

## Question B:

**To what extent do current exclusions and limitations to copyright strike a fair balance between the rights of owners and fair use by private individuals and others?**

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1. **Does your jurisdiction’s copyright law provide for a so-called “triple test” provision, namely a provision which reiterates the requirement of international treaties that exceptions and limitations to copyright shall only apply in certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author? If yes, please provide [an English version of] the text of this provision. If no, how does your law understand and comply with that requirement? In particular, is that requirement taken into account by the courts in individual cases and to what extent? Is there any case law which can serve as guidance? Can you refer to concrete examples used by your national scholars to illustrate that requirement and its concrete consequences? In particular, can you comment on precedents, if any, where the court found that (i) the application of the exception conflicts with the normal exploitation of the work (ii) unreasonably prejudices the legitimate interests of the author?**

- 1.1. The Swiss Federal Act on Copyright and Related Rights (“**CopA**”)<sup>1</sup> does not explicitly refer to or include a provision reflecting the “triple test” as set forth in Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (“**Berne Convention**”) and Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (“**TRIPS**”).<sup>2</sup> However, one exception – the decoding of computer programs exception at Article 21 CopA – integrates to second and third steps of the “triple test” as follows:

1. *Any person who has the right to use a computer program may obtain, either personally or through a third party, necessary information on the interfaces by decoding the program code using independently developed programs.*
2. *The interface information obtained by decoding the program code may only be used for the development, maintenance and use of interoperable computer programs insofar as neither the normal*

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<sup>1</sup> An official translation (although only the French, German, and Italian versions are binding) of the CopA is available on the following link: <https://www.admin.ch/opc/en/classified-compilation/19920251/index.html>.

<sup>2</sup> The triple test is also set forth in Article 10 of the WIPO Copyright Treaty and Article 16(2) of the WIPO Performances and Phonograms Treaty.

*exploitation of the program nor the legitimate interests of the owner of the rights are unreasonably prejudiced.* (emphasis added)

- 1.2. Nonetheless, as Switzerland has ratified these international conventions, the copyright exceptions set forth in the CopA must comply with the “triple test” and the latter shall be taken into account by courts when interpreting the CopA. The Swiss Supreme Federal Court (“SFC”) has referred to the “triple test” on several occasions.<sup>3</sup> In one of those cases,<sup>4</sup> the question was whether the tariff applicable to blank media (“*support vierge*”) mainly used to store works protected by copyright (e.g. memory cards or hard drives integrated in audio recorders or iPods) complied with the triple test.<sup>5</sup> The SFC decided that such was the case.
  - 1.3. To our knowledge, there is no precedent in Switzerland where a court would have found that the application of an exception conflicts with the normal exploitation of a work and/or unreasonably prejudices the legitimate interests of the author. If such was the case, a court would have to interpret the CopA in a way that would comply with the relevant international convention (Berne Convention, TRIPS, WCT, and/or WPPT) and, if no compliant interpretation can be found, the relevant international convention shall take precedence and limit (or exclude) the application of a particular exception.<sup>6</sup>
  - 1.4. It is worth noting that the last substantive changes to the CopA entered into effect on July 1, 2008 in order to implement the WIPO Copyright Treaty.<sup>7</sup> These changes include new language to existing provisions aiming at taking into account the use of works in a digital context (e.g. in relation to the private use exception) as well as new exceptions (e.g. temporary/cache reproduction of works). These will be discussed below.
  - 1.5. A legislative process is currently under way to further modernize the CopA. A pre-draft of the revised CopA (“**CopA Pre-Draft**”) was circulated to interests groups at the end of 2015. Due to the important number of opinions received (1224 totaling more than 8’000 pages), the finalization of the CopA draft can be expected at the end of 2017.<sup>8</sup>
- 2. Does your jurisdiction’s copyright law provide for a list of exceptions? If yes, is it a closed list, namely a list designed in such a way that any use which falls outside the list is not permitted - unless it is authorized by the copyright owner?**
- 2.1. The CopA provides a list of exceptions in Chapter 5 of Title 2 (Articles 19 to 28 CopA). In addition, the parody exception is provided in Article 11(3) CopA, which regards the moral right

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<sup>3</sup> See e.g. ATF 133 II 263 c.7.3.2, JdT 2007 I 146; ATF 133 III 473.

<sup>4</sup> ATF 133 II 263 c.7.3.2, JdT 2007 I 146.

<sup>5</sup> This compensation (by way of a tariff) will be discussed further under Question 11.

<sup>6</sup> See e.g. P.-E. RUEDIN, *Commentaire romand du droit de la propriété intellectuelle*, Basel 2013, Introduction aux articles 19 à 28 LDA, N 6.

<sup>7</sup> RO 2008 2421; FF 2006 3263. Another revision of the CopA took place more recently – on January 11, 2011 (RO 2010 1739; FF 2006 6841) – but was limited to adaptations further to the entry into force of the new Federal Codes on Civil and Criminal Procedures.

<sup>8</sup> A summary of this process is available in English on the website of the Swiss Intellectual Property Institute (“IPI”): <https://www.ige.ch/en/law-and-policy/national-ip-law/copyright-law/modernisation-of-copyright.html>.

of integrity. Although not an exception *per se*, Article 5(1) CopA excludes certain works that shall not be protected – at all – by copyright, i.e. (a) acts, ordinances, international treaties and other official enactments; (b) means of payment; (c) decisions, minutes and reports issued by authorities and public administrations; and (d) patent specifications and published patent applications. Article 5(2) CopA further excludes official or legally required collections and translations of the works referred to in Article 5(1) CopA. Moreover, all these exceptions are applicable by analogy to the rights to which the performers, phonogram and audio-visual fixation producers and broadcasting organizations are entitled (Article 38 CopA).<sup>9</sup>

- 2.2. Although not explicitly stated in the CopA, the exceptions set forth in the CopA are exhaustive.<sup>10</sup> In this respect, any use which falls outside the list shall in principle not be permitted without authorization from the copyright owner. The exceptions set forth in the CopA are the result of a balance of fundamental rights provided for in the Swiss Federal Constitution (“Cst.”); for the copyright owner: the right of ownership (Article 26 Cst.) and for users: various fundamental rights (depending on the exception), such as the freedom of expression (Article 16 Cst.) and of the media (article 17 Cst.).<sup>11</sup> According to the case law of the SFC, the relevant fundamental rights protected by the Cst. should be taken into account when interpreting a copyright exception, but shall however not serve as a basis to extend or create a new exception to copyright.<sup>12</sup>

