

# LALIVE

To: Wikimedia CH

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Re: **Legal Advice on Swiss Copyright Law**

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## 1 WIKIMEDIA INSTRUCTIONS FOR SWITZERLAND

- 1 Wikimedia Commons is the media repository for all projects hosted by the Wikimedia Foundation, including Wikipedia. All content is under a Creative Commons – Attribution – Share alike (CC-by-SA) license, which allows for free redistribution and modification of such content, for any purpose (*i.e.* commercial and non-commercial).
- 2 There have been some recurring discussions among Swiss users as to what can and cannot be uploaded legally on Wikipedia from a copyright law standpoint. Wikimedia Switzerland has asked LALIVE for a legal opinion that it could share as a form of guidance in this respect.
- 3 The present legal advice aims at answering the question “**does Swiss copyright law allow the upload of pictures of [...]?**”. The general structure of the reasoning is as follows:
  - a) Is the subject of the picture protectable by Swiss copyright law (see below, section §2)?
  - b) Is the picture itself protectable by Swiss copyright law (see below, section §2.1.1.7)?
  - c) If the answer to question a) and/or b) is in the positive: is the subject of the picture, or the picture itself, still protected by Swiss copyright law (see below, section §2.3.1)?
  - d) If the answer to question c) is in the positive: does one of the exceptions to the author’s exclusive right of reproduction apply (see below, section §2.3)? If not, the consent of the author of the subject of the picture and/or of the picture itself is required before uploading the latter on Wikipedia. Failure to do so may entail the legal consequences listed in section 4 below.

## 2 OVERVIEW OF SWISS COPYRIGHT LAW

- 4 Copyright is regulated under Swiss law by the Federal Act on Copyright and Related Rights of 9 October 1992 (“CopA”).
- 5 A work is considered eligible for copyright protection provided it fulfils the conditions described hereunder.

### 2.1 Creations that can be Protected

- 6 Pursuant to Article 2 CopA<sup>1</sup>:

*“1. Works are literary and artistic intellectual creations with an individual character, irrespective of their value or purpose.*

*2. They include, in particular:*

- a. literary, scientific and other linguistic works;*
- b. musical works and other acoustic works;*
- c. works of art, in particular paintings, sculptures and graphic works;*
- d. works with scientific or technical content such as drawings, plans, maps or three-dimensional representations;*
- e. works of architecture;*
- f. works of applied art;*
- g. photographic, cinematographic and other visual or audio-visual works;*
- h. choreographic works and works of mime.*

*3. Computer programs are also works.*

*4. Drafts, titles and parts of works, insofar as they are intellectual creations with an individual character, are also protected.”*

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<sup>1</sup> Unofficial English translation from French original.

- 7 To be granted protection, a creation must thus fulfil the following cumulative requirements:
- a) To be a creation of the mind (in other words: an expression of human thought);
  - b) To be literary or artistic (being broadly interpreted); and
  - c) To have an individual character (in other words: original). The individuality is to be distinguished from the commonness of routine work; it results from the diversity of decisions taken by the author and through surprising and unusual combinations making it extremely unlikely that a third party confronted with the same task would be able to create an identical work<sup>2</sup>. The required individual character depends on the liberty of creation of the author. If the said liberty is reduced, for instance because the author must comply with technical constraints, the level of individuality required will also be reduced<sup>3</sup>.
  - d) To be perceivable, *i.e.* expressed, seen or heard. This is not the case for an idea or a concept, even elaborated.
- 8 The financial value, the quality or the goal of the creation is of no relevance to determine whether it may be protected by copyright.
- 9 In Switzerland as in many other jurisdictions, registration of an art work is not necessary (nor even possible, in most of the cases) for obtaining copyright protection and any work which qualifies as a creation of the mind with an individual character is automatically protected as soon as it is created.

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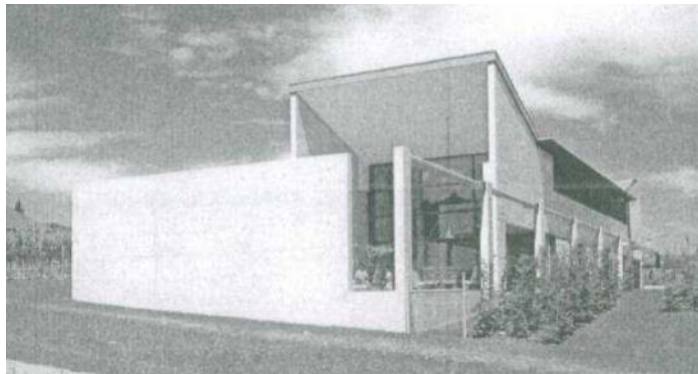
<sup>2</sup> Decision of the Swiss Supreme Court 4A\_675/2015 dated 19 April 2016, para 3.1; FRANÇOIS DESSEMONTET, Commentaire Romand de Propriété intellectuelle, Basel, 2013, *ad* 2 CopA, N17 and N39.

<sup>3</sup> Decision of the Swiss Supreme Court 4A\_675/2015 dated 19 April 2016, para 3.1.

## 2.1.1 *General Comments*

### 2.1.1.1 Architectural Works

- 10 Architectural works are protected by copyright if they have an individual character. A block of buildings that forms a unit from a functional, esthetical and urban perspective may be considered as a work under Article 2 CopA<sup>4</sup>. Plans and models that are the expression of an architectural protected work also benefit from copyright protection, regardless whether the project was eventually realized or not<sup>5</sup>.
- 11 By way of example, the following private house built in Canton of Vaud (Switzerland), which had been the object of various articles published in specialized magazines, was considered as clearly different from common villas and thus bearing an individual character – the open terrace being one of the singularities of the property<sup>6</sup>:



- 12 Therefore uploading this house's picture on Wikipedia would in principle be prohibited without the architect's consent (see however the "freedom of panorama" exception, §2.3.5 below).

