragrpah 2;

e. distribution, import, offer, sale or other distribution, transmission, making perceptible or accessible of works or other objects of protection where information about the attention to rights described in article 39 paragraph 2 have been removed or changed.

2 If the committer or the committress is acting on a commercial scale, a prosecution is imposed ex officio. The penalty is prison up to 1 year or a fine of up to CHF 100'000.-.

3 Acts according to paragraph 1 letters d and e only incur a penalty if they have been conducted by a person which is aware or must have been aware under the circumstances of the fact that he or she was causing, permitting, faciliating or obfuscating the infringement of a copyright or related right.

Reasoning:

See Ammendment 4 to Art. 39a.

3.11.3 Amendment 3: Commercial scale

1 On request by the person whose right was infringed on, any person committing the following acts voluntarily and unrightfully **and on a commercial scale** will be charged with detention or fines:

a. circumvention of technically effective measures according to Art. 39a paragraph 2, with the intention to commit unauthorized use of works or other objects of protection;

b. production, import, offer, sale or any other type of distribution, rental, lend for use or possession for acquisitive reasons of devices, products or parts or the offer or provision of services that don't have a particular purpose or use besides the circumvention of effective technical measures and that are

   1. part of a promotion, advertisement or marketing campaign with the aim of circumvention of effective technical measures; or
   2. mainly designed, produced, adapted or provided in order to permit or faciliate the circumvention of technical measures;

c. advertisement of tools or services concerned by letter b **suggesting the commercial use of these tools or services**;

d. removal or change of electronic information for attention to copyright and related protection rights **on a commercial scale** according to article 39b paragrpah 2;

e. distribution, import, offer, sale or other distribution, transmission, making perceptible or accessible of works or other objects of protection **on a commercial scale** where information about the attention to rights described in article 39 paragraph 2 have been removed or changed.

2 If the committer or the committress is acting on a commercial scale, a prosecution is imposed ex officio. The penalty is prison up to 1 year or a fine of up to CHF 100'000.-.

3 Acts according to paragraph 1 letters d and e only incur a penalty if they have been conducted by a person which is aware or must have been aware under the circumstances of the fact that he or she was causing, permitting, faciliating or obfuscating the infringement of a copyright or related right.

Reasoning:

Circumventions on private grounds as well as for reasons of research, science and education shouldn't be prosecuted.

3.11.4 Amendment 4: Deletion of criminal sanctions

1 On request by the person whose right was infringed on, any person committing the following acts voluntarily and unrightfully will be charged with detention or fines:

a. circumvention of technically effective measures according to Art. 39a paragraph 2, with the intention to commit unauthorized use of works or other objects of protection;

b. production, import, offer, sale or any other type of distribution, rental, lend for use or possession for acquisitive reasons of devices, products or parts or the offer or provision of services that don't have a particular purpose or use besides the circumvention of effective technical measures and that are

   1. part of a promotion, advertisement or marketing campaign with the aim of circumvention of effective technical measures; or
   2. mainly designed, produced, adapted or provided in order to permit or faciliate the circumvention of technical measures;

c. advertisement of tools or services concerned by letter b;

d. removal or change of electronic information for attention to copyright and related protection rights according to article 39b paragrpah 2;

e. distribution, import, offer, sale or other distribution, transmission, making perceptible or accessible of works or other objects of protection where

information about the attention to rights described in article 39 paragraph 2 have been removed or changed.

2 *Deleted.*

3 Acts according to paragraph 1 letters d and e only incur a penalty if they have been conducted by a person which is aware or must have been aware under the circumstances of the fact that he or she was causing, permitting, faciliating or obfuscating the infringement of a copyright or related right.

Reasoning:

Copyright infringements are traditionally matters of civil law, not criminal law. Criminal sanctions against copyright violations have a lot of negative effects, such as criminalization of a large part of the youth.

A Source documents

fr *Arrêté fédéral relatif à l'approbation de deux traités de l'Organisation Mondiale de la Propriété Intellectuelle et à la modification de la loi sur le droit d'auteur*: Feuille Fédérale 2006, p. 3319 - 3324.

http://www.admin.ch/ch/f/ff/2006/3319.pdf

de *Bundesbeschluss über die Genehmigung von zwei Abkommen der Weltorganisation für geistiges Eigentum und über die Änderung des Urheberrechtsgesetzes*: Bundesblatt 2006, Seite 3447 - 3452.

http://www.admin.ch/ch/d/ff/2006/3447.pdf

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- Update the reasoning

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