



Digital Copyrights for E-Learning

Handbook

Copyright in education

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INTRODUCTION

- §1 For teachers and researchers in the world of education, the question of copyright, whether as the user or as the author of content, should not be underestimated because, with the advent of the Internet, copying, duplicating and distributing information has become remarkably easy. So what does copyright mean for teachers in our new digital world? Is copyright merely a problem or can it also be an asset? How should individuals or the school/university as an organization manage it?
- §2 New information and communication technologies, the Internet above all, have posed and continue to pose many questions for whoever has to apply copyright, but also for the legislator who has to provide for its implementation. It is clear that this manual cannot answer all the questions raised by copyright. It should therefore not be considered either as an exhaustive treatise on copyright or as legal advice on how to solve real cases. **Hence, readers will not always find an unequivocal solution to their specific problem here.** When in doubt please consult a copyright expert.
- §3 It should be noted that beyond the copyright, the use of documents or information created by third parties raises legal issues in other areas, especially in contract law and personality rights (see 2.5 below).
- §4 Unless otherwise indicated, we will discuss the cases **assuming the application of Swiss law.**
- §5 Four fundamental questions which you should ask yourself before using content will follow. No definitive solutions will be offered but a method will be proposed that can help solve problems based on the answers to the following questions:

QUESTION 1: WHERE IS THE CONTENT USED?

QUESTION 2: IS THE CONTENT PROTECTED BY COPYRIGHT?

QUESTION 3: WHO IS THE RIGHTS HOLDER OF THE PROTECTED CONTENT?

QUESTION 4: WHAT IS THE PROTECTED CONTENT USED FOR?

- §6 There are three main implications to take into consideration when the use of content affects the exclusive rights of the author:
- Obtaining permission to use the work
 - Paying a fee to use the work
 - If permission is not obtained or any fee due is not paid, users of the work run the risk of incurring liability for infringement of copyright
- §7 In most cases users can consult experts when in doubt about copyright issues; these experts can be contacted at the copyright management companies (collecting societies) when necessary (see point 3.5 below).
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QUESTION 1: WHERE IS THE CONTENT USED?

- §8 Is the content used in Switzerland? If the answer to this question is yes, Swiss copyright law will apply based on the **principle of territoriality**. The underlying assumption is that **content is protected according to the laws of the state in which it is used**.
- §9 But be careful, other cases are possible and it is not always easy to have an unequivocal answer, especially when dealing with the Internet. This manual has been drawn up based on the assumption that Swiss law applies. For an overview of foreign regulations on copyright, we can refer to the study by Ms. Armesto, *e-LERU project*, CSIR.
- §10 If I want to use a work, a text for example, in Switzerland, Swiss law will apply. Consequently, when works protected by copyright are used in Swiss universities, in most cases Swiss law will apply. Instead, in theory, protected content cannot be sent or made available abroad (without express authorization).
- §11 The main legal basis for Swiss copyright is the Federal law of 9 October 1992 on copyright and neighbouring rights (Version of 1st July 2008; *LDA; RS 231.1*). This law is supplemented by the ordinance on copyright and neighbouring rights of 26 April 1993 (Version of 1st July 2008; Ordinance on copyright, *ODA; RS 231.11*). However, it is clear that the interpretation of legal texts entails the study of the case law of the Federal Court and works on legal theory and this clearly falls within the area of expertise of professors in law and lawyers.

§12

CASE 1

A physics teacher wants to use (graphic) content produced by third parties and protected by copyright on his course and includes it in the course he is planning.

Which law applies when I download content?

The first question to ask is where the protected content is used. Insofar as the content is used in Switzerland, Swiss copyright applies to uses in Swiss territory (e.g. the use of content in a PowerPoint course, its printing and distribution to students in Switzerland).

Can authorization to use content in compliance with Swiss law – such as the exception for use for teaching purposes – justify its use abroad?

The exceptions, like that for teaching purposes, envisioned in particular in article 19 LDA (see Question 4) are not applicable as such outside Swiss territory. The use of protected content by the professor abroad will therefore not be subject to Swiss copyright law but to that of the country where it is used. It is therefore important to be careful because stricter conditions on the use of content for teaching purposes may apply.

2

QUESTION 2: IS THE CONTENT PROTECTED BY COPYRIGHT?

§13 Given that Swiss law applies because the content is used in Switzerland, the next question to ask is whether the content possesses the requisites for copyright protection (2.1; 2.2). Works as a concept can be grouped into several different categories: e.g. derived works, unfinished works, composite works and collections (2.3). The work of performers (i.e. a natural person who performs a work or who participates artistically in the performance of a work, for example an opera singer or musician, see *art. 33 LDA*) is not considered a work as such in the legal sense of the term but enjoys protection similar to that of copyright (2.4). Users must heed not only copyright laws but must also be aware that there are other civil, criminal laws and deontological codes which transversally safeguard content (2.5). Finally, we will look at Open Access Repositories and «Creative Common Licenses» (2.6).

2.1 WHAT CONDITIONS MUST BE SATISFIED FOR CONTENT TO BE PROTECTED BY SWISS COPYRIGHT?

§14 *Art. 2 I of the LDA* states: “Works shall mean literary and artistic creations of the mind, irrespective of their value or purpose, that possess an individual nature”. To be protected the work must satisfy three main conditions:

- the work must possess an **individual nature** (2.1.1)
- the work must be a **creation of the mind** (2.1.2)
- the work must be **expressed in some way** (2.1.3)

§15 The application of the law is far-reaching. In other words, most content used can be considered protected by copyright.

§16 **Warning:** Copyright is not the only legal aspect that has to be taken into consideration. There are other civil, criminal, deontological and contractual regulations that can come into play when using content: in particular, rights of personal status, the right to privacy, fair competition and the prohibition of plagiarism. **Subject to the above limits, content which does not satisfy the conditions for being considered work in accordance with the LDA can be freely used.**

2.1.1 What are the characteristics of an original work?

§17 The original nature derives above all from the way in which the new creation differs from existing works. In other words, the work must be individual. You can determine the individuality by placing the content within its environment (comparison test). The content must therefore not only be new but also contain a personnel distinctive note in order to be considered an original work.

§18 It is important to note that this individual nature may also be the result of a combination of existing and known elements providing that the end result is original and individual.

§19 The single parts of a work can also be considered original, providing that same parts can be considered works. The name of an audiovisual literary work, the name of a newspaper, the index of a book, the abstract of a thesis etc. are therefore protected provided that they also meet the general criteria of the

definition of work. In the example of the teacher's course, if the title of the course were, for example, «remarks on copyright» this would not be considered sufficiently original to be considered a work as such.

§20 Finally, the value of the work or its destination is not important. Even a child's scribble could satisfy the conditions to be considered a work.

§21 Moreover, the work does not need to be registered in any register or official deed for it to be protected by copyright.

2.1.2 Does the work have to be a creation of the mind?

§22 Yes. It must be an expression of the human mind. Therefore, any creation which does not originate in the mind cannot be considered a work protected by copyright. **For example**, the following are not works: a sunset, a fossil, the Grand Canyon or a rainbow. But don't be misled! Photographs or images that can be found – on the Internet, for example – of these phenomena or natural objects can be the fruit of the work of an author who has immortalized them in an original film or photograph: in all likelihood the images will therefore be protected under the LDA.

§23 Finally, the law states that «literary or artistic» creations are works (*art. 2 I of the LDA*). However, this definition should be interpreted in the broadest sense of the term. This means that practically all forms of expression of the human mind possess this requisite. In practice, this criteria will therefore always be satisfied. For example web pages or multimedia works are covered by the LDA if they satisfy the condition of original work (2.1.1). Furthermore the LDA expressively states that computer programmes are considered works (*art. 2 III LDA*).

2.1.3 To be protected, does the work have to be expressed in some way?

§24 The work is a creation that has to be created by a natural person and perceivable to the senses; that is, it is not enough just to have an idea! However, the work does not need to be fixed to a material support. Take for example a student of a music academy who has created a new original melody. The expression of the melody with its reproduction using a musical instrument satisfies the condition for being considered a work under the LDA.

§25 The question of evidence of the creation of a work, which could be protected by copyright, is different. In any case it is advisable to transfer your work onto a support in order to determine above all the date of creation and therefore establish the date from which any protection takes effect.

§26 **For example...** «protected and not protected»: ideas (without having been expressed in any way) and laws and judgements of courts (*art. 5 LDA*) are not protected by copyright. Creations which do not possess originality or individuality are not considered protected works either; for example, an image with no element of originality, standard texts of business letters, operating instructions or other trivialities. Free inspiration and logical reasoning are not protected by copyright unless, for the latter, there is an aspect of originality. However, all the other works of the Authorities are protected: flyers, brochures, articles, images and opinions published on the website of the Federal Administration etc. Many institutional websites will, however, make their content available to the public; for example, photographs, writings, illustrations, data. In many cases reproduction is permitted provided that the source is cited. In other cases, authorization to use the content has to be obtained in advance. The fact that these data can be downloaded does not imply that copyright has been transferred or rule out the need to request authorization to use them.

§27

A natural sciences teacher photocopies part of a book of illustrations and photographs of plants and flowers and hands them out to his students to use during his lessons.

Is the book as such and the images it contains protected by copyright?

CASE 2

First of all it is important to ascertain if the photocopies are used in Swiss territory. In this case Swiss law applies (see Question 1 above). The teacher will have to find out if the content and, in particular, the images of the photocopied book are protected by copyright. Only images which satisfy the conditions of originality and creativity as of *art. 2 I of the LDA* are protected. The image of a plant or flower can be problematic in this regard: if it is a simple representation without any aspect of originality (for example a fairly normal photograph with no distinctive traits) then it could be concluded that copyright does not apply to this image because the conditions as of *art. 2 of the LDA* are not satisfied. If, instead, the photograph is taken in an original way, using special techniques, the image may be covered by copyright. In general, teachers can photocopy parts of books for teaching purposes (see Question 4 below).