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<sup>4</sup> Published decision of the Swiss Supreme Court ("ATF") 125 III 328 dated 6 July 1999, para. 4; ATF 120 II 65 dated 15 March 1994, para. 8a.

<sup>5</sup> ATF 125 III 328 dated 6 July 1999, c. 4; FRANÇOIS DESSEMONTET, *Commentaire Romand de Propriété intellectuelle*, Basel, 2013, ad 2 CopA, N42.

<sup>6</sup> Decision n° 32/2015/PHC issued on 26 May 2015 by the Civil Court of Canton Vaud in the civil proceedings n° CO11.049217, confirmed on this point by the Swiss Supreme Court in a decision 4A\_675/2015 dated 19 April 2016, para. 3.2.

### 2.1.1.2 Sculptures

- 13 A sculpture that is a creation of the mind with an individual character is protected by copyright. Protection may be granted even when the sculpture is temporary such as a sand castle which has been exposed before being disassembled<sup>7</sup>.
- 14 For instance, the Swiss Supreme court held that the sculpture of Le Corbusier entitled “*Petite Confiance ou La Biche*” has an individual character and cannot be reproduced on a commemorative medal without Le Corbusier’s consent<sup>8</sup>:



### 2.1.1.3 Industrial Objects

- 15 Industrial objects and furniture may be granted copyright protection if considered as a creation of the mind with an individual character<sup>9</sup>. The combination of lines, shapes and colours that characterize them must not be dictated entirely by technical requirements or the functional use of the object<sup>10</sup>. Quality is not a criterion.
- 16 By way of an example, the couch in the picture below was not considered as sufficiently individual (i.e. original) to be protected by copyright. Its components, albeit unusual, were deemed to consist of basic sofa and couch shapes (round fitting and uniform height of backrest and arm-

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<sup>7</sup> FRANÇOIS DESSEMONTET, Commentaire Romand de Propriété intellectuelle, Basel, 2013, ad 2 CopA, N32-33.

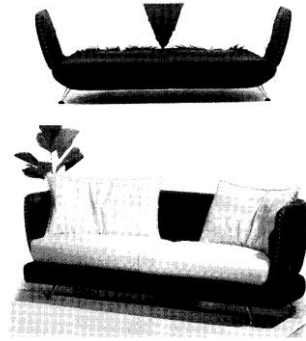
<sup>8</sup> ATF 114 II 368 dated 3 November 1988 (*Le Corbusier* case).

<sup>9</sup> Revue du droit de la propriété intellectuelle, de l’information et de la concurrence (“**Sic!**”) 2000 p. 285.

<sup>10</sup> ATF 105 II 297 dated 27 November 1979, para. 3a.



chairs), with ordinary variations (thin, conical or separated feet) or simple decorations (cross seams on the edges of the armchairs)<sup>11</sup>:



- 17 By contrast, the “Tripp Trapp” highchair which consists of two parallel wooden poles that form an “L” shape was granted copyright protection (below, picture on the left):



- 18 The “Alpha” highchair (above, picture on the right) designed by a competitor which also comprises two parallel wooden poles that form an “L” shape but with two additional poles at the back of the chair was considered a breach of the said copyright<sup>12</sup>.

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<sup>11</sup> Sic! 2002 p. 342; FRANÇOIS DESSEMONDET, Commentaire Romand de Propriété intellectuelle, Basel, 2013, *ad* 2 CopA, N19.

<sup>12</sup> Sic! 2009 p. 900.

#### 2.1.1.4 Literary Works

- 19 Any literary work may be protected by copyright, be it a novel, a book of poetry or an autobiographical work, provided that it complies with the individuality requirement. This is be the case for most literary works.
- 20 An index of dangerous products consisting of different chemical products per sheet, each with high-level details, danger scales with coloured categories, descriptions, etc. (*i.e.* UN danger number, health danger scales, chemical instabilities) was even considered by Swiss courts to have an individual character<sup>13</sup>.
- 21 On the contrary, copyright protection was denied to a compendium merely containing information on medicine as the linguistics of the texts were insufficient to qualify as a work of art within the meaning of the CopA<sup>14</sup>.

#### 2.1.1.5 Logos / Trademarks

- 22 A graphic representation with a commercial use, such as the logo of a company, may be granted copyright protection. The graphic representation of a character or an animal is considered individual if another independent artist would not have been able probably to create the character or animal with an identical appearance.
- 23 As an illustration, the following logo was not considered as sufficiently individual (and thus not protected by copyright), the cow being very realistic and the mountain too simply designed<sup>15</sup>:

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<sup>13</sup> ATF 136 III 225 dated 1 April 2010, para. 4.2.

<sup>14</sup> ATF 134 III 166 dated 13 February 2008, para. 2.

<sup>15</sup> Sic! 2001 p. 729; Decision of the Swiss Supreme Court 4C.86/2000 dated 13 June 2000.



#### 2.1.1.6 Slogans

- 24 An advertisement campaign is usually based on an advertisement concept, such as a slogan, that may be protected by copyright if it arises from an intellectual activity and presents a certain degree of individuality. The latter depends on the choice between several combinations of words to outline the quality of a product or a service. One or just a few words are usually not deemed sufficient to qualify as a work of art<sup>16</sup>.