**3. If your jurisdiction’s copyright law provides for a list of exceptions, what are the fundamental rights or the objectives supporting the permitted uses which justify the exceptions? In particular, do the exceptions pursue the following fundamental rights or objectives: education, research, access to culture and knowledge, freedom of expression and right to receive and disseminate information, privacy and private use, needs of people with a disability, preservation of cultural heritage, public security, freedom of panorama? Are there fundamental rights or objectives which are overlooked or unduly minimized in the current list of exceptions?**

- 3.1. The objective of the exceptions to copyright is to strike a balance between the right of ownership (of the copyright owners) and various fundamental rights (of copyright works’ users).
- 3.2. For example, the following exceptions pursue the following related fundamental right or objective:

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<sup>9</sup> As Article 38 CopA does not refer specifically to the parody exception (at Article 11(3) CopA), it is debatable whether the exception of parody also applies e.g. to the parody of a performance. This has not been decided by courts. B. WITTWEILER, Zu den Schrankenbestimmungen im neuen Urheberrechtsgesetz, AJP 1993, p. 588, argues that it should also apply.

<sup>10</sup> However, *see* the report for Switzerland of AIPPI Q216B (<http://aippi.org/wp-content/uploads/committees/216B/GR216Bswitzerland.pdf>) where the authors refer to “extra-statutory limitations” in Question 5, which in our view shall be construed as broad interpretations of the CopA exceptions. In this respect, *see below*, 4.2.

<sup>11</sup> The fundamental rights are further discussed in the context of Question 3.

<sup>12</sup> *See e.g.* ATF 131 III 480, JdT 2005 I 390.

- Private use *stricto sensu* (Article 19(1)(a) CopA), which relates to the fundamental right to privacy (Article 13 Cst.) and, more generally, to allow certain uses that have become the norm on a societal level;<sup>13</sup>
- Educational exception (Article 19(1)(b) CopA), which relates to the fundamental rights to a basic education (Article 19 Cst.) and academic freedom (Article 20 Cst.);
- Exception for the use of works by people with disabilities (Article 24c CopA), which relates to the Federal Act on the Elimination of Inequalities regarding Disabled Persons;
- Citation exception (Article 25 CopA), which relates to the freedom of expression and information (Article 16 Cst.), freedom of the media (Article 17 Cst.) and academic freedom (Article 20 Cst.);
- Archival and backup exception (Article 24 CopA), which can be linked also to the guarantee of ownership (Article 26 Cst.);
- Temporary copies exception (Article 24a CopA) and exception regarding copies for broadcasting purposes (Article 24b CopA), which have the objective of allowing certain uses that are technically required;
- Decoding of computer programs exception (Article 21 CopA), which relates to the research freedom (Article 20 Cst.);
- Panorama exception (Article 27 CopA), which relates to the general principle that the public domain shall be accessible to everyone; and
- Parody exception (Article 11(3) CopA), which relates to the freedom of expression in general (Article 16 Cst.) and the freedom of artistic expression (Article 21 Cst.).

3.3. As a matter of principle, it appears that the fundamental rights and the objectives cited in the question are appropriately taken into account by the exceptions set forth in the CopA and, therefore, they are not unduly minimized.

**4. If your jurisdiction's copyright law provides for a list of exceptions, are the conditions mentioned in the provisions - in order for the use concerned to be permitted – [unduly] strict and compelling, or rather is there room for flexibility? Can you mention examples to illustrate solutions in this respect? Does the law make a distinction between (i) uses for commercial purposes and uses for non-commercial purposes (ii) uses by individuals and uses by others (e.g. companies, organizations)?**

4.1. By way of introduction, it shall be noted that as a matter of principle under Swiss law, exceptions provided in an act shall be interpreted restrictively. In addition, according to a general principle of interpretation under Swiss copyright law, in case of doubt, a statute shall be interpreted in favor of the author/copyright owner (*in dubio pro auctore*). However, legal scholars recommend not to apply such principles of interpretation in a schematic way, but that

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<sup>13</sup> For a historical perspective on this exception, see R. AUF DER MAUR/C. KELLER, sic! 2004 79 ss.

all circumstances and interpretation methods shall be used in each particular case.<sup>14</sup> It shall further be noted that copyright exceptions shall be interpreted in compliance with the Cst. and international conventions.

4.2. In general, the conditions mentioned in the provisions pertaining to copyright exceptions do not appear unduly strict or compelling.<sup>15</sup> However, some exceptions (e.g. private use *stricto sensu* at Article 19(1)(a) CopA) provide more flexibility than others which are more specific (e.g. temporary copies exception at Article 24a CopA).

4.3. Three exceptions are (explicitly) subject to the condition that the use is non-commercial:

- Article 19(1) CopA – which includes the following exceptions: private use *stricto sensu* (lit. a), educational use (lit. b), and intra organization reproduction (lit. c) – provides:

*Published works may be used for private use. Private use means:*

- a. any personal use of a work or use within a circle of persons closely connected to each other, such as relatives or friends;*
- b. any use of a work by a teacher and his class for educational purposes;*
- c. the copying of a work in enterprises, public administrations, institutions, commissions and similar bodies for internal information or documentation.*

- Article 24(1<sup>bis</sup>) CopA (archival and backup exception) provides:

*Public libraries, educational institutions, museums and archives accessible to the public may make those copies of the works required to secure and preserve their collections insofar as these copies are not made for financial or commercial gain.*

- Article 24c CopA (use of works by people with disabilities) provides:

- 1. A work may be reproduced in a form which is accessible to people with disabilities insofar as the work cannot be perceived by the senses, or can only be perceived by the senses with difficulty, in its already published form.*
- 2. Such copies of the work may only be produced and placed on the market for non-commercial purposes, and only for the use of people with disabilities.*

4.4. Other exceptions may, by their very nature, be non-commercial – e.g. the archival and backup exception (other than those of publicly available archives) at Article 24 CopA – or allow a

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<sup>14</sup> In this respect, see RUEDIN, Introduction aux articles 19 à 28 LDA, N 7 and the cited references.