2.2 DURATION OF THE PROTECTION

§28

The conditions for the application of copyright are sometimes not satisfied. In these cases the content is not protected. In particular, works which are initially protected but which have entered the public domain are not protected by copyright; that is, works whose author has been dead for more than 70 years (*art. 29 IIa LDA*), respectively 50 years in the case of computer programmes (*art. 29 IIb LDA*). In the case of films and audiovisual works, the date of the death of the director is the only factor considered in the calculation of the term of protection (*art. 30 III of the LDA*). If the author is unknown then the term of protection begins on the date of the first publication of the work (*art. 29, 30, 31 of the LDA*; see 2.4 below on the expiry of the term of protection in the case of performers).

§29

For example... If a book is out of print, this does not mean that the work itself is no longer protected by copyright. It is actually important to distinguish the end of the term of protection of 70 years from the date of the death of the author from the fact that same publication is no longer available on the market. Nevertheless, if a book is out of print or no longer available on the market, its use within the context of the exception for teaching purposes will be less restrictive. In this case a teacher is for example allowed to make photocopies of the whole document for a didactical use (see *art. 19 IIIa of the LDA*; see 4.2.5 below on the concept of "obtainable commercially").

2.3 SPECIAL CATEGORIES OF WORKS

§30

Works, however, can come in different guises: derived works, that is, those derived from other works, such as translations or literary adaptations (2.3.1); composite works, that is, works comprising various elements such as an audiovisual or multimedia product (2.3.2); and finally unfinished works (2.3.3) and collections of works (2.3.4).

2.3.1 What if a work is created on the basis of another one? Derived work

§31

According to law, derived works are creations of the mind of an individual nature that have been produced by making use of one or more existing works and whose original nature remains recognizable. Translations, audiovisual and other adaptations, in particular, are considered such works (*art. 3 of the LDA*).

§32

To satisfy the condition for being considered a derived work, the original work must have been modified in such a way that the resulting product can be said to be a new work, original in itself, but it must be

possible to recognize the original work in it. If, instead, the modification is such as to make the original work unrecognizable then the work can be considered an original work, naturally inspired by another but in an irrelevant way for copyright purposes. Again, in the definition of derived works what matters is the creative element. The translation of a work is considered a derived work.

- §33 A derived work is protected by copyright in the same way as an original work. The main difference lies in the fact that the use of a derived work presumes that permission has been granted by the rights holder (see 3.1 et 3.2 below) of the original work. Thus, to use the translation of a contemporary literary or scientific text contained in a hand-out, permission must first be requested from the rights holder both of the original text and of the translation.

2.3.2 What if a work is created by several authors? Composite work

- §34 A composite work is a work which consists of two or more interrelated creative elements which form a single work.
- §35 A composite work is generally the object of a single copyright (*art. 2 of the LDA*) The distinctive trait is that a composite work is often created by several co-authors (*art. 7 I of the LDA*). In this case we speak of collections and co-authors and a series of internal problems (agreements between co-authors, see 3.3.1 below) and external problems (how users should treat a collection, see Question 3 below) have to be taken into consideration.

2.3.3 What if a work is not complete? Unfinished work

- §36 An unfinished work is, for example, a draft version of a text or a student's uncompleted project work. Are these works protected? In theory the answer is yes, providing that the creation is sufficiently individual as set forth in *art. 2 I of the LDA*. Indeed, every work is protected from its conception: protection shall also subsist in drafts, titles and parts of works on condition that they are creations of the mind with an individual nature (*art. 2 IV of the LDA*).
- §37 Therefore, the fact that the source is a text in the pre-print stage or a mere draft does not entitle you to copy the text without complying with copyright law.

2.3.4 How are collections of works protected?

- §38 Collections of works are protected if they satisfy the conditions to be considered as works. The individual nature of the collection with regard to the selection or arrangement of the content is decisive (*art. 4 of the LDA*). The original and individual nature of the creation must lie in the collection as a whole and not in the individual works constituting it. Indeed, the concept of collection does not necessarily imply that the single constituent parts possess the requisites for being called works (*art. 2 II of the LDA*).
- §39 As in the case of derived works, if you want to reproduce a work which can be classified as a collection you will have to request authorization, not only from the author of the final work (collection) but also from the authors of the constituent single works, which are protected individually. Each individual work can be used separately from the collection, providing that this has been agreed between the author of the work and the author of the collection (who can be the same person; see Question 3 below).
- §40 **For example...** A newspaper or a thematic journal can be considered a collection, if they satisfy the conditions. On the contrary, a simple list, which orders entries alphabetically (telephone book), above all if it does not have an individual nature, does not satisfy the conditions of a collection as established in the LDA.

§41

During an ongoing training course held at a Swiss university a DVD is created of the lessons, containing audio and video material.

CASE 3

How is the content of the DVD protected?

Granted that Swiss law applies and that the content of the DVD possesses the requisites of a work as established by law, the DVD itself can be considered a collection of content that has been assembled in an original way (e.g. on a specific theme) and not a mere accumulation of documents. In this case the DVD could be considered a collection. On the contrary a DVD cannot be considered as a collection, if it only serves a backup of contents (for example organised by creation date of the single contents).

2.4 NEIGHBOURING RIGHTS

§42

Copyright should be distinguished from neighbouring rights. The latter are special rights that protect the services of performers (*art. 33, 34 of the LDA*), phonogram and videogram producers (*art. 35, 36 of the LDA*) and broadcasting organizations (*art. 37*). Nevertheless, the law also envisages protection and regulations on the use of works by these categories of people by means of ad hoc regulations (e.g. *art. 33-37, 39 of the LDA*) or by referring back to the application of copyright laws (specially to the articles of chapter 5, which are about exceptions to copyright) (*38 of the LDA*).

§43

Is the performance of a work protected? Certain works can envisage a performance; for example, the script of a play (conceived to be performed), a piece of music (conceived to be played), etc. Clearly, the original texts (the script of the play, the score) are considered works and hence protected by copyright. Instead, the natural person who performs or participates artistically in the performance of a work or another type of performance is called a performer (*art. 33 I of the LDA*) and his work is protected while not being considered a work as such for copyright purposes (*art. 33 I of the LDA*). The work can be interpreted without a new work being created; i.e. a new original creation. For this reason the performer's rights are not regulated by copyright clauses but by special clauses of the articles *33, 34 and 38, 39 of the LDA*.

§44

Pursuant to *art. 39 of the LDA*, protection shall begin with performance of the work by the performers, with production of the phonogram or videogram or with the transmission of the broadcast if they have not been published; it ends after 50 years.

§45

During the graduation ceremony held in the university's Aula Magna a lecturer gives a speech written by his assistant. The ceremony ends with a brief and partial reproduction of Beethoven's Ode to Joy (CD). The speech is then published in full on the university's website under the name of the lecturer who gave it in public during the ceremony.

CASE 4

Can the performance of a piece of classical music be protected?

*In practice, the scores of classical music such as that of Beethoven can be considered as being in the public domain because more than 70 years have passed since the death of the author (*art. 29 II b LDA*). However, Beethoven's music is still interpreted with inspiration and originality by orchestras, conductors and other artists. The law on copyright protects not only the works but also the performance of musical scores (*art. 33 of the LDA*). At the moment of distribution on the market of a phonogram or videogram recording (sold, rent, lent) the performer of the work is entitled to receive a payment (*art. 35 II of the LDA*). This protection ends after 50 years. In most cases the copyright and neighbouring rights management company (collecting society)*

should be contacted for authorization to use the relative piece (*art. 35 III LDA*, see 3.5 below). Finally, it should be noted that a graduation ceremony, like that envisaged in the example, is not a teaching situation.

2.5 WHAT OTHER SOURCES OF CONTENT PROTECTION ARE THERE?

§46 Is the content protected by copyright? Or does copyright not apply? Irrespective of the answer to these questions, attention should be paid to other legal aspects which could place limits on the free use of a work; above all civil regulations (in particular the right of personal status 2.5.1 and contract law 2.5.2). Deontological codes can also envisage restrictions, above all concerning plagiarism (2.5.3). Finally, there are rules of a criminal nature (2.5.4).

2.5.1 The right of personal status

§47 **For example** ... Rights of personal status refer to the assets and values a person possesses merely due to the fact that he exists. Rights of personal status include: the right to one's image, protection of personal data and protection of privacy. The prevention of unfair competition may impose other constraints on the use of content, with the related civil and criminal sanctions.

2.5.2 The contract

§48 Protection of content can also derive from contractual terms and conditions, for example, those agreed by the parties regarding the availability of documents online through access to a database. It is also important to note the specific possibility of reserving the right to manage the image of an exhibited work of art, in particular through contractual conditions and clauses drafted and adopted by a museum.

2.5.3 Deontology, plagiarism

§49 Plagiarism may represent an infringement of copyright, above all when the sources are not given (*art. 25 II of the LDA*). Moreover, plagiarism may also breach deontological codes applicable, for example, in the field of scientific research, or contractual clauses envisioned by some universities. These cases can result in sanctions also of a civil and criminal nature. In the case of doubt it is advisable not to use the work in question or to ask an expert for advice. For example, if a teacher copies parts of masters' dissertations that he is correcting in his own scientific article without giving the sources then he is guilty of plagiarism. In the same way, a student or doctoral candidate who copies parts of texts of other authors in his dissertation without correctly citing the source is guilty of plagiarism and breach of the principle of research integrity adopted by most universities (see for example «*Charte d'éthique de l'Université de Genève* »).

§50 **Warning: even if the work has entered the public domain, plagiarism is still punishable as a breach of the deontological code!**

2.5.4 Other sources

§51 Finally, the protection of content can be envisaged by ordinary criminal law, in particular in the provisions which punish breach of honour and the private sphere (*art 173 f.f. of the Swiss Criminal Code - CP*). The following are punishable, for example: defamation (*art. 173 of the CP*), slander (*art. 174 of the CP*) and breach of privacy using cameras (*art. 179quater of the CP*). Not only can the perpetrator of these crimes be punished; anyone who takes part in them can be punished too (e.g. accomplices, instigators).