#### 2.1.1.7 Photography

- 25 A photography is granted copyright protection provided that it is a creation of the mind with an individual character<sup>17</sup>. To assess the individuality of a photography, the criterion is not the existence of an individual or unique subject, but the characteristics of the photography itself<sup>18</sup>. Using a particular technique does not necessarily entail any protection, just as a photography is not excluded from protection because no particular technique was used<sup>19</sup>.
- 26 A photography is not considered to have an individual character if the photographer does not show enough imagination from a technical or conceptual point of view, and if the presentation is commonplace<sup>20</sup>. Copy-

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<sup>16</sup> FRANÇOIS DESSEMONTET, *Le droit d'auteur*, Lausanne, 1999, p. 64 N100.

<sup>17</sup> ATF 130 III 168 dated 5 September 2003 (*Bob Marley case*) in *Journal des Tribunaux ("JdT")* 2004, p. 285; FRANÇOIS DESSEMONTET, *Commentaire Romand de Propriété intellectuelle*, Basel, 2013, *ad 2 CopA*, N47.

<sup>18</sup> ATF 130 III 714 dated 19 April 2004 (*Meili case*) in *JdT* 2004, p. 281; FRANÇOIS DESSEMONTET, *Commentaire Romand de Propriété intellectuelle*, Basel, 2013, *ad 2 CopA*, N50.

<sup>19</sup> ATF 130 III 714 dated 19 April 2004 (*Meili case*) in *JdT* 2004, p. 281.

<sup>20</sup> *Sic!* 2013 p. 344.

right protection requires demonstrating originality with regard to the selection and the time when the picture was taken and the individual character of the picture, *i.e.* an original combination of different elements of the picture, environment, distribution of light and shadows<sup>21</sup>.



Protection granted  
(Bob Marley case)



Protection denied  
(Meili case)

- 27 A press photographer took two pictures of the late Nicolas Hayek (former president of the Swatch Group) in 1995 and 1997 for a magazine, which were republished in 2010 in the frame of an article dedicated to Mr. Hayek. The first photography showed Nicolas Hayek leaning at the window of his suite on the 28<sup>th</sup> floor of the hotel UN Plaza, making the victory sign with the index and middle fingers of his right hand pointing up, with in the background the building complexes of the United Nations in New York. The UN headquarters was placed at the centre of the image with at the right the UN Plaza hotel from which Nicolas Hayek was looking out and was surrounded by a UN skyscraper. This photography was considered as sufficiently individual to be protected by copyright – and thus not reproducible absent the photographer’s consent<sup>22</sup>. By contrast, the second photography (below) was confined in picturing Mr. Hayek sitting by the swimming pool of his southern French villa, surrounded by his wife and daughter, depicting the villa and garden in the background. It was denied copyright protection for lack of individuality<sup>23</sup>:

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<sup>21</sup> Sic! 2013 p. 344; see also MISCHA SENN, *Wie aus einer Fotografie ein Bild wird*, Sic! 2015 137.

<sup>22</sup> Sic! 2013 p. 344.

<sup>23</sup> Decision issued on 29 August 2012 by the Civil Court of Aarau, *in* Sic! 2013 p. 344.



Protection denied  
(Nicolas Hayek case)

- 28 A passport picture does not qualify as a work of art if it is taken by an automatic photo booth<sup>24</sup>. The same applies to pictures taken by weather forecast satellites, to most scientific photography as well as, usually, to holiday pictures<sup>25</sup>.
- 29 The CopA is currently being reviewed as regards press photography. One of the issues under discussion is the difficulty for a press photography to fulfil the condition of “individual character” and the resulting lack of protection as the news related in an article is given priority over the picture illustrating the information. The review of the law prospects the possibility of granting the press photographer with limited related rights, in particular the exclusive right to reproduce, propose to the public, sell or in any other way put into circulation such a photography as long as it is of interest for newsfeed<sup>26</sup>, regardless of its individual character.

### **2.1.2 Derivative Works**

- 30 Pursuant to Article 3 CopA, derivative works are intellectual creations with an individual character that are based upon pre-existing works, as

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<sup>24</sup> FRANÇOIS DESSEMONTET, *Le droit d’auteur*, Lausanne, 1999, p. 79 N122; FRANÇOIS DESSEMONTET, *Commentaire Romand de Propriété intellectuelle*, Basel, 2013, *ad* 2 CopA, N49.

<sup>25</sup> FRANÇOIS DESSEMONTET, *Le droit d’auteur*, Lausanne, 1999, p. 79 N123; FRANÇOIS DESSEMONTET, *Commentaire Romand de Propriété intellectuelle*, Basel, 2013, *ad* 2 CopA, N49.

<sup>26</sup> See [https://www.admin.ch/ch/f/gg/pc/documents/2677/Revision-LDA\\_03\\_Projet-LDA\\_fr.pdf](https://www.admin.ch/ch/f/gg/pc/documents/2677/Revision-LDA_03_Projet-LDA_fr.pdf) (in French).

long as the individual character of the pre-existing works remains identifiable. These include translations as well as audiovisual and other adaptations. The author of a derivative work needs to obtain the consent of the author of the pre-existing work, if the latter is (still) protected by copyright<sup>27</sup>.

