

9. Proposals of the AGUR12

The AGUR12 discussed in detail the demands of those concerned and heard experts. On the basis of these consultations and in accordance with the selection criteria set out in Chapter 8, the AGUR12 recommends the measures set out in this chapter. While there is consensus regarding the overall package, this is not always the case for individual recommendations.

9.1. Awareness-raising

In order to improve competence in terms of copyright law, a broad-based information campaign involving state agencies and non-state stakeholders should be carried out.

Considerable uncertainty still seems to exist regarding the legal situation around internet use. On the one hand, this can lead to inadvertent copyright infringement with serious consequences for rights holders. On the other hand, obscure fears could result in legitimate uses being waived, and existing exceptions to copyright remaining unused. A broad-based information campaign can remedy these problems.

9.2. Efficiency and transparency of the collective rights management organisations

9.2.1. Increased use of electronic administration

The full potential for further lowering administrative costs should be exploited through a consistent and increased use of electronic administration. This should not only include simplified electronic reporting systems for users, but also an obligation by users to communicate the necessary information (Art. 51 Copyright Act; CopA) in a state-of-the-art electronic format that can be directly used in the distribution process by the relevant collective rights management organisation. The exchange of data should also be made possible between the collective rights management organisations, in particular, if this would avoid users having to report data several times despite the collective rights management organisations already having such data.

9.2.2. Streamlining the tariff landscape

The AGUR12 recognises the need to streamline the tariff landscape. It believes, however, that responsibility for this must be left to the collective rights management organisations and the partners negotiating the tariffs. Certain legitimate interests of the users may, in fact, justify separate or

differentiated tariff regulations¹. The AGUR12, however, recommends that the collective rights management organisations should, as far as possible, use contractual means to inform their partners in a transparent manner of the consequences of the various tariffs applicable in their case, and to summarise the remuneration payable if several different tariffs are applicable. Similarly, it is important to offer users information sheets that set out the tariffs in clear terms, which will contribute to a better understanding of the system by those concerned.

9.2.3. Simplification of the procedure for approving tariffs

With regard to the tariff approval procedure, the AGUR12 regards it as essential to accelerate this for the reasons explained under Section 2.4.5.3. At this stage, the AGUR12 is leaving open the question of the measures to be taken to achieve this goal. However, the AGUR12 supports the following two principles:

- In a matter as technical as copyright tariffs, it is appropriate that the authority of first instance should have equal numbers of representatives of both users and of collective rights management organisations: this ensures a high degree of competence and takes into account practical realities. This parity of representation must therefore be maintained.
- It is essential that the authority of first instance has the necessary means to carry out a proper procedure for taking evidence, in particular, the hearing of witnesses where necessary.

9.2.4. No statutory cap on administrative costs

The AGUR12 believes that the lowering of administrative costs is important. While administrative costs are borne by the rights holders, users who are obliged to pay remuneration also have an interest in ensuring that the remuneration they pay goes, as far as possible, to the rights holders. However, the demand for capping the administrative costs, called for before the work of the AGUR12 began, is not a viable solution because administrative costs are greatly dependent on the repertoire managed. Setting a uniform rate could therefore produce unwanted cross-subsidisation and have adverse effects on cultural niches and the Swiss repertoire.

¹ See 2.2.2.2. above.

9.3. Measures for better copyright enforcement

9.3.1. Statutory regulation of downloading from illegal sources

In view of the measures proposed below (Sections 9.3.2 to 9.3.7.), downloading from illegal sources, as provided for in current law according to the prevailing doctrine, should remain legal.

9.3.2. Removal of copyright-infringing content (take down)

Hosting providers should remove content that has been illegally uploaded when notified to do so by the rights holder or a competent authority. Self-regulation would be appropriate here, for example, along the lines of the “Code of Conduct Hosting” adopted by the Swiss Internet Industry Association (simsa).

9.3.3. Prevention of repeat uploading (stay down)

Hosting providers, whose business model is clearly designed for the infringement of copyright by users, or who intentionally promote running the risk of performing illegal acts through measures or omissions for which they are responsible, need to remove illegally uploaded content when notified to do so by the rights holder and take all reasonable measures to prevent any further illegal uploading of such content. This also includes a comprehensive monitoring of link resources, an obligation to use general search engines with suitably formulated queries and, if necessary, to also use so-called web crawlers to determine whether there is evidence of further infringing links to their service with respect to the content notified. To this end, it is necessary to establish the required legal basis.

Hosting providers who base their business model on the infringement of copyright by their customers cannot be reached through self-regulation. A statutory provision that not only contains a “take down” obligation, but also an obligation to guarantee a “stay down” is essential in these specific cases.

9.3.4. Blocking access via access providers

On the order of the authorities, access providers located in Switzerland need, in serious cases, to block access to web portals that feature obvious illegal sources by means of IP and DNS blocking. The blocking of approved content along with unapproved content (overblocking) is to be avoided, as far as possible, by the competent authorities. All blocking measures are to be made publicly known in an appropriate form by the competent authorities and they may not compromise the technical functionality of the IP or DNS system. The threshold for serious cases needs to be set in such a way that the access provider does not have to implement excessive blocking measures. Rights owners

must adequately compensate access providers for the costs incurred for blocking access. To this end, the necessary legal basis is to be established and a guarantee of judicial review is to be observed.

