

Letter from Switzerland :

THE NEW COPYRIGHT ACT

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INTRODUCTION

The Swiss Parliament adopted a new Law on Copyright and Neighbouring Rights (hereafter : LCNR) on October 9, 1992. It entered into force on July 1, 1993. This letter will introduce the reader to some of the main innovations of the LCNR.

The former law on copyright of 1922 (hereafter : LC) was seventy years old. It had been partially modified in 1955 following the ratification of the Brussels Act of the Berne Convention.

Thus, the first aim of the LCNR was to allow Switzerland to ratify the Paris Act of the Berne Convention, as well as to ratify or to adhere to the Rome Convention of 1961 on Neighbouring Rights, the Geneva Convention of 1971 on Phonograms, and the Brussels Convention of 1974 on Satellite Broadcasting. These adherences became effective July 1, 1993.

The second aim of the LCNR was to take into account seventy years of technological development. Reprography, mass uses and computer programs are now regulated.

I. NEW CATEGORIES OF PROTECTED WORKS

A. COMPUTER PROGRAMS

1. The protection of computer programs is introduced by considering software as a "work of art and literature" (Art. 2 par. 3 LCNR). This provision follows a general legislative pattern throughout Western countries which was endorsed by some Swiss authors in the mid-eighties¹.

¹ See I. Cherpillod, *La protection des programmes d'ordinateur par le droit d'auteur*, in *Revue suisse de la propriété intellectuelle* 1986 (hereafter RSPI), p. 41; F. Dessemontet, *La protection des programmes d'ordinateur*, in *EDV-Software : Rechtsschutz, Vertragswesen, Checklisten* (Cedidac no 4) Lausanne 1986, p. 11.

A majority of Swiss commentators was then opposed to that solution. The Third Expert Committee still proposed, in 1987, to devote a special chapter of the law to computer programs, with a number of special provisions. For example, one draft provision limited the duration of copyright to twenty-five years running from the completion of the program. This solution having been rejected, the LCNR does not govern computer programs with a separate set of specific rules diverging from normal copyright rules. This means, *inter alia*, that computer programs must evidence some degree of originality in order for a court to protect them. It is widely acknowledged that the test of originality should be similar to the standard set by the European Community (E.C.) Directive of 1991. It is therefore less rigorous than the German case law.

2. Nonetheless, it has been found necessary to enact a few provisions bearing on computer programs in particular :
 - a. No legal license for lending exists for computer programs (Art. 10 par. 3 and Art. 13 par. 4 LCNR). Of course such a license would deprive the copyright owner of a most valuable way to put his computer programs to use.
 - b. The employer is alone entitled to the exclusive rights of use for computer programs made for hire (Art. 17 LCNR). It is worth mentioning here that the LCNR does not otherwise dwell upon the rights of employers and producers for works made for hire or commissioned by a party under a contract for work or a specific agency relationship.
 - c. No restriction for private use or fair use applies to copyright in computer programs (Art. 19 par. 4 LCNR).
 - d. A decompilation provision (Art. 21 LCNR) enables programmers to draw interface information from protected software, in order to create interoperable programs. The provision states that the legitimate rights of the copyright owner shall not be unduly prejudiced and that the normal

exploitation of the program may not be prevented as a consequence of the decompilation exception. Although far less detailed than the provisions on decompilation to be found in the E.C. Directive of 1991, the ambit of that provision should be approximately the same. Only an authorized vendee or licensee of the program can avail himself of that exception - or a third party working for him, which conforms to Article 6 par. 1 *litt. a* of the E.C. Directive.

The decompilation exception may nonetheless be broader than the E.C. Directive to the extent that the exception to copyright is not conditioned upon the fact that the relevant information not be available. Further, the decompilation exception is not premised on the condition that the information be indispensable to interoperability. It shall be enough if it is useful for that purpose.

The Swiss Parliament did not take up two important provisions of the European Directive : the disclosure of the decompiled information to a third party is not prohibited, and there is no express prohibition to develop and to market a program which is fundamentally similar (Art. 6 par. 2 *litt. b* and *c* of the E.C. Directive). General principles of copyright law may prevent the unauthorized making of a wholly similar program, but no remedy for disclosure of decompiled information to a third party appears to be given outside contractual law or trade secret law. The application of trade secret law in this particular set of circumstances appears to be highly doubtful, since the possibility of reverse engineering could be deemed to preclude claims of secrecy of the knowledge in question.

e. The rightful user of a program may make a back-up copy of the program (Art. 24 par. 2 LCNR).