<sup>15</sup> For example, the right to decode computer programs (Article 21 CopA) shall be interpreted in order also to encompass the use for bugs detection and citation rights for pictures shall be permitted (see Question 5 of the report for Switzerland of AIPPI Q216B, available at: <http://aippi.org/wp-content/uploads/committees/216B/GR216Bswitzerland.pdf>).

commercial use explicitly or implicitly, e.g. Article 11(3) CopA (parody), Article 25 CopA (citations), Article 27 CopA (works on premises open to the public), and Article 28 CopA (reporting of current events).

- 4.5. In terms of the persons or category of persons who may claim an exception to copyrights, the CopA provides both general exception (applicable to “any person”) or specific exceptions (e.g. broadcasting-related exceptions and museum catalogues exceptions. Two exceptions are applicable only to individuals:

- the private use *stricto sensu* exception (Article 19(1)(a) CopA) applies to any individual; and
- the educational exception (Article 19(1)(b) CopA) applies to teachers and their class.

**5. If your jurisdiction’s copyright law provides for a list of exceptions, are the exceptions listed mandatory or optional? Does your law make a distinction in this respect? If yes, does the distinction depend on the nature of the exception? If the exceptions are mandatory, does that mean that they cannot be ruled out by contract, even if the contract organizes an online (interactive) access to the works? Does your law make a distinction between off-line and on-line uses in this respect? Do you have any other comment concerning the mandatory or the optional character of the exceptions?**

- 5.1. The imperative nature is explicitly set forth only for the exception of archive or backup of a computer program (Article 24(2) CopA), which provides:

*Any person entitled to use a computer program may make one backup copy thereof; this right may not be waived by contract.*

- 5.2. Although the SFC seems to have ruled that the copyright exceptions are mandatory,<sup>16</sup> it is debated among scholars whether such is the case due to the general and superficial reasoning of the SFC.<sup>17</sup> In our view, all exceptions shall be considered – in principle – to be mandatory and, therefore, that they cannot be ruled out by contract.<sup>18</sup>

- 5.3. As a matter of principle, the CopA is technology neutral. Accordingly, it does not distinguish between offline and online uses. It must however be noted that certain exceptions only apply in the context of the Internet and, as such, would not be applicable offline. This is the case of the temporary copy exception (Article 24a CopA), which provides:

*The making of temporary copies of a work is permitted if:*

- a. they are transient or incidental;*
- b. they represent an integral and essential part of a technological process;*

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<sup>16</sup> ATF 127 III 26.

<sup>17</sup> RUEDIN, Introduction aux articles 19 à 28 LDA, N 9 and the cited references.

<sup>18</sup> This would in principle also apply to works made available online. With respect to copyright exhaustion, see below, 17.5.

- c. *their sole purpose is to enable a transmission of the work in a network between third parties by an intermediary or a lawful use of the work;*
- d. *they have no independent economic significance.*

Furthermore, Article 19(3<sup>bis</sup>) CopA – introduced in 2008 – provides that copies which are made by accessing works that are lawfully made available (online) are neither subject to the restriction of private use under Article 19 CopA nor shall be subject to remuneration under Article 20 CopA. This means that such work can be reproduced within companies.

**6. If your jurisdiction’s copyright law provides for a list of exceptions, do these exceptions relate to the “reproduction right” only or to the “right of communication to the public” only, or to both? Does the law make a distinction depending on the exception concerned? If yes, what are the negative consequences in practice for the user of the work, i.e. to what extent is he prevented from making use of the work in a way that is sufficiently effective for the purpose contemplated by the legislature? Can you give some illustrations?**

- 6.1. The exceptions provided in the CopA generally refer to the permitted use(s) in an explicit way, which vary depending on the exception.
- 6.2. Some exceptions relate exclusively to the reproduction right, such as intra organization reproduction (Article 19(1)(c) CopA), archive and backup copies (Article 24 CopA) and temporary copies (Article 24a CopA).
- 6.3. Other exceptions allow a broader range of uses. For example:
  - the private use *stricto sensu* exception allows any personal use, e.g. reproduction (on tangible media or on a cloud server) and making available of the work, subject of course to the requirements of Article 19(1)(a) CopA;
  - the educational exception also allows any use by teachers and their class (Article 19(1)(b) CopA);
  - the freedom of panorama exception allows the offer, transfer, broadcast and distribution of the depiction of the work (Article 27(1) CopA); and
  - the reporting of current events exceptions allows the works to be fixed, reproduced, presented, broadcast, distributed or otherwise made perceptible (Article 28(1) CopA).
- 6.4. It appears that, when drafting the exceptions provisions in the CopA, the legislator has taken into account the specificities of each exception. Indeed, distinguishing the permitted use(s) for each exception allows to address the interests of the users. Overall, we believe that this does not result in negative consequences for the users of the work.

**7. If your jurisdiction’s law provides for a list of exceptions, do these exceptions also affect the moral rights of the author? Is the impact on moral rights explicit or implicit? Is it legitimate and proportionate? Is there a mechanism which guarantees a minimum level for the preservation of the moral rights of the copyright owner? Conversely, is there any risk that the copyright owner could unduly invoke his moral rights to block the exception? Please give some examples.**

- 7.1. The CopA sets forth the following moral rights:

- Paternity (Article 9 CopA), which includes the right to decide under which name (or pseudonym) a work may be published or not to be named at all;
  - Divulcation (Article 9(2)-(3) CopA), which includes the right of the author to decide whether and when a work shall, in whole or in part, be made available to the public; and
  - Integrity (Article 11(1)-(2) CopA); it is debated among scholars whether the right to modify the work (Article 11(1) CopA) is mainly patrimonial or also bears a moral aspect;<sup>19</sup> in our view, it is both patrimonial and moral; in any case, the mandatory right of authors to oppose any distortion of the work that infringes their personal rights (Article 11(2) CopA) is clearly a moral right (such right is referred to in French as the “*noyau dur*”).
- 7.2. Although not explicitly stated in the provisions of the CopA, the exceptions of copyright apply only for works which have been made available by the author (divulcation right).<sup>20</sup>
- 7.3. In principle, the exceptions to copyright pertain to the use of works. However, some exceptions necessarily have an impact on moral rights.<sup>21</sup>
- 7.4. With respect to the right of integrity for instance, a parody modifies the original work by its very nature. The fact that this exception is structurally provided within Article 11 CopA (on the right of integrity) shows that it is meant also as an exception to the moral right of integrity. In our view, the right of integrity may in principle not be claimed by the author against a user of a work to the extent that a modification of such work is required to benefit from an exception. Nonetheless, the author may always be able to claim the “*noyau dur*” protection.<sup>22</sup>
- 7.5. As regards the right of paternity, it is less likely to be affected by exceptions to copyright under the CopA. In this respect, Article 25(2) CopA (citation) and Article 28(2) CopA (reporting of current events) explicitly provide that the source shall be referred to.
- 7.6. Overall, the interaction between moral rights and copyright exceptions are balanced under the CopA.
- 8. Under your jurisdiction’s copyright law, to what extent is there a risk that technological protection measures could prevent from enjoying the benefit of the exceptions to copyright? Is there an obligation upon the copyright owner to make available to the beneficiary of an exception the means of benefiting from that exception? Is there a distinction between the exceptions, depending on their nature? How can the individual user of a work (or a group of individual users) obtain the full and effective benefit of the exceptions?**

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<sup>19</sup> E. PHILIPPIN, Commentaire romand du droit de la propriété intellectuelle, Basel 2013, Art. 11 LDA N 4-5; *see also* the references cited by the author.

<sup>20</sup> RUEDIN, Introduction aux articles 19 à 28 LDA, N 8.

<sup>21</sup> Barrelet/Egloff, p. 118.

<sup>22</sup> *See above*, 7.1.

8.1. Article 39a(1) CopA provides that “[e]ffective technological measures for the protection of works and other protected subject-matter may not be circumvented”. However, the prohibition of such circumvention may not be enforced against those persons who undertake the circumvention exclusively for legally permitted uses (Article 39a(4) CopA). Accordingly, a circumvention would be authorized in order to benefit from an exception.

8.2. There is however no obligation for the copyright owner to provide the means of benefitting from an exception to users, which may impede the effectiveness of exceptions.<sup>23</sup> Rather, Article 39b CopA provides grounds to the Federal Council to establish a monitoring office for technological measures,<sup>24</sup> which

*a. monitors and reports on the effects of technological measures in accordance with Article 39a paragraph 2 on the exceptions and limitations regulated by Articles 19-28;*

*b. acts as a liaison between user and consumer groups and the users of technological measures, and encourages cooperative solutions.*

Users may report issues to the monitoring office through a web form.<sup>25</sup> The monitoring office also publishes activity reports on its website.

**9. Does your jurisdiction’s copyright law provide for a “catch all” exception, i.e. an exception which is worded in such a way that it can apply in various cases which differ significantly from each other (e.g. “fair use”)? If yes, what is the wording of that exception and what are potential illustrations of its flexibility? What are the conditions for a successful application of this exception? What is the guidance for the application of this exception? To what extent are the effects of this exception sufficiently predictable? To what extent is this exception compliant with the triple test?**

9.1. The CopA does not provide for a catch all exception. Neither does the CopA Pre-Draft.

**10. In your jurisdiction’s legal system, when you make abstraction of the exceptions mentioned in the copyright law, to what extent can other fundamental rights than copyright (e.g. freedom of expression, right to private life, right to education) prevail above copyright so that ultimately the use of a work is permitted without the consent of the copyright owner? Can you mention different situations where other fundamental rights can prevail and result into a permitted use of the work? Is the solution different if the use concerned is already addressed in the copyright law itself, and said use does not comply with the conditions required for the application of the exception? Is there case law which can serve as guidance?**

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<sup>23</sup> On this topic, see W. EGLOFF, Das Urheberrecht und der Zugang zu wissenschaftlichen Publikationen, sic! 2007 705.

<sup>24</sup> <https://www.btm.admin.ch/btm/fr/home.html>.

<sup>25</sup> <https://www.btm.admin.ch/btm/fr/home/dienstleistungen/meldung.html>.

10.1. As mentioned under Question 2,<sup>26</sup> the closed list of exceptions provided in the CopA are the result of the balancing of (fundamental) rights of users and the right of ownership of the copyright owner (Article 26 Cst.). As such, the fundamental rights protected by the Cst. should be taken into account when interpreting a copyright exception, but shall however not serve as a basis to extend or create a new exception to copyright.<sup>27</sup>

**11. If your jurisdiction’s copyright law provides for a list of exceptions, does it also provide for a compensation in favor of the copyright owner? Does the law make a distinction between the exceptions in this regard? How is the compensation calculated? Is there a mechanism to ensure that the compensation remains within certain limits, i.e. it does not result into an “overcompensation” to the detriment of some categories of users?**

11.1. A compensation in favor of the copyright owner is provided in Article 20 CopA in relation to the exceptions of private use (i.e. private use *stricto sensu*, educational use, intra organization reproduction) as follows:

- For private use *stricto sensu* (e.g. the reproduction made on a personal computer when downloading a work from the Internet): no compensation is due directly by the users for such exception (Article 20(1) CopA). However, Article 20(3) CopA provides that “[a]ny person who produces or imports blank media suitable for the fixation of works owes remuneration to the author for the use of the works under Article 19”. In addition, when a private copy is made by a third party for the user, such copying is subject to compensation (Article 20(2) CopA). There is thus an indirect compensation to the copyright owner for the private use *stricto sensu*.
- For educational use and intra organization reproduction: a compensation is due by educational institutions and by organizations which reproduce works.

11.2. Remunerations are collected and claims for remuneration can only be asserted by the authorized collective rights management organizations (Article 20(4) CopA). For the purposes of this provision: (i) ProLitteris<sup>28</sup> collects and distributes remuneration for works of literature and art and (ii) SUISA<sup>29</sup> collects and distributes remuneration for copies made on blank tapes, CD-ROM’s and any other kind of digital or analogue data carriers.