### **2.1.3 Orphan Works**

- 31 A work is considered as “orphan” under Article 22b CopA when the author is unknown or may no longer be found (*i.e.* possibly fell into oblivion over the course of time). In such a case, it is possible to bypass the consent of the unknown author to exploit (*i.e.* put at disposal, broadcast, present) phonograms or videograms – but not other kinds of art works – provided that the conditions set forth below are fulfilled.
- 32 Such privilege may only be requested by a licensed company if (i) the use concerns publicly accessible archive or archives of broadcasting organisations, (ii) the right holders are unknown or cannot be found and (iii) the phonograms or videograms were produced or reproduced in Switzerland and at least ten years elapsed since then. Users must report to the licensed company phonograms or videograms that hold orphan works.
- 33 The CopA is currently under review. If Switzerland was an early bird in terms of introducing the concept of orphan works within its legislation, one of the subjects of discussion is the scope of application of the current law that is considered too narrow and specifically related to licensed companies. The law under revision envisages providing that the use of orphan works is authorised if (i) it is done from a specimen of the work located in libraries, schools, museums, collections or archives that are public or publicly accessible or archives of licensed companies, (ii) the specimen of the work referred to in (i) was created, reproduced or made available in Switzerland, or (iii) the use of the work is authorised by a licensed company.

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<sup>27</sup> FRANÇOIS DESSEMONTET, *Commentaire Romand de Propriété intellectuelle*, Basel, 2013, *ad* 3 CopA, N8.

## **2.2 Extent of the Copyright Granted to Authors**

- 34 Pursuant to Article 10 CopA, the author has the exclusive right to decide whether, when and how his art work is used. The author has the exclusive right, in particular, to upload a picture of its work on Wikipedia, respectively to authorise such uploading, to produce copies of the work, such as printed matter, phonograms, audio-visual fixations or data carriers, to offer, transfer or otherwise distribute copies of his work and to broadcast his work by radio, television or similar means, including by wire.
- 35 Posting a link (linking/hyperlink) to a copyright-protected work which is freely available elsewhere on the Internet does not qualify – at least when the work was lawfully made available on the Internet – as an exclusive right belonging to the author over such work, and is therefore allowed<sup>28</sup>.
- 36 On the other hand, framing the content of a website containing a copyrighted work on another website, i.e. importing the copyrighted content of a website into another website, probably breaches the exclusive rights pertaining to the author<sup>29</sup>.

## **2.3 Limits and Exceptions to Copyright Protection**

### ***2.3.1 Duration of the Protection***

- 37 Copyright is limited to 70 years after the death of the author (50 years for computer programs) or, in case of an art work created by several authors, 70 years after the death of the last author (Articles 29 and 30 CopA).

### ***2.3.2 Works Excluded from Protection***

- 38 Copyright protection does not cover (Article 5 CopA):

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<sup>28</sup> Association Internationale pour la Protection de la Propriété Intellectuelle (AIPPI), Question Q216B, Report of the Swiss Group dated 25 April 2011, pp. 6-7; FRANÇOIS DESSEMONTET, *La propriété intellectuelle et les contrats de licence*, 2<sup>nd</sup> edition, Lausanne, 2011, p. 110; PHILIPPE GILLIÉRON, *Les liens hypertextes et le droit privé*, Sic! 2000, p. 755, p. 763.

<sup>29</sup> PHILIPPE GILLIÉRON, *Les liens hypertextes et le droit privé*, Sic! 2000 p. 755, p. 767.

- 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;
- e) official or legally required collections and translations of the works referred to above.

### 2.3.3 *Freedom of Quotation*

- 39 Pursuant to Article 25 CopA, copyright-protected works may be quoted if the quotation is an explanation, a reference or an illustration, and the extent of the quotation is justified by the use/purpose of the quote (“freedom of quotation”).
- 40 The freedom of quotation sets a limit to copyright with the aim of allowing and fostering the debate of ideas. One must indeed be entitled, in a democratic society, to make a reference to a work of art with the objective of criticizing it or supporting a thinking. Rights granted to copyright holders must not constitute an excessive burden in this respect<sup>30</sup>.
- 41 Quoting an entire work is rarely accepted (with the exception of poems under certain circumstances)<sup>31</sup>. For instance, when reporting current events, a quote should not exceed 4-5 sentences (in reference to Article 28(2) CopA). The quotation must be designated as such and mention its source, including the name of the author if available.

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<sup>30</sup> PIERRE-EMMANUEL RUEDIN, La citation en droit d’auteur: étude de l’article 25 LDA dans son contexte constitutionnel et international, Thesis, Neuchâtel 2010, pp. 6 and 227; see also VINCENT SALVADÉ, Droit d’auteur : la liberté économique implique-t-elle vraiment l’épuisement international du droit de distribution ? *in* Sic ! 2004, 356, 358.

<sup>31</sup> REYNOLD/CONTEL, Commentaire Romand de Propriété intellectuelle, Basel, 2013, *ad* 25 CopA, N25.



- 42 Freedom of quotation traditionally applies to written art works, musical works and audio-visual works<sup>32</sup>. The question whether freedom of quotation applies to visual art works (paintings, sculptures and graphic works, works with scientific or technical content such as drawings, plans and maps, works of applied art, photography and other audio-visual works) is debated in Switzerland<sup>33</sup>. It is accepted by the majority of the Swiss scholars<sup>34</sup> but no specific case law exists in this respect.

### 2.3.4 *Museum, Exhibition and Auction Catalogues*

- 43 An art work that is part of a museum collection may, under Article 26 CopA, be reproduced in a catalogue issued by the administrators of the collection. The same rule applies to the publication of exhibition and auction catalogues. This exception is limited in time. Once the exhibition is over, new editions of the catalogues shall not be covered by this exception.<sup>35</sup> Art books, internet websites, tourist guides, calendars, posters, postcards, reproductions on t-shirts or other supports do not benefit from this exception.<sup>36</sup>

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<sup>32</sup> PIERRE-EMMANUEL RUEDIN, *La citation en droit d'auteur: étude de l'article 25 LDA dans son contexte constitutionnel et international*, Thesis, Neuchâtel 2010, pp. 203, 206 and 226.