B. SEMI-CONDUCTORS

The Swiss Parliament enacted a separate law protecting the topography of semi-conductors (chips). Duration of the exclusive right is ten years after first marketing if the semi-conductor design is registered. Otherwise it is two years .

C. DRAFTS, TITLES AND PARTS OF WORKS

For clarity's sake, the LCNR mentions that drafts, titles and parts of works are assimilated to works (Art. 2 par. 4 LCNR). The only requirement is that of some originality, which is understood here, as throughout the Act, as an "**individual character**"². Each of the drafts of a work of literature may be protected as such. Of course, copyright contracts shall ensure that no conflict arises between the entitlements to the various works so protected.

Article 2 par. 2 *litt. g* LCNR protects all "visual and audio-visual works", as well as "photographic and cinematographic works". The legislature endeavoured to clarify that all sorts of visual works are protectible subject matter, be they video clips, holograms, video samplings, etc. This mention does not mean that visual works or photographs should be submitted to a different standard of individuality. In fact, some courts have had a rigorous approach to the individuality requirement as applied to photographs³. The Third Expert Committee explicitly rejected a proposal to overturn the current case law. There is no other law available to protect photographs, save the application of the Unfair Competition Law of 1986. Since the LCNR provides no particular provisions for photographs, many press photographs lacking individuality will be excluded from protection.

² For more comments on that notion under the LCNR, see F. Dessemontet, Switzerland, in P. Geller, ed., *International Copyright Law and Practice*, New York, release to be published in 1994.

³ See RSPI 1985, p. 221; Schweizerische Juristenzeitung 1972, no 174, p. 308; see however Semaine Judiciaire 1964, pp. 171 ss; ATF 54 II 54.

This prudent attitude of the Swiss legislature can also be noticed in other areas. Most notably, there are the definition of the **author**, who must be a natural person (Art. 6 LCNR), and the restatement of the rights conferred upon him, to which we shall now turn.

II. THE RIGHTS OF THE COPYRIGHT OWNER

The new law does not follow a "dualist" classification distinguishing moral rights and patrimonial rights. It rather sets out a basic principle first, then enumerates various rights that flow from that principle. Then it governs the relationship between the owner of a copy of the work and the owner of copyrights. Further, it dwells upon the transfer of copyrights and, finally, provides for the usual restrictions to rights and their duration.

A. THE EXCLUSIVE RIGHT TO THE WORK

Article 9 par. 1 LCNR expresses the following principle for the first time in Swiss copyright law :

"The author has an exclusive right to his work".

This sentence has been added to the governmental bill by the Council of States, the smaller Chamber of Parliament, on the strength of the draft bill prepared by the Third Expert Committee. Its meaning is manifold.

1. General right on new uses

From a practical point of view, the assertion of an *"exclusive right to the work"* in itself should mean that the enumeration of particular rights and prerogatives in the following provisions of the law does not foreclose the protection of the LCNR in cases where changing technologies

and marketing practices would not be covered by a particular provision⁴ in the future.

The preceding provision in the drafts of 1971, 1974, and 1987 proposed by the Expert Committees drafts was fought by the lobby of the "users" precisely because it was an "open-ended" general statement. It thus undermined the position that each and every utilization which is not mentioned in the law should be free until the Copyright Act is amended. As copyright laws in Switzerland have displayed a tendency not to be amended for seventy years at a time, the Parliament was right to reinstate the principle of an exclusive right distinct from particular entitlements. Thus, the courts are free to construe that general right in accordance with the needs of justice as may arise in the future, without being impeded by the slow pace of legislative revisions.

For the years to come, however, this open-ended principle does not appear to have any content other than the specific rights that are mentioned later on in the Act.

2. Monist theory

The notion of an "exclusive right" may serve as a conceptual framework to understand the true nature of copyright. Although the enactment of a list of particular rights is necessary to give guidance to the courts and the public, the "*exclusive right to the work*" is a right *per se*, as the right of property is a right in itself. Two consequences may be derived from this principle :

a. The moral right ("droit moral") is part of copyright. From now on, the Swiss LCNR shall be premised on the idea that moral right is mainly recognized in the LCNR. This theory should entail the German view that a transfer of the whole copyright is impossible. The 1984 Bill followed that

⁴ See *per analogiam* BGHZ 16, pp. 4 *et seq.*

lead and declared copyright as a whole to be unassignable. The Third Expert Committee, the 1989 Bill, and the Parliament then reversed that main consequence of the monist theory. Article 16 par. 1 LCNR now states that "*the copyrights are transferable and can be inherited*". Note the use of the plural in this provision.