11.3. The remuneration is based on tariffs that are prepared by the collective rights management organizations, which shall be negotiated with the relevant associations of users (Article 46 CopA). The tariffs are approved by the Federal Arbitral Commission and published (Articles 46 and 55 CopA) and are binding on the courts when finally approved<sup>30</sup> (Article 59(3) CopA). The

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<sup>26</sup> See above, 2.2.

<sup>27</sup> See e.g. ATF 131 III 480, JdT 2005 I 390.

<sup>28</sup> <https://prolitteris.ch/fr/>.

<sup>29</sup> <https://www.suisa.ch/en/home.html>.

<sup>30</sup> A tariff is finally approved when it has been approved by the Federal Arbitral Commission and cannot anymore be contested before the SFC (see e.g. P. FEHLBAUM, Commentaire romand du droit de la propriété intellectuelle, Basel 2013, Art. 59 N 14). A court may nonetheless examine the compliance of a finally approved tariff with mandatory law, its application and its interpretation (SFC 4A\_203/2015, sic! 2015 639).

tariffs shall be fair and reasonable (Article 59(1) CopA). Article 60 CopA further provides the principle of fairness applicable to the tariffs:

1. *When determining remuneration, account is taken of:*
  - a. *the proceeds obtained from the use of the work, performance, phonogram or audio-visual fixation or broadcast, or alternatively the costs incurred in such use;*
  - b. *the nature and quantity of the works, performances, phonograms or audio-visual fixations or broadcasts used;*
  - c. *the ratio of protected to unprotected works, performances, phonograms or audio-visual fixations or broadcasts as well as to other services.*
2. *Remuneration normally amounts to a maximum of ten per cent of the proceeds or costs incurred from the use of the copyright and a maximum of three per cent for related rights; however, it is determined in such a way that entitled persons receive equitable remuneration conditioned upon sound financial management for the administration of rights.*
3. *The use of the work under Article 19 paragraph 1 letter b is subject to preferential tariffs.*

11.4. The following are examples of tariffs:

- Tariff 4<sup>31</sup> and 4i<sup>32</sup> on blank media and memory integrated in devices;
- Tariff 7<sup>33</sup> on educational uses;
- Tariffs 8I-VII<sup>34</sup> on intra organization reproduction; and
- Tariffs 9I-VII<sup>35</sup> on use of works within internal organizations' networks.

11.5. The same system applies to the exception pertaining to the use (reproduction and distribution) of works by people with disabilities (Article 24c(3)-(4) CopA). Such uses are subject to Tariff 10.<sup>36</sup>

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<sup>31</sup> [https://www.suisa.ch/fileadmin/user\\_upload/downloadcenter/tarife/Tarife\\_ab\\_2017/GT4\\_2017-2018\\_FRE.pdf](https://www.suisa.ch/fileadmin/user_upload/downloadcenter/tarife/Tarife_ab_2017/GT4_2017-2018_FRE.pdf).

<sup>32</sup> [https://www.suisa.ch/fileadmin/user\\_upload/downloadcenter/tarife/Tarife\\_ab\\_2017/GT4i\\_2017-2018\\_FRE.pdf](https://www.suisa.ch/fileadmin/user_upload/downloadcenter/tarife/Tarife_ab_2017/GT4i_2017-2018_FRE.pdf).

<sup>33</sup> [http://www.prolitteris.ch/fileadmin/user\\_upload/ProLitteris/Dokumente/Tarife\\_ab\\_2017/GT\\_7\\_F\\_2\\_017\\_2021.pdf](http://www.prolitteris.ch/fileadmin/user_upload/ProLitteris/Dokumente/Tarife_ab_2017/GT_7_F_2_017_2021.pdf).

<sup>34</sup> <https://prolitteris.ch/fr/bases/documents/>.

<sup>35</sup> <https://prolitteris.ch/fr/bases/documents/>.

<sup>36</sup> [http://www.prolitteris.ch/fileadmin/user\\_upload/ProLitteris/Dokumente/Tarife\\_ab\\_2017/GT10-fr-2013-2017.pdf](http://www.prolitteris.ch/fileadmin/user_upload/ProLitteris/Dokumente/Tarife_ab_2017/GT10-fr-2013-2017.pdf).

- 11.6. These provisions aim at ensuring that the remuneration does not result in overcompensation in favor of the copyright owners.<sup>37</sup>
- 11.7. It shall further be noted that Article 23 CopA (compulsory license for the manufacture of phonograms) is not a typical restriction as it provides for the right of certain users to obtain a license from the copyright owner under certain conditions.<sup>38</sup> Such compulsory license is subject to compensation, which is due directly by the user to the copyright owner.

**12. Does your jurisdiction’s law provide for an exception in order to allow temporary acts of reproduction which are necessary to enable a lawful use? What is the wording (in English) of that exception? What are the conditions thereof? Is that exception sufficiently effective to enable the development of [most of] legitimate online activities/ new business models? Can you give some examples where that exception was (un)successfully applied? Is that exception mandatory?**

- 12.1. Under Swiss law, the exclusive right of reproduction provided in Article 10(2)(a) CopA applies whether the copy is permanent or temporary.<sup>39</sup> As a result, any use of works in a digital context – which may otherwise be lawful – would in principle infringe on such right as reproduction is technically required, e.g. to browse the Internet, send emails and run a computer program. The adoption of a temporary copy exception was thus necessary to ensure that such uses do not constitute an infringement of the CopA.
- 12.2. Such (mandatory) exception is provided in Article 24a CopA. Its wording is based on Article 5(1) of the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society. It states:

*The making of temporary copies of a work is permitted if:*

- a. they are transient or incidental;*
- b. they represent an integral and essential part of a technological process;*
- c. their sole purpose is to enable a transmission of the work in a network between third parties by an intermediary or a lawful use of the work;*
- d. they have no independent economic significance.*