§52

A teacher gives his students a pdf handout containing photographs. Afterwards, one of the students on the course uploads the handout onto a website. Teachers at other schools or universities take the handout, use its structure and some of the photographs and illustrations without asking for permission from the first teacher and, in some cases, without citing the original source.

Can the content of third parties found online be used?

CASE 5

Care must be taken. Finding content on the Internet does not mean that it is in the public domain or that it is sufficient to quote the source in order to avoid infringement of a third party's right. The source must be given in any case because this is a legal obligation (art. 25 of the LDA), besides being a deontological one. If you know that the content is protected and you want to use it for teaching purposes (see Question 3 below), you will have to know when and how the content was published, pursuant to law, for the first time (art. 9 III of the LDA, Questions 3 and 4). The rights are held solely by the author and use must be made with his permission. If the work is not published in accordance with law then it cannot be used even for teaching purposes. In truth, we cannot know if the images used were found by the teacher on the Internet and if this was done legally. If in doubt, it is better to be cautious and refrain from using the images which are most likely protected by copyright. For more extensive use it would certainly be advisable to request permission from all possible rights holders: the author-teacher of the course or the university he works for, the authors of the images, any subjects depicted in the images or other rights holders (think of the case of the images exhibited in a museum which could have its own policy regarding photography and the use of the images of exhibited objects).

2.6 PUBLISHING AND USING OPEN ACCESS (OA) CONTENT AND/OR CONTENT UNDER A CREATIVE COMMONS (CC) LICENSE

- §53 This section 2.6 is under an «Attribution ShareAlike 2.5 Switzerland Creative Commons license <http://creativecommons.org/licenses/by-sa/3.0/>».
- §54 Open Access repositories and Creative Commons licenses serve the same goals as libraries have served since the Alexandria one: preserving, sharing and advancing knowledge. Since 2002, when MIT started publishing its course materials online in its OpenCourseWare program and the first version of CC licenses was released, countless scholars and researchers all over the world have been using OA repositories and CC licenses. The legal permissions that must be granted when publishing a work in an OA repository, and which can be met easily by using some types of CC licenses, also ensure its visibility. This visibility is a better protection against unauthorized reuses than so-called digital protections and legal measures prohibiting their circumvention, which have impressively failed so far to even slow down unauthorized copying and sharing, because the more people have access to a work, the greater the likelihood that unauthorized uses be spotted and exposed. Moreover, as an increasing number of authors and of serious publishers are realizing, this visibility is also a far more efficient publicity in ROI terms than older means like excerpts of articles published in scientific/scholarly journals and review copies sent to journalists.
- §55 In Switzerland, many higher education institutes and most academic and research decision-making bodies have adhered to the 2003 Berlin Declaration on Open Access. This means that OA publication is an obligation for practically all researchers and scholars. OA repositories are easy to use, and so are Creative Commons licenses that allow authors to meet the permission requirements of OA publication. However, attention must be paid to the proper way of using OA and CC: hence this section.

2.6.1 Open Access

§56 The main Swiss higher education authorities have signed the Berlin Declaration on Open Access. This is a great progress for research. It also means that all publications by teachers and researchers – and all theses by students – of Swiss academic and higher education institutions must be made available in Open Access repositories, following the rules stated in by the 2003 Berlin Declaration:

- The author(s) and right holder(s) of such contributions grant(s) to all users a free, irrevocable, worldwide, right of access to, and a license to copy, use, distribute, transmit and display the work publicly and to make and distribute derived works, in any digital medium for any responsible purpose, subject to proper attribution of authorship (community standards, will continue to provide the mechanism for enforcement of proper attribution and responsible use of the published work, as they do now), as well as the right to make small numbers of printed copies for their personal use.
- A complete version of the work and all supplemental materials, **including a copy of the permission as stated above, in an appropriate standard electronic format is deposited** (and thus published) in at least one online repository using suitable technical standards (such as the Open Archive definitions) that is supported and maintained by an academic institution, scholarly society, government agency, or other well-established organization that seeks to enable open access, unrestricted distribution, interoperability, and long-term archiving.

§57 In our opinion it is important to include this permission in the work itself, and not only in its Repository description.

§58 Ask your higher education institution which Open Access repository you must use for your publications, and how.

2.6.1.1 Using Open Access works

§59 In spite of the 2003 Berlin Declaration requirement that a copy of the Open Access permissions be included within Open Access works, this is not always the case: some Open Access repositories – particularly Swiss ones – contain a high proportion of works with an improper strict copyright declaration, or without any copyright/permission declaration, which is the same as strict copyright. Therefore check permissions carefully before re-using a work you find in an Open Access repository.

2.6.2 Creative Commons

§60 Creative Commons (CC) licenses, which enable authors to automatically grant some rights they have under copyright law while reserving other rights, are a very useful tools towards implementing the rules for Open Access works mentioned above.

2.6.2.1 Four main modules

§61 A creative commons license results from a combination of some of four possible modules:

- **BY - attribution to the author/s:** is compulsory because attribution is required by copyright laws.
- **NC - No commercial use:** means that the author does not automatically authorize commercial uses, for which – as with traditional copyright licenses – permission must be requested.
- **ND - No derived works:** means that the author/ do/es not automatically authorize modifications, for which – as with traditional copyright licenses – permission must be requested.
- **SA - Share Alike:** means that if others want to diffuse the work, they must do it under the same

CC license that was chosen by the author.

2.6.2.2 No "ND" for Open Access

- §62 The 2003 Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities specifies that Open Access contributions must bear a declaration by which: «the author(s) and right holder(s) of such contributions grant(s) to all users a free, irrevocable, worldwide, right of access to, and a license to copy, use, distribute, transmit and display the work publicly **and to make and distribute derived works**, in any digital medium for any responsible purpose, subject to proper attribution of authorship [...]».

2.6.2.3 Finding works under Creative Commons license

- §63 The advanced search options of Google (and of some other search engines) enables onr to look for works under a given Creative Commons license: be they web pages, videos or images. Flickr offers the same possibility for pictures.

2.6.3 Further information

- §64 You can find further resources about Open Access and Creative Commons in the relevant sections of the «Online Resources» document (downloadable from the "Reports" page of the DICE site): http://www.diceproject.ch/wp-content/uploads/2010/03/DICE_onlineResources_20100305.pdf or under <http://tinyurl.com/DICE-OA-CC>.
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3

QUESTION 3: WHO IS THE RIGHTS HOLDER OF THE PROTECTED CONTENT?

- §65 If the content you intend to use is a work which is protected under the LDA then you have to find out who the owner of the copyright is. In general, authorization has to be obtained from the rights holder in order to be able to use the content (use for teaching purposes is an exception to this rule, see Question 4 below).
- §66 The owner of the copyright can be the creator of the work (3.1) or a third party (3.2). Contexts related to collaboration relationships (3.3) and teaching (3.4) give rise to specific problems. In the case where authorization has to be obtained, you can/must contact the copyright management companies (collecting societies) (3.5).

3.1 THE AUTHOR IS THE RIGHTS OWNER OF THE CONTENT

- §67 Note that the author can only be a natural person whose mind confers an individual nature to the work he has created (*art. 6 of the LDA*). A corporate body, a company for example, cannot be the author but can own the copyright as a result of the transfer of the rights (see 3.2 below). Therefore, any natural person can be the author of protected content. This includes employees, student-researchers, doctoral candidates, teachers but also people who cannot exercise their civil rights such as minors or people with impaired judgement. In principle the author has exclusive rights to make decisions about his work (for details on this see 4.1 below).
- §68 It is fundamental, but not always possible, to discover who the author. In this respect the law has envisaged a **presumption of authorship**. *Art. 8 of the LDA* establishes that, until otherwise proved, the author shall be deemed to be the person identified as such with his own name, a pseudonym or a distinctive sign on copies of the work or on publication of the work. Moreover, as long as the author is not identified or remains unknown in the case of a pseudonym or a distinctive sign, the person who edits the work may exercise copyright. Where such person is also not named, the person who has published the work may exercise copyright (*art. 8 I and II of the LDA*). However, being only a presumption of authorship for the exercise of copyright which is valid **until the real author pursuant to art. 6 and 9 of the LDA is identified**, there may be some confusion when dealing with the exercise of moral rights which instead are due in principle solely to the actual author in accordance with *articles 6 and 9 of the LDA* (see 4.1.1 below).
- §69 **For example...** A teacher can be the author of the course content which he prepared, illustrating it in class with slides. But a student can also be an author, for example, of an individual research project prepared within the framework of the evaluation of his training, or students if they take part in a photography competition organized by the university.

3.2 A THIRD PERSON, AND NOT THE AUTHOR, OWNS THE COPYRIGHT

- §70 The law states that copyright can be transferred, also in part (*art. 16 I and II of the LDA*). This right of use is almost absolute and exclusive if the author is the rights holder. Instead, if a third party is the rights holder, the possibility of using the transferred rights will depend on the extent to which and how the copyright was transferred. In other words, the third party rights holder can use the work within the scope of the transfer of the rights. The author can decide to **transfer only some of the rights:**

for example, it is possible to transfer the right to reproduce a novel in written form but not authorize its “reading” on the radio. Or the author can decide not to transfer the rights to his work but **to authorize solely the use of the content under contract (license)**. The user does not therefore acquire rights of use but merely authorization to use certain content under certain conditions. For example, to play, record or broadcast a work on television, authorization has to be obtained from the owner of the copyright for each of these activities. If, instead, we are talking about use, for example, by a teacher for teaching purposes and within the framework of the exception as of *art. 19 of the LDA*, then it is not necessary to ask the rights holder for authorization as the law itself grants a so-called legal license to use the content (*art. 19 of the LDA*, see Question 4 below).