As they are left with these two seemingly contradictory principles, the *unity* of moral and patrimonial rights and the *transferability* of copyrights, the commentators may consider that the "droit moral" is susceptible of transfer. Then the author would only enjoy remedies under the Civil Code against defacement or mutilation of the work by the transferee or by another party authorized by the transferee. In my view, this reading of Article 11 par. 2 LCNR is solidly based on the legislative record. It is of course a striking departure from former Swiss law, in which all moral rights were premised on the Civil Code alone.

Another view holds that, in Switzerland as in Germany, a contract may not transfer moral rights, but only authorizes a person other than the author to claim any and all appropriate remedies for moral rights as an agent or for his own account⁵.

b. The monist theory further explains the following : Where the grant of a license by contract or under the law (legal license for phonograms, Art. 23 LCNR) temporarily reduces the copyright of the author or his successor in title, as soon as the license lapses the copyright owner recovers all his privileges, none of which shall fall in the public domain. This may be described as the "elasticity" of copyright.

⁵ M. Rehbinder, *Schweizerisches Urheberrecht*, Berne 1993, p. 137.

B. NEW RIGHTS

The Act of 1992 restates existing rights and introduces some new rights.

The new rights are mainly :

1. The rental fees

The royalties due for rental by the owner are new (Art. 13 LCNR).

Collecting societies are alone in charge of collecting the royalties. Swiss law does not follow the E.C. Directive of November 19, 1992, to the extent that, under Swiss law, there is no possibility for the copyright owner to prohibit the rental of copies (with the exception for computer programs)⁶.

Further, public lending by public or private libraries, videotheques, etc., if they charge no fee, shall not give rise to royalties.

2. The right to show broadcast emissions or retransmissions of broadcast emissions

This right is recognized in broader terms in Article 10 par. 2 *litt. f* LCNR than in the former Article 12 par. 2 sec. 7 LC. With the exception of pay TV and of programs that cannot be received in Switzerland, Article 22 LCNR introduces, however, a legal limitation akin to a compulsory license, to the effect that only a collecting society may claim remedies if Article 10 par. 2 *litt. f* LCNR is violated.

⁶ See above, part I, A.2.a.

3. The right of access and the right of display

The copyright owner may request the owner of a copy to allow access to that copy, if this is necessary to assert his rights under the LCNR. This may be the case, for example, for an architect who wants to have a report on his accomplishments published in a professional journal.

The copyright owner may further request that the owner of a copy make this copy available for display, but within Switzerland only. Transportation abroad was not deemed to be safe enough !

4. Protection in case of destruction

Another, comparable new right is introduced. The owner of the sole embodiment of a protected work must ask the copyright owner if he wants to take the embodiment back for the cost of the materials (and the cost of separating it from the building as the case may be) before the owner of the embodiment may destroy it.

If it is not possible to transport it, access for reproduction shall be granted. For works of architecture, the only right is to take photographs and to have plans made at the author's cost.

5. Reprography

Two new rights have been introduced to take into account reprography and modern mass uses.

a. A general royalty on reproduction by photocopying, scanning, or other devices is due, with the exception of utilization of the work for personal use in a closed personal circle (such as relatives or friends).

b. A royalty is due on blank video and audio tapes, CD-Roms, etc.

Collecting societies have exclusive authority to collect these royalties.

The reproduction of a whole work is not possible if copies are to be had on the market, outside reproduction for personal use. Further, it is prohibited outside such personal use to reproduce a figurative work or musical scores. Finally, the recording of a performance of the work is prohibited in the same manner.

It is apparent that the "private use exception" under Swiss law is very narrow. Educational institutions as well as companies, public administrations, etc., may well use reprography against fees, but they cannot substitute reprography for buying copies of the protected work.

6. Cable TV

The new law restates the case law⁷.

First, the simultaneous diffusion of TV and radio broadcasts through whatever means (broadcast or cable) is not allowed without the authorization of the copyright owner (Art. 10 par. 2 *litt. e*).