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<sup>37</sup> Considering the tariffs that are based on a “tax” on all blank media and that Article 19(3<sup>bis</sup>) CopA exempts from compensation for copies made of works made available lawfully, it has been argued that such tariffs result in a double payment by the consumers (once for the legal download and once for the “tax” on the blank media they are using. However, it shall be noted in this respect that Article 19(3<sup>bis</sup>) CopA shall be taken into account when fixing the relevant tariffs which results in a lower tariff (*see e.g. V. SALVADÉ, Du streaming au cloud computing: quel avenir pour la copie privée en Suisse?, sic! 2016 434, p. 436 s.*)

<sup>38</sup> On this topic, *see P. LING, Commentaire romand du droit de la propriété intellectuelle, Basel 2013, Art. 23 N 1 ss.*

<sup>39</sup> *See P. GILLIÉRON, Commentaire romand du droit de la propriété intellectuelle, Basel 2013, Art. 24a LDA N 4 and the cited references.*

12.3. These four conditions shall be met cumulatively:

- The reproduction shall be transient or incidental. A reproduction is transient when it is not stored in a lasting way on a medium. In this respect, the relevant test is whether the data remains stored after an electricity interruption: if it is not, then the copy is considered transient. Such is the case for example for copies made in RAM when browsing the Internet or segmented copies (part of works) stored in a buffer. A reproduction is considered incidental when its goal is to store data for the purpose of facilitating another use's process. Although such copy shall not be permanent, it can nonetheless be stored for several days. Such is for example the case of data stored in the cache memory of a computer.
- The reproduction shall be an integral and essential part of a technological process. This condition implies that the reproduction and deletion of data shall be made automatically. Therefore, the act of downloading content on a hard-drive – even if deleted shortly thereafter by the user – cannot satisfy the requirements of Article 24a CopA due to the manual process that is involved.
- The sole purpose of such reproduction shall be to enable either (i) a transmission of the work in a network between third parties by an intermediary or (ii) a lawful use of the work. The first purpose amounts to a limitation of liability of intermediaries – such as Internet access and service providers as well as hosting providers – to the extent that they allow the transfer of data. A transmission within an internal network is not covered by this purpose. The second purpose is met in particular when the reproduction is required to exercise a copyright exception or when the user benefits from an authorization to access a work given by the copyright owner.
- Finally, a temporary reproduction shall not bear an independent economic significance. This fourth condition related to the second and third prongs of the “triple test”. It shall therefore be assessed in each particular case whether a temporary reproduction conflicts with a normal exploitation of the work or unreasonably prejudices the legitimate interests of the copyright owner. Such would be the case in particular where the copyright owner could generate revenues from such temporary copies, e.g. when the temporary reproduction can be substituted to a permanent copy.<sup>40</sup>

12.4. This exception applies in principle to streaming (whether the source is lawful or not). As Article 24a CopA is not subject to compensation, it was proposed to the Federal Council in 2014 to amend the CopA in order for streaming to be subject to compensation (as is the case for downloading<sup>41</sup>). The Federal Council has however decided not to introduce a compensation for streaming mainly for practical reasons.<sup>42</sup>

12.5. Article 24a CopA was to our knowledge never applied by Swiss courts. In our view, it strikes a right balance between the interests at stake and is effective to enable the development of legitimate online activities/new business models. It should however be suggested to include a

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<sup>40</sup> GILLIÉRON, Art. 24a LDA N 22.

<sup>41</sup> See above, 11.1.

<sup>42</sup> On this topic, see SALVADÉ, p. 438.

compensation for the cases where the temporary reproduction exception is used to serve works from an illegal source (e.g. streaming from unlawful platforms).

**13. Does your jurisdiction's copyright law provide for exceptions in order to allow the freedom of expression? If yes, please provide [the English version of] the text of these provisions. What are the conditions for the use to be permitted? Can you give some examples where these exceptions were successfully, respectively not successfully, applied? Is there any compensation required for the benefit of the copyright owner? Are the exceptions concerned mandatory?**

13.1. The CopA provides two mandatory exceptions related to freedom of expression which do not give rise to compensation.

13.2. Article 25 CopA (citations) provides:

1. *Published works may be quoted if the quotation serves as an explanation, a reference or an illustration, and the extent of the quotation is justified for such purpose.*
2. *The quotation must be designated as such and the source given. Where the source indicates the name of the author, the name must also be cited.*

13.3. Article 28 CopA (reporting of current events) provides:

1. *Where it is necessary for reporting current events, the works perceived in doing so may be fixed, reproduced, presented, broadcast, distributed or otherwise made perceptible.*
2. *For the purposes of information about current affairs, short excerpts from press articles or from radio and television reports may be reproduced, distributed, broadcast or retransmitted; full reference must be made to the relevant excerpt as well as the source. Where the source refers to the name of the author, the name must also be cited.*

13.4. In a case regarding the citation exception, the SFC has ruled that reproducing an entire press article in another journal – with very limited added original content – is not covered by the citation exception.<sup>43</sup> The facts of this case are interesting: a journal reproduced two articles (discussing the same topic but with opposite views) that were published in another journal together with a criticism of those articles. The journal argued that it did so to enable its readers to form their own view by getting access to the full and original views expressed in the previous two articles (an argument which relates to the freedom of information and press).

13.5. The same case also involved a (short) discussion on Article 28 CopA. The journal which had reproduced the two previously published articles argued that such reproduction shall fall within the scope of the reporting of current events exception. The court stated that the publishing of an

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<sup>43</sup> SFC 131 III 480, JdT 2005 I 390.

article shall not be considered as a “current event” pursuant to Article 28 CopA and that in any case this article only allows to reproduce short excerpts of works.

**14. What are the cases (e.g. political speeches, news of the day, mere items of press information), if any, where your jurisdiction’s copyright law explicitly provides that the content concerned is excluded from the benefit of copyright protection? If there is a list of such cases, is that list a closed list? Is there, in your view, any content missing in that list? Would you recommend to provide for such a list?**

14.1. Article 5 CopA (works excluded from protection) provides:

*1. Copyright does not protect:*

*a. acts, ordinances, international treaties and other official enactments;*

*b. means of payment;*

*c. decisions, minutes and reports issued by authorities and public administrations;*

*d. patent specifications and published patent applications.*

*2. Copyright also does not protect official or legally required collections and translations of the works referred to in paragraph 1.*

14.2. Political speeches may thus be excluded from the protection of CopA to the extent they are included in minutes or reports and issued by public administrations. News of the day and mere items of press information are not explicitly excluded. It shall however be noted that such types of “works” may not be considered original enough to be protected by the CopA.<sup>44</sup>

14.3. The list in Article 5 CopA is a closed list of works which – even if satisfying the conditions of protection under Article 2 CopA – do not benefit from the protection of the CopA.