- §71 Finally, while patrimonial rights can be transferred, in full or limited only to the use of the content (licenses), moral rights are not transferrable (see Question 4 below on the concept of moral and patrimonial rights and what these concepts are based on). Consequently, the third party transferor may be the holder of the patrimonial rights but in principle cannot exercise the moral rights over the content.
- §72 Copyright is also **transferrable by inheritance** (*art. 16 I of the LDA*). This explains the right of an author’s heirs to exercise the rights of same author also after his death.
- §73 Transfer of rights over the work must be differentiated from transfer of the work itself. Transfer of ownership of a copy of a work shall not comprise any authorization to exploit copyright even in the case of an original (*art. 16 III of the LDA*).
- §74 **For example...**, think of a painting. Let us imagine that an artist has sold or donated his painting to third parties. These third parties are therefore the new owners of the work. They in turn can use and exploit the painting **because it is a physical support**: the new owner can therefore freely rent out, exhibit, lend, sell or donate the work. However, **the transfer of the painting does not necessarily also imply the transfer of copyright over the work considered as an intangible creation**. Without the author’s agreement it will therefore not be possible to make copies of the painting, make changes to it or include it in another work unless the author has agreed also to the exploitation of copyright.
- §75 **Another example** is that of an image purchased on the Internet. In all likelihood the author of the image has only authorized the use of the image (license) within certain limits. This does not normally include the transfer of the moral rights or all of the patrimonial rights: it is unlikely that the right to modify or use the image in ways other than those agreed on with the author or authorized by him will have been acquired.
- §76 Before using the content it is important to know who the third party owner of the copyright is because this is the person who will have to be contacted if you intend to use the work. You should be aware that the author may not have transferred all the rights to the work, in particular the moral rights (see *art. 16 II of the LDA*). His permission is needed for this. In the same way, the owner of a license does not have the right to allow third parties to use the work.

3.3 COLLABORATIONS AND COPYRIGHT

- §77 It is true that copyright is regulated by law but it also reflects the free will of the parties. In this context collaborations at all levels have an influence on how copyright is regulated. A collaboration relationship can be horizontal (3.3.1) among co-authors or vertical (3.3.2) between the author and the employer. The question in both cases is the same: who owns the copyright?

3.3.1 Several authors have contributed to the creation of a work: Co-authors

- §78 When several people have contributed to the creation of the work as authors then we talk about co-authors (*art. 7 of the LDA*). This means that copyright belongs to them jointly (*art. 7 I of the LDA*). Unless otherwise agreed, the co-authors may only use the work with the consent of all the authors; such consent may not be refused for reasons contrary to the principle of good faith (*art. 7 II of the LDA*). Where the individual contributions may be separated and there is no agreement to the contrary, each co-author may use his own contribution independently where such use does not prejudice the exploitation of the joint work (*art. 7 IV of the LDA*).
- §79 It is important to distinguish between a co-author and an executor: the latter merely carries out the author's orders without making any personal creative contribution. The executor does not become the owner of the copyright.
- §80 **For example...** An assistant under an employment contract with the university who prepares the slides of the professor he assists for use in class is not a co-author but an executor.
- §81 **It is also important to distinguish between an executor and a performer** who, instead, contributes his artistic gifts and this offers him protection under the above-mentioned neighbouring rights (see 2.4 above). Finally, it should be noted that in the case of several performers acting as a group under a group name the law states that a representative must be appointed who is vested with the power to exercise the rights of the group as a whole (*art. 34 of the LDA*).
- §82 **The work of co-authors is different from a derived work** (which may also involve several authors, see 2.3.1 above) because the work of co-authors is the creation of several authors who have a common purpose, who provide "ad hoc" creative contributions which are not an end in themselves and which do not already exist but have the aim of producing a new, unique work, working in a coordinated way in a set period of time.

3.3.2 Other collaboration agreements

- §83 The author may have entered into a private contract or could have a public function as an employee of a school or university for example.
- §84 In these cases the transfer of copyright which protects created content is often envisaged in the contract signed by the parties. The transfer can take place contractually, privately, or in a regulatory or legislative way in the public sector.
- §85 The consequence of the transfer of rights is that the **author is no longer the owner of the copyright**. He will therefore not be able to dispose of his creation in a discretionary way without the authorization of the rights holder (employer, client, school/university or public authority).
- §86 **In the private sector** the contract defines who the owner of the copyright is. For example, unless otherwise stated in the contract an author who transfers the publication rights for one of his articles to the publisher of a scientific magazine cannot decide on a different type of publication of the article without the agreement of the publisher. The publishing contract is regulated in art. 380 f.f. of the Code of Obligations (CO) – barring any application of foreign law (for example, publication contract with a foreign publisher) – where it is expressly stated that copyright passes to the publisher within the limits and for the time required to fulfil the publishing contract (*art. 381 I of the CO*) and the author must declare to the publisher, before signing the contract, if the work was already granted in part or in full to another publisher or if he knows whether it has already been published (*art. 381 III of the CO*).
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§87 On the other hand, if a photographer is commissioned to take photographs for a specific job, it must be clearly agreed (better if in writing) that the copyright over the photographs will be transferred to the client. If this is not envisaged the photographer could decide to raise claims to his works.

§88 **In the public sector** it is the regulation of the public entity itself and not an article of law that will define the scope of the transfer of copyright.

§89 **For example...** Art. 15 I of the *loi cantonale genevoise du 13 juin 2008 sur l'Université* (Canton of Geneva Universities Law) expressly sets forth that with the copyright exception regarding publications, the university is the holder of intellectual property rights covering all intellectual creations and results of researches. This also includes IT programmes, which have been created on duty by people having a working relationship with the university.

§90 In general, when the situation is unclear, irrespective of the type of relationship (public or private) it is good practice to determine first and foremost who owns the copyright.

§91

During an ongoing training course held at a Swiss university a DVD is created of lessons, containing audio and video material. The DVD was conceived and created by the teachers with the assistance of an external expert to whom a specific assignment was given.

Who owns the copyright over a DVD created by more than one teacher?

Granting that Swiss law applies and providing that the works are protected by copyright, it is important to determine who the owner is. In this case several teachers collaborated in the creation of protected content with the assistance of an external expert. The general rule is that the author is the rights holder and, if there is more than one author, the co-authors. However, contractually or by law it is possible that the actual author of the work may not be considered the rights holder. It is therefore important to verify this possibility, in particular regarding the collaborator, external agent, but also regarding the teachers. For example, a teacher's function is often bound by regulations and contractual clauses which envisage that works created when under contract belong to the school/university or public entity in which the teacher is employed. In the same way, the external collaborator, acting under a private agency agreement, may be contractually limited by the rights holders. In practice, it is advisable to put in writing that the agreement envisages not only the performance of the established tasks but also the transfer of copyright.

CASE 6

§92

A teacher creates a blog on which he intends to publish some of his own works: articles already published in magazines, courses given to students, videos, images, pdf texts and interesting links to other websites, etc. The site, which is freely accessible, was created with the help of a professional external web designer. The external expert is not a collaborator of the professor's institution.

Can a teacher upload all the content he has prepared or bought onto his online blog?

First of all you have to know where the content will be used and therefore if Swiss law applies. Granting that Swiss law applies, you have to know if the content you intend to use are works protected under the LDA, something which is highly probable. The question is once again: who owns the copyright? To answer this question, three possible cases have to be taken into consideration:

- a. *the content is created by the teacher outside his function and outside a publishing contract with third parties*

CASE 7

- b. *the content is created within the context of his role as a teacher or under a publishing contract*
- c. *the content makes use of works created by third party authors*

In case a. the teacher is free to make all of the content he has created outside the context of his function available online.

Instead, in case b. – content created by the teacher within the context of his function or in the fulfilment of a publishing contract – the teacher will have to comply with the applicable contract or law provisions. In particular, in a publishing contract exclusive rights in favour of the publisher are often envisaged along with other important conditions (art. 380-393 of the Swiss Code of Obligations, CO). Within the context of the teacher's function there may be contractual/regulatory clauses whereby the content he creates belongs to the School/University or the Authority he works for. The teacher might need to ask the competent authorities for authorization in order to publish his works on his blog.

In case c., that is, content protected by third party authors used, for example, on a course or published on the teacher's blog, authorization must be requested from the rights holders and, if necessary, a fee will have to be paid. The possibility of applying the exceptions to copyright such of that for teaching purposes remains (see point 4 above).

Who owns the copyright in the case of a private assignment?

The web designer, who is not an employee of the school/university, has probably entered into a specific agreement with the school/university or directly with the teacher. Also in this case the contract, besides establishing a congruent remuneration for the services performed, could provide for the transfer of copyright over the content created, on the request of the school/university or the teacher. To avoid misunderstandings it is therefore important, for the purpose of providing proof, to stipulate a detailed transfer of rights in writing.

3.4 TEACHING AND COPYRIGHT

§93 Let us now evaluate some practical cases related to teaching: teacher (3.4.1) and student (3.4.2) in the capacity as author.

3.4.1 The teacher is the author

§94 Relationships of private or public law linking the author with third parties (institutes, universities, employers, principals, etc.) may provide for the transfer or right or pre-emption of copyright over what a teacher has created within the context of his function. The contracts or regulations of some Swiss universities generally, but not always, envisage this type of clause: the school/university or authority is the owner of the copyright over all the material produced by its employees during their working hours. This is without doubt admissible insofar as the employment or collaboration relationship reasonably justifies the transfer of copyright from a patrimonial and moral point of view. However, an absolute and unlimited transfer of patrimonial and moral rights would be excessive (art. 27 of the Swiss Civil Code) and therefore potentially null.

§95 **For example...** A teacher subject to a canton-wide law which envisages that all the rights over the works created during the performance of his function or in relation to same function belong to the State cannot in principle publish on his private blog a work created within the framework of his function such as a course of study. In this case, authorization can be given by the authority holding the rights.

§96 With the agreement of the authority which holds the rights according to the applicable regulation, the teacher can enter into a publishing contract with third parties for the publication of his article. In this case the teacher-author could be doubly constrained: on one hand he will have to fulfil the contract with the publisher and thus, for example, not publish his contribution in another publication. On the other, he will be bound by the regulations governing his work for the school/university he teaches at. Therefore, if the article is written during the fulfilment of his function and the school/university envisages a transfer clause in its contract then the school/university is the owner of the copyright. The school/university is therefore the party that has to enter into the publishing contract or appoint the professor that created the work as its representative. Potentially, the institute could hand over to the teacher any remuneration received under the publishing contract. Of course, special agreements may be reached between the author and the university or the case where the transfer appears excessive may apply.