Secondly, collecting societies are alone authorized to collect the royalties. Although the 1989 Bill had provided for a legal license, the Parliament changed the wording of the relevant Article 22 par. 1 LCNR, so that it seems that there is no compulsory license, but a compulsory intervention of the collecting societies. The difference is that, in a particular case, the society may refuse to give the necessary authorization, but it must prove extraordinary

⁷ See ATF 107 II 57, 107 II 82, 110 II 61.

circumstances for this refusal for it to be approved by the courts⁸.

The new law falls short of defining the exact limit between private cable diffusion (as in an apartment building) and public cable diffusion subject to royalties. The only test mentioned in the law is "a small number of users", such as the residents "in a multifamily building". What if a hotel network serves eight hundreds people ? Is it still "a small number of users" ? The only sure point seems to be that there is no free cable diffusion if the cables cross public land⁹.

C. DURATION

The new copyright term has been set at seventy years after the 31st of December of the year of the author's death.

For computer programs the duration is limited to fifty years *post mortem auctoris*.

For movies and videos, only the director's death triggers the *post mortem* term.

Switzerland has followed the lead of Germany and Austria in extending to seventy years *p.m.a.* the duration of copyright. The Swiss publishers were the moving force behind that extension, as they argued that Swiss-German authors would rather publish in Germany if no extension were granted. The European harmonization proposal was not an issue at the moment when the Swiss Parliament granted the extension.

An interesting controversy has arisen about the status of works that fell into the public domain less than twenty years before entry into force of the LCNR.

⁸ See *per analogiam* RSPI 1991, p. 76.

⁹ See ATF 110 II 68.

The collecting societies and at least one authority¹⁰ consider that the new law protects these works retroactively, taking them back out of public domain as it were. The better opinion seems to be that works which were already in the public domain stay there, while works of persons deceased between January 1 and June 30, 1943 are still protected, because by application of the former Copyright Act (Art. 41 LC) as well as of the new law (Art. 32 LCNR), those works should only fall in the public domain on December 31, 1993. As a consequence, they were not in the public domain as of July 1, 1993, and they benefit from the extended duration of seventy years.

III. NEIGHBOURING RIGHTS

Swiss copyright law has been changed to assure performing artists and phonogram and videogram producers, as well as broadcasting organisms, the full protection of their neighbouring rights. Their rights cover primary recording, as well as secondary utilization and cable diffusion, thus enabling Switzerland to apply Article 12 of the Rome Convention.

Neighbouring rights have a duration of fifty years running from performance, the production of videos or phonograms, or broadcasting, respectively. They are subject to the first-sale doctrine. For example, the resale of used compact disks would seem to fall under this doctrine, with the effect that the owners of copyrights and neighbouring rights would not be entitled to any compensation. This reasoning could be attacked, however, on the theory that the resale of used CDs is akin to rental and deprives the owners of their rental fees under Article 13 LCNR. Owners of neighbouring rights benefit from the rental provision.

Neighbouring rights can be transferred and seized in bankruptcy proceedings, and they are subject to the same restrictions as the other rights deriving from copyright, for

¹⁰ Rehbindler, p. 128.

example, the right to quote that has received a new concise definition.

Neighbouring rights, like many other rights, will often be administered by the collecting societies. Thus, the new law did lead to the creation of a new collecting society in which, for the first time, the State Radio and Television Company shall share interests with performing artists.

As far as these societies are concerned, the general system of control has not been changed. However, the new law clearly spells out the obligations of the societies and mentions, interestingly, that the royalties shall reach up to ten percent of the gross cash receipts generated by the use, or the costs entailed by the use, of the work. For neighbouring rights, this amount is reduced to three percent (Art. 60 par. 2 LCNR).

As remedies, the new law expressly mentions the accounting for profits besides damages and compensation for wrongful violation of personal interests ("tort moral").

On the procedural side, the customs authorities shall now help the copyright owner or the collecting societies to come to term with unlawful imports (Art. 75 to 77 LCNR).

CONCLUSION

As may be readily seen, the new Swiss Copyright Act of 1992 overhauls the law of copyright in most areas of interest. It takes into account the fledgling European law on copyright, without following it in a slavish manner. Conformity with European law could be enhanced later on with such amendments as shall be seen as necessary when the question shall arise.

The biggest loopholes in the Act concern the "*droit de suite*" and the lending right when lending is free of charge. Those two minor drawbacks might also be corrected by a partial revision - hopefully before seventy years have elapsed.

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August 5, 1993