<sup>33</sup> REYNOLD/ CONTEL, *Commentaire Romand de Propriété intellectuelle*, Basel, 2013, *ad* 25 CopA, N17 ff; MACCHIACCHINI/OERTLI, *URG*, Berne, 2012, p. 340 N5; PIERRE-EMMANUEL RUEDIN, *La citation en droit d'auteur: étude de l'article 25 LDA dans son contexte constitutionnel et international*, Thesis, Neuchâtel 2010, p. 220; BARRELET/EGLOFF, *Le nouveau droit d'auteur*, Berne, 2008, *ad* 25 N2; FRANÇOIS DESSEMONTET, *Le droit d'auteur*, Lausanne, 1999, N491.

<sup>34</sup> See, among others, REGULA BÄHLER, *Jenseits von Walter Benjamin und Bob Marley*, *in* *Medialex* 2012 p. 196, 200; PIERRE-EMMANUEL RUEDIN, *La citation en droit d'auteur: étude de l'article 25 LDA dans son contexte constitutionnel et international*, Thesis, Neuchâtel 2010, p. 220 footnote n° 1254 and p. 228; LUKAS FRIEDLI, *Gibt es das Bildzitat im schweizerischen URG?*, *in* *Jusletter* dated 24 April 2006; I. CHERPILOD, *Schranken des Urheberrechts*, *in*: *Schweizerisches Immaterialgüter- und Wettbewerbsrecht (SIWR) II/1* Basel 2006, p. 296; JACQUES DE WERRA, *Liberté de l'art et droit d'auteur*, *in* *Medialex* 2001, n° 3, 143, 148.

<sup>35</sup> FRANÇOIS DESSEMONTET, *La propriété intellectuelle et les contrats de licence*, 2<sup>nd</sup> edition, Lausanne, 2011, p. 112.

<sup>36</sup> BARRELET/EGLOFF, *Le nouveau droit d'auteur*, Berne, 2008, *ad* 26 N3; FRANÇOIS DESSEMONTET, *La propriété intellectuelle et les contrats de licence*, 2<sup>nd</sup> edition, Lausanne, 2011, p. 112.

### 2.3.5 *Works on Premises Open to Public (“Freedom of Panorama”)*

- 44 Pursuant to Article 27 CopA, a work permanently located in a place accessible to the public may be represented in a two dimension format (“freedom of panorama”)<sup>37</sup>. Irrespective of whether the work is located on a public or private domain, the criterion is whether it is visible, by eye, from the public domain. Such a copyrighted work may thus be photographed and a photography may be uploaded on the Internet or otherwise distributed<sup>38</sup>.
- 45 The interior of a building (museum, church, etc.) is not “accessible” to the public for the purpose of the CopA, even if the owner of the building is a public entity<sup>39</sup>. By contrast, the interiors of a commercial centre or a train station are likely covered by the freedom of panorama<sup>40</sup>, although there is no specific case law on the matter in Switzerland.
- 46 Furthermore, the art work must be permanently visible from the public domain, which is not the case for an advertisement sign posted for one or two weeks or a sculpture exhibited temporarily in the park of a museum<sup>41</sup>. With regard to advertisement on public transportation or illuminated billboards on buildings, the criterion is the intention to durably leave the work on the public domain, even if posters, for instance, would be replaced after a few months because they are fragile<sup>42</sup>.

### 2.3.6 *Reporting Current Events*

- 47 Reporting current events (news) is granted copyright exceptions under Article 28 CopA. Works that were seen or heard during such events may

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<sup>37</sup> By comparison, the European Union directive 2001/29/EC grants member states the faculty to provide for a freedom of panorama exception in their copyright laws, without compelling them to do so. The French Parliament is currently debating the inclusion of such an exception into French copyright law.

<sup>38</sup> REYNOLD/ CONTEL, *Commentaire Romand de Propriété intellectuelle*, Basel, 2013, *ad* 27 CopA, N10 ff.

<sup>39</sup> BARRELET/EGLOFF, *Le nouveau droit d’auteur*, Berne, 2008, *ad* 27 N4.

<sup>40</sup> MACCHIACCHINI/OERTLI, URG, Berne, 2012, p. 360 N 6.

<sup>41</sup> FRANÇOIS DESSEMONTET, Lausanne, 1999, N503; REYNOLD/ CONTEL, *Commentaire Romand de Propriété intellectuelle*, Basel, 2013, *ad* 27 CopA, N5-6.

<sup>42</sup> FRANÇOIS DESSEMONTET, *La propriété intellectuelle et les contrats de licence*, 2<sup>nd</sup> edition, Lausanne, 2011, p. 113.

be reproduced, presented, broadcast, distributed, or made visible or audible in any other way. This also applies to short excerpts from press articles or from radio and television reports; the excerpt must be indicated, as well as the source and the author if specified (see above freedom of quotation, section §2.3.3).

### **2.3.7 Parodies**

- 48 Pursuant to Article 11 (3) CopA, works of art may be used to create parodies or other comparable imitations. The purpose is to allow the free use of an art work for satire; the message must be expressed with a humorous tone<sup>43</sup>. This is not a way to harm the original art work or a method to substitute it<sup>44</sup>.
- 49 By way of an example, an advertisement panel set at the entrance of a local store named “Edmond Baud” displaying a man in a black suit holding a drilling machine with the quote “My name is Baud, Edmond Baud” would probably be considered a lawful parody of the original quote “My name is Bond, James Bond”.