Providers whose services are based on copyright infringement can avoid legal action through the clever choice of location or technical concealment. IP or DNS blocking is required in specific serious cases in order to limit damage. CYCO (the Cybercrime Coordination Unit Switzerland) or an appropriate new official agency based on the same model should issue such an order.

9.3.5. Data processing

Rights holders should be allowed to process internet connection data (in particular, dynamic and static IP addresses) for the purposes of investigating copyright infringement, provided that they abide by the standards required by the Federal Data Protection and Information Commissioner (FDPIC)².

The legal basis is to be established to the extent necessary.

9.3.6. Notifications

An overzealous enforcement of the law is problematic and is perceived as being aggressive because internet users are often unclear about the legal situation. Prior notification may remedy this. It is therefore important to create the possibility for access providers to issue a one-off notification, when notified by the rights holder or a competent authority, to owners of internet connections who seriously infringe copyright by using peer-to-peer networks. Rights owners should adequately compensate access providers for the costs incurred for delivering such notification. Upon receipt of the notification, the subscriber will then have to take appropriate steps to prevent continued use of his connection for copyright infringement via peer-to-peer networks in order to avoid facing joint civil liability in the event of recurrence. To this end, the necessary legal basis is to be established and a guarantee of judicial review is to be observed; in particular, ISPs and consumer organisations must have the possibility of appealing to the competent authority upon notification from a rights holder.

9.3.7. Civil and criminal proceedings

It must be possible to take effective civil and/or criminal action against peer-to-peer network users who seriously infringe copyright. Being able to identify them is therefore crucial. Where an internet connection subscriber does not take action to prevent copyright infringement, despite being notified of it under Section 9.3.6, the access provider must, on the order of the authorities, disclose the identity of the internet connection subscriber to the rights holder for the purpose of initiating civil proceedings.

² *Relating to criminal law published in 19th Activity Report of EDÖB, see also*
<http://www.edoeb.admin.ch/dokumentation/00153/00154/00986/index.html?lang=de>.

Rights holders must adequately compensate access providers for the costs incurred for disclosing the identity of the internet connection subscriber. To this end, the necessary legal basis is to be established and a guarantee of judicial review is to be observed; namely in connection with breaching the secrecy of telecommunications in a civil law context, and the necessary storage and required storage period of IP addresses for the identification of the internet connection subscriber. No further obligations exist for the access provider.

This regulation would also mean that rights holders would directly receive the information for civil proceedings instead of having to obtain it via the right of the injured to access records of criminal proceedings. Existing possibilities for civil and criminal proceedings would, of course, remain available. Only the disclosure of the identity of the negligent internet connection subscriber would be subject to the delivery of a prior notification and an official order.

9.3.8. Exemption of providers from liability

Alongside the obligations of providers (i.e. access, search engine and hosting), their protection – provided they meet these obligations – must be established in law in the form of an exemption from liability and a clear delimitation of responsibilities. Under the EU's E-Commerce Directive, claims under civil law against access providers and search engine operators for damages, removal and injunctive relief, as well as their criminal liability, are ruled out if the provider does not initiate the transmission (of the requested information), does not select the recipient of the transmitted (or requested) information, and neither selects nor changes the transmitted (or requested) information. The same applies to the hosting provider if he has no actual knowledge of any illegal activity or information, or once he obtains such knowledge, takes immediate action to remove the information or block access to it. Nor should providers have any obligations imposed upon them to monitor the information stored or transmitted by them, nor to actively search for instances that indicate illegal activities. In connection with the measures set out in Sections 9.3.2 to 9.3.7, in particular, there must be legal provisions that expressly exempt access and hosting providers from liability. It must therefore, for example, be clear that an access provider cannot be held liable for an action taken in fulfilling the provisions of Sections 9.3.2 to 9.3.7. This exemption from liability must apply both to claims made by rights holders, and to non-contractual or contractual claims made by customers and operators of websites. To this end, the necessary legal basis is to be established.

9.4. Adaptation of regulations governing exceptions and limitations

9.4.1. General

Investigation is required into whether the limitations to copyright should be revised and the exchange of works and services on the internet by an existing and limited circle of persons be subject to collective rights management. Under current law (Art. 10 para. 2 let. c CopA), for example, uploading a photograph taken by another person for friends to see on one's personal Facebook page falls under the right of making available and is illegal because the circle of "closely connected persons" under the current limitation on private use (Art. 19 para. 1 let. a CopA) does not, in fact, correspond to the much wider circle of "friends" on Facebook. When further considering a reform of the regulations for exceptions and limitations, obligations under international treaties must be respected and the measures set out in Section 9.3 may not be voided. There must be no double payment for users and consumers, and the primacy of permissible individual rights management must be ensured as well.