**15. In the context of education, what are the uses which are permitted by your jurisdiction’s copyright law? What are the conditions for the uses to be permitted? Are the provisions sufficiently broad to cover distance learning? Does the law make a distinction depending on whether the user is a profit or a non-profit organization, and pursues a (non-) commercial purpose? Is there a compensation provided for the benefit of the copyright owner? How is the compensation calculated? Are the exceptions concerned mandatory?**

15.1. The (mandatory) educational exception is part of the private use exception in Article 19 CopA:

*1. Published works may be used for private use. Private use means:*

*[...]*

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<sup>44</sup> Article 2(1) CopA defines the works which are subject to the protection of the CopA as follows: “[W]orks are literary and artistic intellectual creations with an individual character, irrespective of their value or purpose.”

*b. any use of a work by a teacher and his class for educational purposes;*

*[...]*

*2. Persons entitled to make copies of a work for private use may also have them made by third parties subject to paragraph 3; libraries, other public institutions and businesses that make copying apparatus available to their users are also deemed third parties within the meaning of this paragraph.<sup>1</sup>*

*3. The following are not permitted outside the private sphere defined in paragraph 1 letter a:*

*a. the complete or substantial copying of a work obtainable commercially;*

*b. the copying of works of art;*

*c. the copying of musical scores;*

*d. the fixation of recitations, performances or presentations of a work on blank media.*

*3<sup>bis</sup> Copies which are made by accessing works that are lawfully made available are neither subject to the restriction of private use under this Article nor are they included in the claims for remuneration under Article 20.3*

*4. This Article does not apply to computer programs.*

15.2. Subject to paragraph 3, works which are related to the taught matter can be used by teachers and their students. All commercial uses are encompassed in this exception (e.g. reproduction, performance and making available). The making available of works over a network is allowed to the extent only teachers and their students have access to the works.

15.3. This exception typically applies at the all levels (kindergarten, primary school, middle and high school and universities) whether public or private. It is debated whether distance learning is covered by the educational exception.<sup>45</sup> In our view, this exception should apply to distance learning to the extent access controls to the lectures and teaching materials (i.e. providing access only to the teacher and the students) are properly implemented, as this would in principle satisfy the “triple test”.

15.4. The law does not explicitly distinguish whether the classes are held within a non-profit organization or if it pursues a commercial purpose. However, some scholars are of the view that

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<sup>45</sup> See GILLIÉRON, Art. 19 N 33 and the cited references. This author suggests that the “triple test” should be applied on a case-by-case basis to assess whether the educational exception applies to distance learning.

the educational exception should not apply in the context of continuous education especially when it is organized by a for-profit organization.<sup>46</sup>

15.5. This exception gives rise to compensation, as discussed above.<sup>47</sup>

**16. In the context of research, what are the uses which are permitted by your jurisdiction's copyright law? Is there an exception to support big data related activities? Is there an exception concerning "text and data mining"? What are the conditions for said uses to be permitted? Does the law make a distinction depending on whether the user is a profit or a non-profit organization and pursues a (non-) commercial purpose? Is there a compensation for the benefit of the copyright owner? Are the exceptions concerned mandatory?**

16.1. There is no specific exception with respect to research in the CopA. To a certain extent, the educational exception<sup>48</sup> could be applicable to research in a teaching context.

16.2. The CopA Pre-Draft includes a new exception (Article 24d) for scientific uses, which would authorize the reproduction and adaptation of works when they are necessary for the application of a technical process. This new exception would apply to text and data mining.<sup>49</sup> Such exception would be subject to compensation and would be mandatory. No distinction is made as regards the for-profit or non-profit organization in Article 24d CopA Pre-Draft.

**17. In your jurisdiction's copyright law, to what extent and under which conditions is the copyright exhausted? To what extent and under which conditions does exhaustion of copyright apply to online situations where the work has been made available by electronic means in a digital format? To what extent can the copyright owner exclude the exhaustion of copyright via the terms and conditions of an agreement?**

17.1. Article 12 CopA sets forth the principle of exhaustion under copyright law:

*1. Where the author has transferred the rights to a copy of a work or has consented to such a transfer, these rights may subsequently be further transferred or the copy otherwise distributed.*

*1<sup>bis</sup> Copies of audio-visual works may not be further transferred or rented as long as the author is thereby impaired in exercising his right of performance (Art. 10 para. 2 let. c).1*

*2. Where the author has transferred the rights to a computer program or has consented to such transfer, such a program may subsequently be used or further transferred.*

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<sup>46</sup> See GILLIÉRON, Art. 19 N 33 and the cited references.

<sup>47</sup> See above, 11.

<sup>48</sup> See above, 15.

<sup>49</sup> See C. P. RIGAMONTI, Urheberrecht und Grundrechte, ZBJV 153/2017 365, p. 391.