### **2.3.8 No “Fair Use” Doctrine under Swiss Law**

- 50 Fair use, or an equivalent doctrine, arises from common law and does not exist as such under Swiss law. Fair use seeks to balance the interests of the author or rightful holders with the interests of the public in the wider use of the art work, by allowing limited use of copyrighted works for “fair use”. Such a principle may nevertheless be found in the CopA with respect to the above mentioned exceptions to copyright protection such as the freedom of quotation, the freedom of panorama, the freedom of parody, etc.

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<sup>43</sup> EDGAR PHILIPPIN, *Commentaire Romand de Propriété intellectuelle*, Basel, 2013, *ad* 11 CopA, N30 ; see also VINCENT SALVADÉ, *L’exception de parodie ou les limites d’une liberté*, *in* *Medialex* 1998, p. 92.

<sup>44</sup> EDGAR PHILIPPIN, *Commentaire Romand de Propriété intellectuelle*, Basel, 2013, *ad* 11 CopA, N31.

### 3 SPECIFIC CASES

#### 3.1.1 Introduction

51 As indicated above the present legal advice aims at answering the question “**does Swiss copyright law allow the upload of pictures of [...]?**”, and the following structured reasoning must be kept in mind:

- a) Is the subject of the picture protectable by Swiss copyright law (see below, section §2)?
- b) Is the picture itself protectable by Swiss copyright law (see below, section §2.1.1.7)?
- c) If the answer to question a) and/or b) is in the positive: is the subject of the picture, or the picture itself, still protected by Swiss copyright law (see below, section §2.3.1)?
- d) If the answer to question c) is in the positive: does one of the exceptions to the author’s exclusive right of reproduction apply (see below, section §2.3)? If not, the consent of the author of the subject of the picture and/or of the picture itself is required before uploading the latter on Wikipedia. Failure to do so may entail the legal consequences indicated in section 4 below.

#### 3.1.2 Advertisement

52 Advertisements are usually the combination of a slogan (“Always Coca Cola”, “Have a Break Have a Kit Kat”, see above the section on slogans, §2.1.1.6) with a graphic presentation or a brand (Marlboro’s Cow-boy, Michelin Man, etc.). Advertisements may also use the type of product or its packaging (Toblerone chocolate bar with triangular chocolate pieces or Kit Kat chocolate bars with four fingers) or even consist of small gifts offered to consumers (McDonald’s “Happy Meal” menu which contain toys as gifts for kids). Advertisements may be protected by copyrights as long as they fulfil the protection requirements (see above the section on general conditions, §2.1).

### **3.1.3 Album, Book and Video Game Covers**

- 53 Album, books and video game covers are not governed by specific provisions and may be considered as art works if the graphic presentation fulfils the protection requirements (see above the section on general conditions, §2.1).

### **3.1.4 Artwork**

#### *a) That is displayed on the public domain*

- 54 Art works displayed on the public domain fall under the exception of freedom of panorama (§2.3.5, *supra*). Pictures of such art works may therefore be uploaded on Wikipedia.

#### *b) That has been restored in a trivial or non-trivial manner (e.g. stained glass in a church)*

- 55 In order to be considered a work of art, the restoration must modify important elements of the original work, i.e. modify its character to such an extent that it may qualify as a work of art *per se*. In such a case, if the stained glass is still protected by copyright (see above the section on the duration of the protection §2.3.1), and the author gave his consent to such restoration, it may qualify as a derivative work (see above the section on derivative works §2.1.2). If the stained glass has fallen into the public domain (which is the most likely scenario), then the author's consent is not necessary and the renovation itself may qualify as a work of art if it fulfils the conditions for copyright protection (see above the section on general conditions, §2.1).

#### *c) That is displayed on a private property (e.g. inside a museum, church or foundation), whether open to the public or not*

- 56 See above the section on freedom of panorama, §2.3.5.

#### *d) A screenshot from a movie, TV show, cartoon or videogame, depicting a particular actor (e.g. Joseph Gorgoni acting as Marie-Thérèse Porchet) or character (e.g. Les Babibouchettes)*

- 57 The subject matter of a movie, TV show, cartoon or videogame may benefit from copyright protection provided that the conditions for protec-

tion are fulfilled (see section §2.1, above). For instance, the concept of two characters representing a cat and a mouse is not protected whereas Tom & Jerry probably are<sup>45</sup>.

*e) An identical copy of a public domain artwork that has not been done by the uploader (e.g. someone took the reproduction of a XV<sup>th</sup> century painting from a museum's website).*

- 58 Such a copy may be uploaded on the Internet since, first, the subject matter is no longer copyrighted (expiration of time) and, second, the photography confining itself in reproducing said subject matter lacks individual character. See above the section on photography (§2.1.1.7).

### **3.1.5 Board Games**

- 59 Board games may be considered as art works if they fulfil the protection requirements. See above the section on general conditions (§2.1) and section on industrial objects (§2.1.1.3).

### **3.1.6 Clothing and Articles of Fashion, Tradition Costumes, Sports and Professional Uniforms**

- 60 Clothing and articles of fashion, though guided by the latest trends, may be granted copyright protection as creators have numerous possibilities of shapes and accessories to create a work with individual character – see above the sections on general conditions (§2.1) and industrial objects (§2.1.1.3)<sup>46</sup>.
- 61 The same applies for sports or professional uniforms, even though it must be noted that their design should not only serve their functional use but also show creative research as opposed to being dictated by their purpose

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<sup>45</sup> FRANÇOIS DESSEMONTET, *Le droit d'auteur*, Lausanne, 1999, p. 67 N107.