3.4.2 The student is the author

§97 In this case the student is in essence also the rights holder to the extent to which he is not bound contractually or by any specific agreement with third parties. If the content is created within the context of the student's training then in theory his authorization must therefore always be requested.

§98 **For example...** If a competition is organized by a school or university which involves the creation of a work by students (e.g. photographs, short stories etc.), if same are not bound by specific regulations then it will have to be clearly specified who will own the copyright over the content. In the absence of this condition the student-authors will have exclusive rights over their work. In this respect, while it may be admissible for a university to keep a copy of the Bachelor or Master dissertations in the archives for the purpose of future evidence, these dissertations cannot be used for other purposes, in particular commercial or exhibition ones, without the authorization of the authors.

§99 If, instead, the content is created within the framework of a research project, if a contract therefore exists between the student and the university, for example for the participation in a project as a student assistant or, afterwards, as a doctoral candidate, the contract or regulation of the institute may (but not necessarily) envisage a clause that envisages the transfer of copyright over the works created during the period of these assignments. In this case the rights are transferred to the university to the extent agreed on or defined by the parties. Also in this case, clauses that bind the author contrary to law or ethics could be excessive and therefore void.

§100 **For example...** Art. 41 of the *Vaud canton regulation for higher education institutes (REHV)* of the 4th December 2003 sets forth that, the intellectual property related to personal works made by students during their studies belong to them (art. 41 I REHV). While if a student collaborates at works assigned to or by the school, the result of his work belongs to the school (Art. 41 II REHV). Another example: art. 37 III of the *regulation of the Swiss National Fund regarding the concession of grants* expressly sets forth that scientific collaborators who have autonomously contributed to a project financed by the fund can be considered co-authors of the publications based on that project. It states that the beneficiaries of subsidies grant to scientific collaborators involved in research activities, the option to take decisions based on their scientific contribution. They have the right to figure as co-authors of publications of those research activities as long as they made a significant and autonomous scientific contribution.

3.5 COLLECTING SOCIETIES: WHAT IS THEIR ROLE?

§101 So far we have only briefly mentioned a key player in the question of copyright: the collecting societies.

§102 While not being the owners of the copyright, collecting societies play a central role in the copyright protection system. Collecting societies that manage the rights subject to domains of activities under surveillance of the Confederation must obtain a license (*art. 41 LDA*). The domains of activities under surveillance of the Confederation are as follows (see *art. 40 of the LDA*): They have the task of administering exclusive rights for the performance and broadcasting of non-theatrical works of music and the production of phonograms and videograms of such works, the exercise of certain exclusive rights stated for example in *art. 20 of the LDA* (compensation for private use which is fundamental within the teaching context) and the exercise of the remuneration rights provided for example in *art. LDA 13* (rental of copies of a work). Collecting societies set the tariffs for the recovery of remuneration which is subject to the Federal Arbitration Commission (*article 46 of the LDA*). With the goal of standardizing their services, the collecting societies also determine common tariffs (called in short: CT; see *art. 48 of the LDA*). For users who want to exploit music, an image or a text, the collecting societies represent the principal intermediaries: indeed, they will have to get in touch with the collecting society and not directly with the author to request authorization or pay the requested remuneration. In Switzerland there are five collecting societies: *SUISSIMAGE* for audiovisual works; *PROLITTERIS* for literary, photographic works and figurative arts; *SUISA* for musical works; *SUISSPERFORM* for neighbouring rights; *SSA* for theatrical, drama-musical and audiovisual works. These societies are subject to the control of the Confederation (see *art. 52 ss. of the LDA*).

3.5.1 How does the Common Tariffs (CT) system work?

§103 When more than one collecting society operates in the same sector, they will establish a common tariff for the same utilization of works or performances and shall designate one of their numbers as the joint office for payment (*art. 47 of the LDA*). The common tariffs are applied by the collecting societies that represent the interests of the authors and owners of neighbouring rights who have registered with them. The CTs are binding for the parties and the courts called on to apply them. Moreover, these tariffs are periodically renegotiated and are therefore subject to modification. For example, the current CT7 regarding teaching use is valid until the end of 2011, after which it will be reviewed and renegotiated by the parties involved and with the collecting societies. For example, if I want to organize a concert of famous singers I will contact *SUISA* and *SUISSPERFORM*. If, instead, I want to reprint the text of a living author (or in any whose date of death is no more than 70 years ago) I will contact *PROLITTERIS*.

§104 Since membership of these collecting societies is not obligatory for authors in Switzerland as it is in other countries, not all Swiss and international authors may be duly represented. In this case authorization has to be requested directly from the authors themselves (in Switzerland or abroad) unless the use does not fall under one of the obligatory licenses as of *art. 19 I of the LDA*.

§105 **Schools are an exception:** In general, schools/universities (the authority responsible for paying for the use of works in this context) pay the remuneration established in the CT on the basis of lump-sum amounts calculated taking into consideration various factors, including the number of students. The CTs establish the remuneration due for teaching use, for the use of works for the internal needs of schools, universities, libraries, the services sector etc. Teachers and students can therefore work with more freedom and independence.

4

QUESTION 4: WHAT IS THE PROTECTED CONTENT USED FOR?

- §106 To unravel a problematic situation from the point of view of copyright you have to find the answer to three basic questions: does Swiss law apply? Is the content in question protected by copyright? Who is the rights holder? After finding the answers to these questions, there is a final decisive point to clarify which regards the use to be made of the content: for which goal is the protected content used?
- §107 Assuming that the author holds exclusive rights over the work (4.1), which include moral rights (4.1.1) and patrimonial rights (4.1.2), we will see how, depending on how the content will be used, the user can benefit from the exceptions to copyright, envisaged in the so-called legal licenses (*art. 19 of the LDA*) as well as the limits to these exceptions (4.2). We will then discuss some exceptions to copyright envisaged by law (4.3).

4.1 EXCLUSIVE RIGHTS

- §108 As mentioned briefly above, the author of a work pursuant to *art. 2 of the LDA* is the exclusive owner of the copyright over his creation. These rights are considered absolute; that is, they can be exercised over anyone. The author is therefore the *dominus* of his creation and as such can decide on its fate. These prerogatives are divided into moral rights (4.1.1) and patrimonial rights (4.1.2).
- §109 What happens when you use a protected work? In most cases, if the work is considered a work pursuant to *art. 2.1 of the LDA*, then it will be the object of an exclusive right. Consequently, users can either make recourse to one of the exceptions to copyright or they must obtain prior authorization from the rights holder, paying a fee if requested.

4.1.1 Moral rights

- §110 Moral rights is the closest bond the author has with the work he has created. Indeed, this is an exclusive and absolute right of personal status; that is, it can be invoked against anyone. Moral rights are considered inalienable and inseparable from the capacity as author. The privileges of the author's moral rights are the following: first of all he holds the so-called right of paternity over the work; that is, the exclusive right to be identified as the author. The author shall have the exclusive right to decide whether, when, how and under what name his own work may be published for the first time (*art. 9 II and III of the LDA*). This privilege is important as a work published for the first time in accordance with the LDA, without the authorization of the author, cannot be used, even within the framework of the exceptions envisaged by art. 19 of the LDA. Pursuant to *art. 9 III of the LDA*, a work shall be considered published when it has been made available for the first time, by the author or with his consent, to a large number of persons not constituting a private circle (*art. 19 Ia LDA*). Publication can take place using any means including electronic ones, the Internet, email, fax or mobile phone. The author's moral rights also include the right to the integrity of the work: the author shall have the exclusive right to decide whether, when and how the work may be altered or whether, when and how the work may be used to create a derived work or may be included in a collection (*art. 11 I of the LDA*). Moral rights include the author's right to demand that any person who holds or possesses a copy of his work provide access thereto under certain conditions (see *art. 14 of the LDA*) and the obligation for the owner not to destroy a unique, original work without first having asked its author to take it back (see *art. 15 of the LDA*). **For example**, without the authorization of the author, it is forbidden to cut and paste

photographs, thus modifying them, include the author's photograph in another work, for example a blog on the Internet, thus creating a derived work, or include it in a collection.

§111 In particular, even where another person is authorized by contract or by statute to alter a work or use it to create a derived work, the rights holder may oppose any distortion of the work that is damaging to his personality (*art. 11 II of the LDA*). This is an absolute limit to the use of protected content and applies also within the framework of the exceptions envisaged by law.

4.1.2 Patrimonial rights

§112 The author is not only the owner of the moral rights, he also holds rights over the economic exploitation of the work. As regards the patrimonial rights the law provides a list of examples of way how a work can be exploited. *Art. 10 of the LDA* lists the various uses covered by the author's exclusive rights. It is a long list but nevertheless it should not be considered exhaustive.

§113 If I want to commercially exploit an author's photograph (e.g. the reproduction of a protected photograph on the cover of a book) I will have to pay a fee to the author for this use. **Patrimonial rights, including the right of reproduction and representation of the work, are alienable.** If these rights are transferred to the new third party owner of the copyright, the new owner can even raise claims in this regard against the author.

§114 The fact that the use takes place online or offline has no importance: the use remains subject to the exclusive right of the author or the owner of the copyright.

§115 **Let us give some examples of offline uses:** printing, photocopying, scanning, extracting or reproducing a digital copy (for example, a scan of an image or of a text, or storage on a CD), producing colour or black and white copies of protected and published works, or part of same, on paper, synthetic materials or other supports using photocopiers, multifunctional equipment, fax, printers or similar equipment (see definition *CT8III p. 3*), projecting (using overhead projectors, projectors connected to a computer, beamers, etc.), and distributing or displaying a file on a screen (for example a pdf file, an image or the reproduction of an MP3 file etc.).

§116 **For online uses,** for example, the following activities are subject to exclusive rights: uploading, downloading (the Internet and intranet), browsing, caching, viewing content in streaming, linking, embedding etc. The subjugation to exclusive rights of all these activities in the case of a protected work means that in principle you can start from the assumption that any use of a work protected by copyright may infringe copyright or damage the rights holder.