3. *Works of architecture that have been constructed may be altered by the owner; Article 11 paragraph 2 remains reserved.*

- 17.2. According to Article 12(1) CopA, only the distribution right (Article 10(2)(b) CopA) is exhausted when the author has transferred such distribution rights or has consented to such transfer. The distribution right implies that a transfer of property of the material incorporating the work be transferred. Since a download on the Internet requires a reproduction on another digital medium, such download should in principle not be considered as exhausting the copyright owner's distribution right and a further transfer should thus not be permitted.
- 17.3. To the extent that the "purchase" of a work by way of download from the Internet is economically similar to the purchase of a material copy of a work, it is debated among scholars whether Article 12(1) CopA should apply in such case.<sup>50</sup>
- 17.4. In our view, such should be the case to the extent the work has been made available for an unlimited period of time through download (download-to-own) by or with the consent of the copyright owner. Accordingly, one who has downloaded a copy work in the aforementioned context should have the right to further transfer such copy to a third party, it being specified that this should not result in additional copies being made in the process (i.e. the person who transfer to a third party should not keep a copy of the work for himself).<sup>51</sup> Such right has been recognized with respect to a software in a cantonal preliminary injunction decision.<sup>52</sup>
- 17.5. Terms and conditions which would prevent a user from further transferring a work that has been made available for an indefinite period of time (download-to-own) could be considered unenforceable on the basis of consumers law to the extent such prohibition is deemed unusual.<sup>53</sup> However, when the works are made available on the basis of a subscription (e.g. Apple Music or Spotify), such works are not made available for an indefinite period of time. Such agreements correspond economically to the renting of works, which does exhaust the distribution right of the copyright owner. Consequently, the contracts related to such use may prevent the further transfer of works made available in that context.
- 18. Does your jurisdiction's copyright law provide for a panorama-exception? What are the conditions for that exception? Does the law make a distinction depending on whether the user is a profit or a non-profit organization and pursues a (non-) commercial purpose? Is there a compensation for the benefit of the copyright owner? Is the exception mandatory?**
- 18.1. Article 27 CopA sets forth a (mandatory) panorama exception:

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<sup>50</sup> See the thorough discussion of that topic in A. ALBERINI, Switzerland Chapter, in: *Compatibility of Transactional Resolutions of Antitrust Proceedings with Due Process and Fundamental Rights & Online Exhaustion of IP Rights*, Zurich 2016, p. 633 ss. See also H. BÖTTCHER, *Die urheberrechtliche Erschöpfung und ihre Bedeutung im digitalen Umfeld*, Bern 2013.

<sup>51</sup> See e.g. PHILIPPIN, Art. 12 N 13 LDA.

<sup>52</sup> Zug cantonal tribunal, ES 2010 822 (May 4, 2011), sic! 2012 99.

<sup>53</sup> See ALBERINI, p. 650-651 and the cited references.

1. A work permanently situated in a place accessible to the public may be depicted; the depiction may be offered, transferred, broadcast or otherwise distributed.

2. The depiction may not be three-dimensional and it may not serve the same purpose as the original.

18.2. Article 27 CopA does not make any distinction related to the type of users and no compensation is due for such uses.

**19. To what extent and under what conditions does your jurisdiction’s copyright law allow to make private copies? Is the private copy exception inapplicable to some critical situations (like the scanning of works by others than private individuals)? Is there a compensation for the benefit of the copyright owner? If yes, what form(s) of compensation (one single form or two forms)? Is there a risk that the compensation system could result into an “overcompensation” to the detriment of some users? Is the exception mandatory?**

19.1. The exception for private copies is included in the private use *stricto sensu* exception (Article 19(1)(a) CopA).<sup>54</sup>

19.2. According to Article 19(2) CopA, individuals who are entitled to make copies for private use may also have them made by third parties, subject to the restrictions set forth in Article 19(3) CopA:

*The following are not permitted outside the private sphere defined in paragraph 1 letter a:*

*a. the complete or substantial copying of a work obtainable commercially;*

*b. the copying of works of art;*

*c. the copying of musical scores;*

*d. the fixation of recitations, performances or presentations of a work on blank media.*

19.3. Except with respect to copies which are made by accessing works that are lawfully made available, the private use *stricto sensu* exception is not subject to direct compensation (Articles 19(3<sup>bis</sup>) and 20(1) CopA). However, any person who produces or imports blank media suitable for the fixation of works owes remuneration to the author for the use of the works under Article 19 CopA (Article 20(3) CopA).<sup>55</sup>

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<sup>54</sup> See above, 6.3.

<sup>55</sup> For more information on compensation, see above, 11.

**20. When you make an overall assessment of your jurisdiction’s copyright law, what are the risky factors which could possibly result into an imbalance between the rights of the copyright owner and the rights of (/ the fair use made by) the users of works? In particular, where do the risks come from: the absence of certain exceptions so that specific fair uses could be prevented? The wording of certain conditions for the application of specific exceptions which is unduly demanding to the detriment of some categories of users? The effect of “overcompensation” which unduly favors the copyright owner? The negative impact of some exceptions on the normal exploitation of the work or the legitimate interests of the copyright owner so that the copyright owner is unduly disfavored? What solutions do you recommend to tackle potential issues in this respect?**

20.1. The fact that the CopA does not provide for a catch-all exception results in a lack of adaptability of the CopA to new uses which would otherwise satisfy the “triple test” and be fair. This has the upside of providing more legal certainty – as the exceptions shall be specifically set forth in the CopA – but has the downside of preventing certain uses unless the CopA is amended.

20.2. In our view, a catch-all exception – which should be based on the “triple test”, be subsidiary to the other exceptions and applied exceptionally – should be included in the CopA.<sup>56</sup> This does not mean that new exceptions should not be added to the CopA. When necessary to provide more legal certainty, new exceptions should be added to the CopA in order not to rely on the catch-all exception. More specifically, the following exceptions should be considered:

- Non-commercial user-generated content which make use of works, to the extent that such use satisfies the “triple test”<sup>57</sup>
- Research uses<sup>58</sup>
- A broader educational exception in order to ensure that distance learning is also included.

20.3. In opposition to the above, some exceptions provided by the CopA are in our view too broad and could negatively affect the normal exploitation of copyright owners. In particular:

- The private use *stricto sensu* exception (Article 19(1)(a) CopA) does not make any distinction pertaining to the lawfulness of the source. In our view, such exception shall be limited to uses which are made of a work which was lawfully been made available.
- The temporary reproduction exception (Article 24a CopA) should in our view be subject to compensation in cases where the use consists in streaming works made available unlawfully.<sup>59</sup>

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<sup>56</sup> On this topic, see RIGAMONTI, p. 391 ss.

<sup>57</sup> See e.g. Article 29.21 of the Canadian Copyright Act (<http://laws-lois.justice.gc.ca/eng/acts/C-42/page-9.html#h-27>).

<sup>58</sup> See above, 16.2.

<sup>59</sup> See above, 12.4.

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