<sup>46</sup> KAMEN TROLLER, *Manuel du droit suisse des biens immatériels*, Tome I, 2<sup>nd</sup> edition, Basel, 1996, p. 285.

or pre-existing forms<sup>47</sup> – see above the sections on general conditions (§2.1) and industrial objects (§2.1.1.3)<sup>48</sup>.

- 62 With regard to traditional costumes, they may fall within the public domain due to the expiration of time (section §2.3.1 *supra*). If not, see sections on general conditions (§2.1) and industrial objects (§2.1.1.3).

### **3.1.7 Costumes and Cosplay**

- 63 Costumes and cosplay do not fall within an exception to copyright and may be granted copyright protection if they fulfil the protection requirements (sections on general conditions (§2.1) and industrial objects (§2.1.1.3)).

- 64 It must be noted however that if the costume and cosplay represent a figure that is itself copyrighted, e.g. a Walt Disney character, the authorisation of the author is required in order to be entitled to use such character, unless the use is for purpose of parody<sup>49</sup>.

### **3.1.8 Household Objects**

- 65 See above the section on industrial objects (§2.1.1.3).

### **3.1.9 Fireworks Displays**

- 66 Fireworks do not fall within one of the exceptions to copyright and may therefore be protected as such. Nevertheless, they will likely not fulfil the individuality condition. In addition, they may, depending on the circumstances, be deemed too ephemeral to be considered as works of art. In all cases, fireworks will most likely fall under the freedom of panorama exceptions (section §2.3.5). Fireworks display may therefore be freely uploaded on Wikipedia.

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<sup>47</sup> For recent U.S case law regarding the copyright protection of cheerleader uniforms, see *Star Athletica v. Varsity brands Inc.* U.S Supreme Court, N° 15-866.

<sup>48</sup> KAMEN TROLLER, *Manuel du droit suisse des biens immatériels*, Tome I, 2<sup>nd</sup> edition, Basel, 1996, p. 263.

<sup>49</sup> FRANÇOIS DESSEMONTET, *Le droit d’auteur*, Lausanne, 1999, pp. 70-71, N113.

- 67 A video or a photography of fireworks may be considered as an art work *per se* if it complies with the requirements for copyright protection – see above, section §2.1.1.7. If it is the case, such video or photography may not be uploaded on Wikipedia without the author’s consent, unless an exception to the author’s exclusive right of reproduction apply (see section 2.3 *supra*).

### **3.1.10 Food, be it Food Specialties or Artwork Based on Food**

- 68 Food and related art works do not fall within the exceptions to copyright and may therefore be protected provided that the general requirements are satisfied. The presentation of a recipe can be copyrighted, but not the recipe itself<sup>50</sup>.

### **3.1.11 Footage from a Surveillance Camera**

- 69 Footage from a surveillance camera is in principle not considered as a work of art as it is dominated by its functional purpose (to automatically scan the horizon) – see section §3.1.17 on medical images, by analogy – unless it is transformed in such way that it becomes a creation of the mind with an individual character (see above sections on general conditions (§2.1) and photography (§2.1.1.7)).

### **3.1.12 Gardens**

- 70 Gardens and designed parks are considered as architectural works and may thus be protected by copyright (section §2.1.1.1 *supra*)<sup>51</sup>. However, they will frequently fall under the freedom of panorama exception (§2.3.5, above).

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<sup>50</sup> FRANÇOIS DESSEMONTET, *Le droit d’auteur*, Lausanne, 1999, p. 55.

<sup>51</sup> FRANÇOIS DESSEMONTET, *Le droit d’auteur*, Lausanne, 1999, p. 81; KAMEN TROLLER, *Manuel du droit suisse des biens immatériels*, Tome I, 2<sup>nd</sup> edition, Basel, 1996, p. 280; FRANÇOIS DESSEMONTET, *Commentaire Romand de Propriété intellectuelle*, Basel, 2013, ad 2 CopA, N39.



### **3.1.13 Graffiti**

- 71 A graffiti may be protected by copyright if it satisfies the general requirements (see section §2.1). The question is whether it was painted for an indefinite period at a certain place, regardless of the effective life time<sup>52</sup>: if the graffiti lies in the public domain and is permanent, it falls within the freedom of panorama exception (see above section §2.3.5) and may be photographed and uploaded on the Internet.

### **3.1.14 Jewellery**

- 72 Jewellery is not governed by specific provisions of the CopA and may be considered as an art work. They are thus copyright-protected provided that the general conditions are satisfied – see above the 2.1 section.

### **3.1.15 Labels, such as those on Beer and Wine Bottles**

- 73 Labels are not governed by specific provisions of the CopA either, and may be protected provided that they fulfil the general requirements (§2.1, above). Usual fonts are not protected by copyright<sup>53</sup>.

### **3.1.16 Maps, including State Produced Documents**

- 74 Copyright protection may be granted to maps (including bus routes and transportation networks, geographical or topographical maps and tourist maps). This protection does not depend on the result of the measures but on the original representation of data that appears on the map, that is the drawings of rocky lands, forests, routes, etc.<sup>54</sup>. There is no distinction on whether maps are issued by an authority or generated by users.

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<sup>52</sup>MACCIACCHINI/OERTLI, *Urheberrechtsgesetz, Bundesgesetz über das Urheberrecht und verwandte Schutzrechte. Mit Ausblick auf EU-Recht, deutsches Recht, Staatsverträge und die internationale Rechtsentwicklung*, 2012, p. 360.