4.2 THE LAW ENVISAGES EXCEPTIONS TO THE AUTHOR'S EXCLUSIVE RIGHTS

§117 The law governing copyright envisages exceptions; that is, cases where a user of protected content does not have to request specific authorization from the author (or the owners of the copyright) and, in specific cases, does not even have to pay a fee.

§118 **The question to ask at this stage is: is the use of the work considered an exception to copyright?**

§119 The system of the exceptions set forth in *art. 19 I of the LDA (private use)* which will be illustrated below, can be briefly summed up as follows:

- if the scope is limited to a **strictly personal** use then the user does not in principle have to be worried about copyright and this for whatever type of usage (4.2.1)
- if the intended use of the work is for **teaching purposes** between a teacher and his students (4.2.2) or for **informative purposes** in a school, university or company (4.2.3) there are many exceptions to copyright but it is important to pay attention in any case because there are **limits** (4.2.4), without forgetting the obligation to pay (see point 3.5 above, the collecting societies)
- if the use of the work has **other purposes**, commercial for example, then the copyright law applies, barring some specific exceptions dealt with below (4.2.5)

§120 It is important to note once again that these exceptions can apply only if the work has been published for the first time in compliance with copyright laws (*art. 9 II of the LDA*): before publication the work cannot be used for teaching purposes (*art. 19 Ib of the LDA*), for informative purposes and internal documentation (*art. 19 Ic of the LDA*) or, for example, as a quotation (*art. 25 of the LDA*).

4.2.1 Strictly personal use (*art. 19 Ia of the LDA*)

§121 Any type of use of the work is permitted in the personal sphere or within a circle of **persons closely connected to each other**, such as relations or friends. This is an **absolute exception to copyright**. It is important to note that the element characterizing the exception is the scope of the use. Private use for personal purposes, unlike use for teaching purposes for example, **does not entitle the author to remuneration**. In practice, therefore, for private use for personal purposes as of *art. 19 Ia of the LDA* it is not necessary to contact the collecting society or the author of the work. **For example**, the fact that a student copies a CD bought in a store using his computer and then uploads the content free of charge onto a relative's Ipod falls under this exception. If, instead, he uses this music file to exchange or download other files (e.g. the famous peer-to-peer systems) or to reproduce it outside his private circle, the exception no longer applies and he will be responsible for a potential infringement of copyright.

4.2.2 Exception for teaching purposes (*art. 19 Ib of the LDA*)

§122 **For the purposes of this manual, the most important exception envisaged by the law on copyright is certainly the one established for teaching purposes.**

§123 This exception is envisaged in *art. 19 Ib of the LDA* which grants a legal license, albeit less extensive and with some exceptions compared to that for use in a strictly personal context (*art. 19 Ia of the LDA*).

§124 Within the framework of the exception for teaching uses, in principle any use of content by a teacher and his students for teaching purposes is permitted. In particular, the law adopts the term «any use» in this context. Therefore, to this end, the projection of content, the copying and the distribution of physical and digital material etc. are allowed.

§125 In these terms it would seem that any use for teaching purposes in general can fall within the context of the exception. But this is not the case: the albeit extensive legal license is applicable only within a clearly defined circle of people comprising the teacher and his students. The German text of the law seems to be more restrictive and speaks of “classroom lessons” (“jede Werkverwendung der Lehrperson für den Unterricht in der Klasse”). Teaching is therefore defined as the relationship between the teacher and his students, independently of where exactly it takes place.

§126 The memorandum of the current *CT 7* (tariff for teaching use) states that “the term lesson means any activity (including the preparation) by the teacher and his students which takes place within the context of the syllabus”. It is therefore important to ensure (also by adopting effective technical solutions) that

- only your own students have access to the content. In many cases distribution (upload) on the Internet can create problems for this reason: an indefinite circle of people can access the material and so use in Swiss territory is not guaranteed. Uploading onto the school's **intranet**, instead, seems to fall within this exception, providing that only the students of the teacher in question can access it for the purpose of the lessons. If the use of the school's intranet is not linked to a teaching purpose pursuant to *art. 19 Ib of the LDA* then the exception as of *art. 19 Ic of the LDA* (information and internal documentation, see point 4.2.3 below), that grants a more limited use, could apply.
- §127 In any case, publication on the Internet of a protected work, thus making it freely available to anyone, is not covered by the exception in question. The authorization of the authors of the work is required to upload material onto the Internet, even if this is done for "teaching" purposes.
- §128 By "teaching" the law means classroom lessons with a teacher and students (*art. 19 Ib of the LDA*) at all levels and in all training sectors (basic training, advanced training, professional training).
- §129 Instead, teaching does not include courses for entertainment purposes (e.g. evening dancing classes but also the use of the content for the sole purpose of "embellishing" a presentation!) or training courses held in companies: in this latter case *art. 19 Ic of the LDA* will apply.
- §130 The *CT7* currently in force considers "schools" as all those "institutes whose main scope is training or professional training". From this definition it can be literally construed that "schools" which pursue other purposes are excluded: **for example**, as mentioned, a dance school is not included in this category unless it is part of a training/professional training programme. A less restrictive interpretation would be preferable but there is no majority opinion in this regard.
- §131 Neither the law nor the applicable *TC7* indicates if the exceptions clause applies also to students' research activities such as presentations or master's dissertations. As long as the students' research activities are aimed at allowing the teacher to assess their training within the context of the syllabus, it seems logical (but also here different interpretations are possible) that this must be included among the exceptions. Instead, pure research activities (doctoral candidate, post graduate) do not seem to benefit at present from this exception. Unless, of course, the doctoral candidate or post graduate student satisfies the legal conditions as of *article 19 Ib of the LDA*. **For example**, the presentation made by a doctoral candidate to a study group comprising other doctoral candidates could fall under the umbrella of this exception.
- §132 Finally, the location of use (for example the headquarters of a university, peripheral sites where courses are held or the teacher's home where he prepares the content or the student's home where he studies it), providing that it is in Swiss territory, is not pertinent but the purpose is, and it must be for teaching purposes, linked to a pedagogical need.
- §133 **Warning:** Use in this context is not free; a fee must be paid (*art. 20 II of the LDA*). This fee is collected by the collecting societies discussed above (*art. 20 IV of the LDA; art. 40 Ib of the LDA*). As already mentioned, the schools and universities pay the lump-sum amounts to guarantee use of content for teaching purposes.
- §134 **For example...**
- a. "Photocopy of a chapter of a book and distribution in class". In this case the exception covers the use of the text, which has been created by the author, published by a publisher, purchased by a library, photocopied by the teacher and, finally, distributed in class to the students. Publication of the work by an editor assumes the transfer of the necessary copyright. Partial photocopy of the work at the school's library by the teacher is covered by *art. 19 II of the LDA*. The distribution of

parts of the work in class is covered by the exception of the *art. 19 Ib of the LDA* provided that this is done with an educational goal (studying the works of the author is for example formally covered by the school curriculum).

- b. "PowerPoint presentation with images taken from the Internet". In this case the image could be an artistic photograph, downloaded from the Internet, reproduced on the teacher's computer, included in a set of slides making up the course and projected in class. The exception for teaching purposes envisages that "any use" of published content is allowed. The inclusion in a set of slides and power point presentation is allowed in class if the images used have already been published with the consent of the author. The problem is that the exception for teaching purposes only allows **partial use** if the content is **commercially available** (*art. 19 III a of the LDA*, see point 4.2.4 below): can the use of the image taken from the Internet be considered in this way? If the answer is no; that is, the image cannot be considered commercially available then it can be used for teaching purposes without risking infringement of copyright. However, it is important to check that there are no other impediments: this is the case when there are doubts about respect for privacy, personal data or another right regarding personal status, concerning the subject/object of the image and the use that will be made of it, or if the use is opposed for contractual reasons. In this case the question will have to be assessed more carefully.

4.2.3 Exception for internal documentation and information (*art. 19 Ic of the LDA*)

- §135 Unlike the exception for teaching purposes, in this case "any use" is not allowed; only the "reproduction of copies of a work" is permitted (*art. 19 Ic of the LDA*) thus expressly ruling out execution, interpretation or modification. However, the literal interpretation of the term "reproduction" in the law appears to be overly restrictive. In this context the *CT 8* and *CT 9* common tariffs, to which reference should be made, apply. In particular, *CT 9* under point 2.3 version 2007-2011 (use in electronic format within the framework of private use on a school's intranet) states in this respect that reproduction also means "(...) the storage and use on workstations using a scanner or similar equipment of data retrieved from the Internet, email attachments etc. as well as data collected from existing supports".
- §136 **For example...** The employees of a company or the collaborators of a university can view, transmit through internal email or load onto the intranet and print protected reproduced content for the purpose of internal information and documentation. Instead, exchange in the same way of protected content for entertainment purposes, during the break for example, is not covered by this exception. On the contrary, the transmission of documents by email between a teacher and his students, not for teaching purposes but for information purposes, or the distribution of material for the internal training of the school/university's collaborators are covered by this exception.
- §137 Also in this case, the important aspect is not the physical location of the reproduction (e.g. the headquarters of a school) but the purpose of internal information or documentation. **For example**, documents for internal documentation and information purposes can be distributed or disclosed to the employees of a company in a meeting held in a hall rented ad hoc (for example a hotel conference hall). On the contrary, content reproduced during a workshop open to the general public, organized in the Aula Magna of a university which has granted the use of the hall to a private company, is not covered by the exception of *art. 19 Ic of the LDA*. Thus, the exception of "internal information" does not cover information addressed to clients or the general public (e.g. the university magazine, distributed publicly).
- §138 **For example...** Content published in a magazine produced by the university does not fall under the umbrella of teaching use (*art. 19 Ib of the LDA*), or within the frame work of use for internal information or documentation (*art. 19 Ic of the LDA*).

4.2.4 What are the consequences for the users of a work used within the context of the exceptions as of *art. 19 Ib and c of the LDA*?