9.4.2. Index privilege (proposed clause and clarifications)

9.4.2.1. Draft provision

The AGUR12 welcomes the request presented by the Federal Office of Culture under Section 3.54 introducing a new copyright exception for inventory indexes. It proposes the following draft wording to put this request into legal form:

Art. 24d (new) CopA: Inventory indexes

¹Public and publicly accessible libraries, educational institutions, museums and archives may provide short excerpts from the works or copies of works in their indexes useful for the cataloguing and presentation of their collections, provided that the normal use of the works is not thereby impaired.

²Short excerpts within the meaning of paragraph 1 means, in particular, the following parts of works:

- a. For works of visual art, in particular, paintings, sculptures and graphic works, as well as photographic and other visual works: an overall view of the works in the form of small-scale low-resolution images.
- b. For linguistic works: the cover as a small-scale low-resolution image, title, frontispiece, table of contents and bibliography, as well as the cover pages.
- c. ... (music and other acoustic works).
- d. ... (films and other audio-visual works).

9.4.2.2. Clarifications

The “Index Privilege” proposed in Art. 24 para. d (new) CopA is based on the archive privilege within the meaning of Art. 24 para. 1^{bis} CopA, for which the legislature already took a step into the digital age in 2008. For the sake of completeness, Art. 24d (new) of the CopA should now permit excerpts of works and copies of works to be reproduced, to a narrowly limited extent, in inventory indexes, if and insofar as this serves the cataloguing and presentation of such inventories. The usual working methods of memory institutions will thus be reflected in the CopA and made possible without remuneration. Enjoyment of the works and their further use are, however, to be excluded by the restriction contained in paragraph 1 and the specification in paragraph 2 of the proposed provision.

The term “Inventory Index” is to be understood in a broad and technologically-neutral way and covers all current and future forms of indexes, both digital and analogue, online and offline. This also includes library and museum indexes conventionally designated as “online catalogues”. Similarly, the form of the works reproduced is not relevant. Thus, both works in analogue form, as well as purely digital works (notably digital born works) can be reproduced in indexes.

Works reproduced in inventory indexes should be limited to short excerpts that are useful when using an inventory index. In addition, such reproduction may not impair the normal exploitation of works (e.g. trading with books and paintings).

The meaning of the term “short excerpts” is specified in more detail for certain genres of work in paragraph 2. In this respect, paragraph 2 let. a and b of the draft clause reflect the consensus found by the AGUR12 regarding linguistic and visual works. As regards linguistic works, it remains to be discussed whether the royalty-free reproduction of summaries of scientific linguistic works (abstracts) is to be permitted under the new inventory index proposals. Furthermore, it seems clear that an effective and workable index privilege must cover all genres of work. The discussion concerning further genres and parts of works is therefore to be continued in the follow-up to the AGUR12. As regards the reproduction of musical works and films in inventory indexes, one possibility is a permitted maximum duration for the excerpt combined with a low resolution. Ultimately, the aim is to formulate a comprehensive index privilege for all genres of work together in dialogue with stakeholders.

9.4.3. Remuneration for private copies and double payment

The system of remuneration applied to blank media (Art. 20 para. 3 CopA) is still relevant in the digital age. In fact, it permits a simple way of remunerating rights owners via collective rights management organisations while avoiding the criminalisation of consumers. This system is nevertheless poorly understood by the public and often criticised. One of the reasons is the problem known as “double payment”. Without going into the legal reasons that, at present, could justify the co-existence of

payments to an online platform and remuneration on blank digital media, it is clear that this co-existence hinders acceptance of the system. What is particularly annoying is that platforms authorise a certain number of copies against payment, for which remuneration is sometimes once again payable on the recording medium. One solution could be to limit remuneration to the cases in which private copies made at either the time of downloading or later are not part of the service offered to internet users of the platform. Different interpretations of Art. 19 para. 3^{bis} CopA exist within the AGUR12.

9.5. Further recommendations

9.5.1. No general cultural flat rate

There should not be a general cultural flat rate covering all internet usage. The existing concept of a judicious combination of collective remuneration at a more or less standard rate and individual exploitation is to be maintained.

9.5.2. Avoidance of limitations on market entry and an development of legal offers

Legal offers need to be made available to consumers. The legislature should therefore ensure that the legal framework does not present unintentional barriers to market entry, which obstruct the creation of legal offers. The legislature should also employ suitable measures to ensure cultural diversity.

9.5.3. Extension of the enforcement of copyright limitations to the internet

The revision of 2008 (Art. 10 para. 2 let. c CopA) introduced the so-called online right. The system of online portals hinders the exercising of limitations to copyright (Art. 19-28 CopA). In particular, the royalty-free right of citation, which is important for scientists, is no longer guaranteed. The AGUR12 recommends investigating how the exercising of copyright limitations ensured by the Revised Berne Convention, TRIPS, WCT and WPPT can once more be safeguarded, e.g. in a new Art. 28bis CopA and Art. 69b CopA (prohibition of obstructing the use of limitations by technical measures). In the words of the Federal Supreme Court (BGE 131 III 480 [490]), the provisions on limitations restrict the exclusive rights of authors in the interests of the general public or of certain user groups: "With these provisions, the legislature achieved a balance of the existing conflict of interests by regulating those acts with underlying collisions of constitutional fundamental rights."