<sup>53</sup>FRANÇOIS DESSEMONTET, *Le droit d’auteur*, Lausanne, 1999, p. 74.

<sup>54</sup>ATF 103 Ib 324 dated 25 November 1977; FRANÇOIS DESSEMONTET, *Commentaire Romand de Propriété intellectuelle*, Basel, 2013, *ad* 2 CopA, N37; KAMEN TROLLER, *Manuel du droit suisse des biens immatériels*, Tome I, 2<sup>nd</sup> edition, Basel, 1996, pp. 279-280 (footnotes 37-38).

- 75 This being said, copyright does not cover official documents such as master plans or other documents of building instructions emitted by authorities (Article 5(1) (a) CopA)<sup>55</sup>. See above the section on works excluded from protection (§2.3.2).

### ***3.1.17 Medical Images***

- 76 Medical images such as x-rays are not considered as a work of art as the picture is dominated by its functional purpose and the image itself is a simple photography that anyone could take without providing any particular effort.<sup>56</sup> They can, therefore, be uploaded on Wikimedia/Wikipedia.

### ***3.1.18 Models***

- 77 Models are not excluded from copyright protection. See above the section on general requirements (§2.1). The object that is being replicated may already be protected by copyrights, see above section on derivative rights (§2.1.2).

### ***3.1.19 Movie Posters***

- 78 Movie posters may be protected by copyright as a graphic design work or a photography work. See above the section on photography (§2.1.1.7) and the section on general requirements (§2.1).

### ***3.1.20 Newspaper Front-Pages***

- 79 Newspaper front pages do not fall within one of the exceptions to copyright and may benefit from protection if the requirements for copy-

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<sup>55</sup> CARRON/KRAUS/FÉROLLES/KRÜSI, *Le droit d'auteur des planificateurs*, Fribourg, 2015, p. 69; FRANÇOIS DESSEMONTET, *Commentaire Romand de Propriété intellectuelle*, Basel, 2013, *ad* 5 CopA, N4.

<sup>56</sup> FRANÇOIS DESSEMONTET, *Commentaire Romand de Propriété intellectuelle*, Basel, 2013, *ad* 2 CopA, N49; KAMEN TROLLER, *Manuel du droit suisse des biens immatériels*, Tome I, 2<sup>nd</sup> edition, Basel, 1996, p. 294; FRANÇOIS DESSEMONTET, *Le droit d'auteur*, Lausanne, 1999, p. 124 and references mentioned.

rights protection are fulfilled<sup>57</sup>. Titles are protected but only if they present strong individuality, which is rarely the case<sup>58</sup>.

### **3.1.21 Patents and Patent Descriptions**

80 Patents are explicitly excluded from protection. See above the section on limits to copyrights protection (§2.3.2).

### **3.1.22 Postcards**

81 The protection of postcards depends on whether the image on the postcard or the postcard itself may be considered as an art work (see above §2.1).

### **3.1.23 Road Signs**

82 See above the section on freedom of panorama (§2.3.5).

### **3.1.24 Stamps**

83 Postal stamps do not fall within the scope of works excluded from protection and therefore may benefit, given their characteristics, from copyright protection.<sup>59</sup>

## **4 CONSEQUENCES OF COPYRIGHT INFRINGEMENT**

84 Copyright holders who believe that the uploading of a picture on Wikipedia breaches the CopA must act to protect their rights, as there is no action automatically initiated by the State. It is thus possible (if not likely) that certain copyright holders do not object to the uploading on Wikipedia of pictures of their art work, or even support such uploading.

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<sup>57</sup> FRANÇOIS DESSEMONTET, *Le droit d'auteur*, Lausanne, 1999, p. 73 N116b; FRANÇOIS DESSEMONTET, *Commentaire Romand de Propriété intellectuelle*, Basel, 2013, *ad* 2 CopA, N24.

<sup>58</sup> KAMEN TROLLER, *Manuel du droit suisse des biens immatériels*, Tome I, 2<sup>nd</sup> edition, Basel, 1996, p. 272.

<sup>59</sup> MACCHIACCHINI/OERTLI, *URG*, Berne, 2012, p. 55 N3 (see reference to BARRELET/EGLOFF, *Le nouveau droit d'auteur*, Berne, 2008, *ad* 5 N5).

- 85 If a copyright holder decides to file a civil claim against the unlawful uploading of a protected art work on Wikipedia, it may require from the judge (*inter alia*):
- a) To prevent an imminent infringement (Article 62 let. a CopA);
  - b) To remedy an existing infringement (Article 62 let. b CopA);
  - c) To award damages;
  - d) To order the defendant to return his/her profits (if any);
  - e) To publish the judgement.
- 86 A copyright holder may also file a criminal complaint aiming at protecting his/her copyright. This route may be followed against any person who wilfully and unlawfully commits one of the acts below (*inter alia*):
- a) To use an art work under a false designation or a designation that differs from that decided by the author;
  - b) To publish an art work;
  - c) To modify an art work;
  - d) To use an art work to create a derivative work;
  - e) To produce copies of a work in any manner;
  - f) To offer, transfer or present a work or to make a work perceptible or somewhere else either directly or with the help of any kind of medium;
  - g) To make a work available through any kind of medium in such a way that persons may access it from a place and at a time individually chosen by them.
- 87 A person who intentionally omits to indicate the source used where required by law and where the author is named therein, to provide the name of the author, is liable to a fine on the complaint of the person whose rights have been infringed (Article 68 CopA).

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