- §139 If the use is covered by the exception to copyright for teaching purposes (*art. 19 Ib of the LDA*) or for internal information (*art. 19 Ic of the LDA*), the user does not need to request authorization from the owner.
- §140 However, **use is not free of charge** as it is in the case of strictly personal use (*art. 19 Ia of the LDA*). In the cases of use for teaching purposes or for internal information or documentation, *art. 20 II of the LDA* sets forth that whoever reproduces works must pay the author a fee. The right to remuneration can be exercised solely by the collecting societies.
- §141 The user must therefore pay a lump-sum amount to the collecting society based on the applicable common tariffs. In general, public and private schools/universities already pay this fee so in this regard the teacher or student can use the content, within the limits envisaged by the exception, without worrying about this aspect.

4.2.5 Limits to the exceptions

- §142 As regards the exceptions dealt with in the paragraphs above, it is important to note that law has established important exceptions, which could be called "exceptions to the exceptions". In particular, note that:
- a. **It is forbidden to completely or almost completely reproduce copies of a work (*art. 19 IIIa of the LDA*), if such work is already obtainable commercially, irrespective of the location or type of course (in the classroom or online).** This limit is dictated in particular by the assessment of the damage caused to the author by excessive reproduction, both quantitatively and qualitatively, of a work. If such reproduction makes the purchase or the rental of the commercially obtainable work superfluous then the reproduction is no longer covered by the legal license for teaching purposes. Law rules out the production of copies if these are similar in a certain way to those commercially obtainable. This is the case, in particular, of a film recorded on a DVD and obtainable commercially. Consequently, the teacher cannot record the DVD in full. It is, instead, possible to copy a sequence of the film and show it to the students in digital form using the school's intranet. Law also rules out the reproduction of a full magazine containing a series of articles (or of a full CD which contains various excerpts). Instead, one full article published in the magazine can be copied. As a general rule the principle set by the law is that it is not possible to reproduce or copy works obtainable commercially in an identical form to that existing on the market. This principle can be easily applied in the case of works created on a material support (paper, DVD, CD, etc.) and it does not matter whether the duplication of the extract is then transferred into digital form. The principle outlined above is more difficult to apply in the case of the diffusion of work in the form of radio or television broadcast or in numerical form via the Internet. It should be noted in this respect that in the first case the full reproduction of the work is possible providing that this copy does not correspond to a form already available on the market. For this reason, in accordance with the LDA, it is not possible to copy a complete film broadcast on the television and which is available in stores on DVD. Instead, it is possible to copy a full television or radio broadcast which is not available on the market (see radio podcasts). As regards the diffusion of works over the Internet, the criterion of commercially obtainable is not so clear. Based on a strict interpretation of this criterion, it will not be possible, **for example**, to copy in full and distribute in the class an article or piece of music downloaded from a pay-for-content website but only excerpts of these because they are "commercially obtainable". Furthermore we also have to be careful with images. One might assume that providing images on the Internet, without paying, allows making full copies for educational reasons. Indeed the image is not sold on Internet but only "displayed".

Any other use than for teaching or for strictly private use is prohibited without permission from the copyright holder of the image in question.

- b. **The reproduction (also only partial) of works of fine arts such as drawings, graphs, paintings, postcards, posters and advertisements is forbidden (art. 19 IIIb of the LDA).**
- c. **The reproduction (including partial reproduction) of the scores of musical works (art. 19 IIIc of the LDA) is forbidden.**
- d. **The recording of the delivery, performance or presentation of a work on phonograms, videograms or data carriers is not permitted (art. 19 III d of the LDA). This includes recording on any format (including digital) of live shows.**
- e. **The name of the authors of reproduced works must be mentioned.** Art. 19 Ib of the LDA states that all uses are allowed, it is therefore referred to the exclusive rights of the authors ex art. 10 of the LDA. However, the legal license does not mean that the author's moral rights should not be respected, and in particular the right of paternity (art. 9 of the LDA). It is therefore important to always mention the names of the authors of the reproduced works.
- f. **In principle reproduced works cannot be modified.** For uses as of point e., note that opinions differ. The literal meaning of the law (art. 19 Ib of the LDA) envisages "any use" for teaching purposes or for strictly personal use. Therefore, for these purposes, again providing that the use remains within the close circle of the class during the lesson given by the teacher, it could be deduced that the exception also covers modification of the content. Moreover, the current memorandum of SUISSIMAGE under CT7 point C5 ("which uses are permitted by law?") sets forth that "works and representations" (...) "can even be reworked for teaching purposes". **But beware:** This is an interpretation given by the collecting society to the CT and does not have the same weight as a law.

It may be useful to look at a concrete example of its application. The question does not arise in the case of the exception for internal information and documentation purposes: the modification of the content is not covered either by the tariffs or by the LDA; the law envisages "the reproduction" of copies of works in accordance with the above indications as the only permitted use and not "any use".

- g. **The transmission or arrangement of copies of works abroad is not permitted without the express authorization of the owners of the copyright.** In particular, making protected copy available to the general public or abroad is not covered by the common tariffs set by the collecting societies.

§143

CASE 8

A physics teacher uses content created by third parties, protected by copyright, on his course and in the course he is planning.

Granting that this content includes images taken from the Internet, would it be possible to use them in his course and distribute them to his students?

Before answering this question it is important to know whether the content is used in Switzerland; that is, to determine if Swiss law applies (see point 1 above). The next question to ask is whether the content in question satisfies the conditions for being considered a protected work as of the LDA (see point 2 above). In short, Swiss copyright would apply for use in Switzerland of the downloaded images; moreover, the photographs used are almost always subject to copyright. Having ascertained that the work is protected in accordance with the LDA, it is then important to identify the owner of the copyright or other rights holders (see point 3 above). In the case in question, having been found on the Internet, it can be difficult to find out who these people are. Granting that the owner of the copyright can be identified, this person has to be contacted to

request authorization to use the content, paying a fee if necessary. The next important question to answer is for what purpose the protected content is used. In the case in question it is assumed that it is for teaching purposes and therefore during the teacher's lessons. If this is the case then the exception envisaged by *art. 19 Ib of the LDA* which permits any use of a published work for teaching purposes applies. This exception is limited by *art. 19 IIIa of the LDA* which states that the complete or almost complete reproduction of a work obtainable commercially is prohibited. Being a work, the image should in principle not be completely reproduced. Nevertheless, the question of whether the image is considered "commercially obtainable" remains. If it is not commercially obtainable then it can be reproduced completely.

Can the teacher modify the images?

Let's take a first case: the teacher obtains authorization from the rights holder to use the image. If he has obtained permission to download the photograph then the next step is to check if a fee has been paid. Granting that the photograph can be downloaded legally from the Internet (therefore with the consent and under the conditions set by the rights holder) it is still not a foregone conclusion that this permission covers the right to modify the image, especially if this damages the personal status of the author or rights holder (*art. 11 II of the LDA*). Based on the principle of the integrity of the work (*art. 11 of the LDA*), modifying the work is a right which can generally only be exercised by the author.

Let's take a second case where, instead, the teacher has not obtained permission from the rights holder to use the work. Also in this case the first question is the same as the one asked in the first case, and the next question would be whether it is possible to completely use an image even for teaching purposes. After answering this question, and granting that the image can be used, the question of its modification remains. *Art. 19 Ib of the LDA* envisages that any use for teaching purposes is permitted. If the term "any use" used in the law can indicate (but the question is controversial) also the possibility of modifying protected content then we must be aware that this in any case does not include those modifications which could damage the author's right to personal status (*art. 11 II of the LDA*). In short, to be on the safe side it is not advisable to modify a work without the consent of the rights holder.

§144

A natural sciences teacher photocopies part of a book of illustrations of plants and flowers and distributes them to his students during his lessons.

Does the teacher have the right to make photocopies from the book?

This is another problem linked to the use of the content. After ascertaining first of all whether Swiss law applies and that the content satisfies the conditions to be considered a protected work as of the LDA and having identified the owner of the copyright, it is possible then to verify if the use in question falls under one of the exceptions envisaged by the copyright law or not (see point 4.2 f.f. above and point 4.3 below). In general, the teacher will be entitled to photocopy protected content but only in part and only for teaching or strictly personal purposes (*art. 19 Ia of the LDA*). In this way the use remains within the scope of the exception to copyright envisaged by law. In any case it will be necessary to pay a fee, in principle paid by the schools or the relative authority. If this fee is not paid, the teacher will not be entitled to photocopy the entire book. To do this he needs the permission of the rights holder.

4.3 OTHER EXCEPTIONS

§145 Besides the legal licenses for teaching purposes and for internal information and documentation described above, the law provides for other exceptions regarding use for more specific purposes.

4.3.1 To what extent is quotation permitted?

§146 Quotations from works must serve as comment, reference or demonstration of a theory or affirmation. The extension of the quotation must be justified by its use (*art. 25 I of the LDA*). Finally, the source of the quotation and its author must be given (*art. 25 II of the LDA*).

§147 The general limit to quotations is infringed when the quotation could cause unjustified damage to its author.

§148 The quotation is valid in all contexts and therefore, and above all, in the teaching sector. However, it is problematic to quote works of fine art (drawings, graphs, paintings, postcards, posters, advertisements) and photographs. Owing to their nature, certain works can be quoted only by reporting the work in full and this would represent a free use which is inadmissible. For the same reason, also the quotation of musical works requires special attention because, according to some experts, it should be considered illegal.

4.3.2 Is it possible to create an archive copy?

§149 Yes. It is legitimate to make a copy of a work to ensure its preservation. A copy must be stored in an archive, not accessible to the public and marked as an archive copy (*art. 24 of the LDA*). The same applies to the copy of a computer programme for backup purposes. The copy can be made only in one legitimately used specimen. Therefore, a teacher can make an archive copy of a programme he has bought but not of software he has copied without authorization.

4.3.3 Does temporary reproduction of a work represent an exception?

§150 Yes. Temporary reproduction of a work is permitted if it is transitory or accessory, is an integral and substantial part of a technical procedure, is used exclusively for the transmission in the network or for a legitimate use and does not have its own economic significance (*art. 24 a of the LDA*). In principle, the display of representations, streaming, browsing and caching is permitted. On the other side, providing copyrighted works, including streaming, is allowed only as far as it accomplishes the general conditions of the LDA. However, the mere display of works in form of streaming, should not be regarded as a usage of works but as a simple right of use allowed under the terms of copyright.

4.3.4 Current affairs reports for information purposes

§151 Where necessary for reporting on current events, works perceived to do so may be recorded, reproduced, presented, broadcast, distributed or otherwise made perceivable. For the same purpose, short extracts from press articles or from radio and television reports may be reproduced, distributed and broadcast. The extract must be indicated as such and show the source and author (*art. 28 of the LDA*).

4.3.5 On demand services

§152 *Art. 19 III bis of the LDA* states, "Reproductions referring to works legitimately made available are not subject to the restrictions of private use considered in this article or to the rights to remuneration as of article 20". This for example refers to works that are uploaded onto the Internet and legitimately

made available on demand, for example: i-tunes, databases of videos, photographs, texts or services on-demand, whether free of charge or against payment. Computer programmes are excluded.

4.3.6 Parody

§153 It is always legitimate to use existing works for the creation of parodies or other imitations such as caricatures or other modifications of the form of multimedia works (*art. 11 III of the LDA*). Satire is defined as a comical representation for critical purposes. Parody is a form of satire which preserves the form of the work but modifies its content. The freedom to use these methods of expression is therefore guaranteed. Parody is also a special case of a derived work as the work must in any case remain recognizable and have a comical effect.

4.3.7 Use by the disabled

§154 According to *art. 24c I of the LDA* "A work can be reproduced in a form accessible to the disabled providing that for those people the sensorial exploitation of the work in the form already published is impossible or difficult." However, also in this case there are limits. These copies can be prepared and put in circulation only for the use of the disabled and must not be for profit making purposes (*art. 24c II of the LDA*). Finally, use is not free: in principle the author has the right to remuneration for the reproduction his work in this form and for making it available. The right to remuneration can be exercised only by the collecting societies. The right to remuneration does not apply in the case of the arrangement of single copies (*art. 24c III and IV of the LDA*).

§155

A teacher wants to show his class some sequences of films. To do this he records the sequences of the films from the television or uses DVDs that he has bought. He then uploads these sequences of the film onto a platform which is accessible using a password provided only to his students.

Can the teacher show sequences of films?

Even if the content is in principle protected, the teacher can record sequences of films and show them to his students during the course as long as the use falls within the context of teaching purposes. In particular, the projection in class and the distribution in a protected digital environment to which only the course students have access is permitted. This must, however, remain circumscribed to and accessible only in Swiss territory. In this case, also the preparation of the course at home is covered by the exception for teaching purposes. On the contrary, providing material on a public website could be a potential violation of copyrights because in this case the use is no longer covered by the exception.

Is the teaching purpose in the use of content by the teacher an absolute exception?

*The teaching purpose represents an important exception to copyright but it is not absolute because it is subject to conditions and has exceptions. One of these exceptions to the exception is that of preventing the complete or almost complete reproduction of a work (*art. 19 IIIa of the LDA*). However we have to consider that the use of the film has to be realized with an educational goal, which involves a teacher and his students *art. 19 Ib of the LDA* in order to accomplish the conditions of use for didactical reasons. Furthermore if we suppose that the film is commercially available, we have to make sure to show only part of the film in question and not the whole one in order to be sure to respect the LDA.*

5

RESPONSIBILITIES AND SANCTIONS

§156 Having reached the end of the method proposed to manage copyright and having found an answer to questions 1 to 4, the last thing we will do is illustrate responsibilities and sanctions in the case of infringement. In particular, it is important to determine who is liable to prosecution (5.1) and consider the sanctions foreseen, whether civil/contractual or criminal (5.2).

5.1 WHO IS LIABLE TO PROSECUTION IN THE CASE OF INFRINGEMENT OF COPYRIGHT?

§157 Whoever uses content protected by copyright (e.g. to create a derived work) without obtaining the necessary authorization can be held liable. A teacher who uses protected material to create a new work must check his rights before proceeding in the case where use does not fall within the field of application of a restriction or exception to copyright.

§158 The author of a derived work, or the user of a work, will not be liable for any use that third parties may make of content made available within the framework of a legitimate use, for example for teaching purposes.

§159 As a precautionary measure, to avoid an official reprimand for complicity in a potential crime committed by third parties **it is always best to inform users that the content used is protected**. For the same reason it is important to avoid instigating illegitimate use of protected content. For example, teachers must not make protected content available online to students abroad without requesting the necessary authorization. Teachers should, as a precautionary measure, inform students that their material contains works of third party authors.

§160 Users who download material for personal use or within a restricted circle of people (e.g. friends) are not liable even if the downloaded material is illegitimately used by one of these other people in breach of copyright. However, they become liable for this infringement if, after the download, they make this content available to third parties outside their private circle (*art. 19 Ia of the LDA*).

§161 **For example...** A teacher downloads a photograph protected by copyright from the Internet and publishes it on his blog, not for profit, but without asking for permission. The teacher receives a claim from the author's representatives for compensation for copyright infringement of Euro 2,000 corresponding to the damage incurred. It is important to request permission before use as once the crime has been committed it is not always possible to obtain the author's consent. The request for compensation of Euro 2,000 does not rule out a report being sent to the criminal authorities in the case of wilful infringement.

§162 **For example...** A teacher who uploads protected content originally prepared for his courses on the Internet infringes copyright. He can also be liable if he sends the content abroad or makes it available to his students abroad. On the contrary, the teacher is not liable if he legitimately shows a TV programme previously recorded from the television for teaching purposes and a student films the images using the videocamera incorporated in his mobile phone. It is good practice for teachers to inform their students of the fact that they are dealing with protected material and if possible to do everything possible to make it technically difficult to make an illegitimate use of the protected content.

5.2 SANCTIONS

§163 What sanctions are foreseen in the case of copyright infringement? Civil sanctions must be distinguished from criminal ones. Civil action does not rule out criminal action and vice versa.

5.2.1 Civil and contract law sanctions

§164 Firstly, the onus for the reimbursement of damages lies with the person who has infringed the copyright. If particular conditions are satisfied, the party that been damaged in his capacity as author, or risks being damaged, can ask for measures to be taken to prevent an imminent damage, end a current damage or oblige the defendant to provide information; as regards the counterfeit market, for example, to remove an image from a website or handouts (*art. 62 of the LDA*). If the danger in delaying the action is such as to prejudice the good outcome of the civil action and if the conditions of urgency, irreparable damage in the absence of the requested measure and the apparent existence of grounds exists, it is possible to request that these measures be adopted in a provisional way, that is, urgently, before the final judgement is made (*art. 65 of the LDA*).

§165 The party guilty of copyright infringement can see the illegally manufactured object confiscated as well as the means used for its production (e.g. the tracings used for the printing, the hard disk of the computer with the files, etc.) (*art. 63 of the LDA*). If the copyright infringement also entails a breach of an existing contract (for example, breach of contract with a publisher) then the party guilty of the infringement is liable to civil action which can lead to a claim for reimbursement for damages.

5.2.2 Criminal sanctions

§166 For a criminal action to be started, the user must have committed the act wilfully; therefore, being fully aware of copyright issues and having the intention to breach them. The action must be illegitimate; that is, it must be committed in breach of a standard or law that protects copyright. In less serious cases the police authorities will proceed only if a lawsuit is brought against someone. This means, for example, that the author, his legal representative or a collecting society can report anyone identified as infringing copyright to the authorities. It is therefore **advisable always to obtain authorization before using a work**: requesting authorization at a later date could expose the requesting party not only to the refusal of the request but also to a lawsuit for infringement of copyright. The penalties range from a fine in the case of omission to indicate the source to a pecuniary penalty or imprisonment for up to one year in minor cases. In more serious cases imprisonment can be for up to five years. At a criminal level, any infringement of copyright set forth in *art. 67 of the LDA* (which should be consulted) is punishable, in particular if a lawsuit is brought.

6

CONCLUSIONS

- §167 The use of protected content poses a multitude of questions which are not always easy to answer. Sometimes, finding an answer can even be impossible, in that data and elements on which to base a decision are lacking. In this case it is advisable to avoid using the content or to go into the question in more detail, if necessary contacting experts or obtaining more information. The use of content does not only entail the question of copyright discussed in this handbook but can foresee other limits deriving from other fields of civil or contract law or laws on fair competition.
- §168 This handbook cannot give an exhaustive list of answers to all the problems that may be encountered; instead, it aims to allow teachers to face the problem of copyright with greater awareness. The method illustrated and the criteria outlined help break-down a generic and complex problem into pertinent questions to ask from the legal point of view. If you have any doubts or concrete questions your best course of action is to ask for the help of an expert lawyer.
- §169 Finally, another warning should be heeded when concrete cases involving copyright are in question: like in any field, also in copyright amendments to law, judgements passed down by the courts and, in particular, the consolidated practices of the main players should always be borne in mind. Take for example the common tariffs which are periodically re-negotiated by the parties and entities involved – therefore also potentially the readers of this manual! – and then issued by the collecting societies.
- §170 Having said this, we hope that this handbook can help users, and users in the field of education in particular, to better understand the theoretical system of Swiss copyright, making it less obscure and abstract.
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THE DICE PROJECT:

DICE aims at providing support to teaching and non-teaching staff of Swiss higher education institutions in copyright management of digital content for eLearning.

The goal of DICE is:

- a. Increasing awareness of copyright issues related with digital content, in order to provide sound knowledge and eliminate unreasonable fears
- b. Developing fundamental skills in intellectual property and copyright management for higher education staff (e.g. understanding basic rules applicable in Switzerland, using Creative Commons licenses, etc.)
- c. Increase the readiness and ability of authors for publishing open access resources (aka Open Educational Resources)

PROJECT PARTNERS:

Higher education institutions:



Università della Svizzera italiana (USI), Lugano



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SWITCH working group on legal issues

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