

Art. 10 CopA: The author's exclusive rights of use

Structure of Art. 10: exclusive right as default, use versus enjoyment, and publication

Art. 10 CopA is the central rule on the author's economic control over the work. Para. 1 grants the exclusive right to decide "whether, when and how" the work is used. Para. 2 lists, "in particular", the main rights of use: reproduction (lit. a), offering and distribution (lit. b), recitation, performance, presentation, making perceptible elsewhere and making available on demand (lit. c), broadcasting (lit. d), retransmission (lit. e) and making perceptible of works made available, broadcast or retransmitted (lit. f). Para. 3 adds an exclusive rental right for computer programs **Art. 10 CopA**.

Three structural points govern the application of the provision:

- Exclusive right as the default. Art. 10 states the rule. A use is free, or subject only to remuneration, only where another provision says so. The main such provisions are exhaustion (Art. 12), the rental remuneration (Art. 13), private use (Art. 19) and compulsory collective management (Art. 22 ff.). The Federal Supreme Court applied this logic to plans placed on public inquiry. They had been published within the meaning of Art. 9(3) CopA and could therefore be copied for private use. Any other use requires the right holders' prior authorisation under Art. 10(1) **1C_230/2025**. In a parallel Ticino case, the Court likewise took Art. 10(1) as the starting point and held that consulting and photocopying building plans filed with the authority was covered by private use **1C_613/2025**.
- Use versus enjoyment. Mere consumption of the work is not a use within Art. 10. Reading and selecting articles does not interfere with the rights of use described in Art. 10 **BGE 133 III 473**. The Federal Administrative Court treated ad-skipping in replay TV as conduct aimed at enabling ad-free enjoyment of the work ("einen werbefreien Werkgenuss zu ermöglichen"). It had to be assessed separately from the recording, which is the copyright-relevant act of reproduction **b-687-2024**.
- Relationship to the first-publication right. Art. 9(2) CopA separately reserves to the author the decision whether, when, how and under what designation the work is first published. Under Art. 9(3), a work is published when it is made available to a large number of persons outside the private circle of Art. 19(1)(a) **Art. 9 CopA**. Publication matters for Art. 10 mainly because private use under Art. 19(1) is open only for published works **Art. 19 CopA**. Filing building documents with the authority counts as definitive publication even though the disclosure is temporary **1C_613/2025**.

Is the catalogue open, and does para. 1 operate as a catch-all?

The wording "in particular" makes the list in para. 2 non-exhaustive **Art. 10 CopA**. The retrieved case law does not, however, contain a decision that applies para. 1 on its own to a use not named in para. 2. Two decisions show where the open edges lie:

- In **BGE 136 III 232** the Federal Supreme Court held that the broadcasting right covers only the injection of the satellite signal. Reception is "a priori not a fact covered by Swiss copyright law, except possibly by recourse to the general clause of Art. 10 para. 1" ("la réception n'est a priori pas un fait appréhendé par le droit

d'auteur suisse, sauf éventuellement à recourir à la clause générale de l'art. 10 al. 1 LDA"). The Court expressly left that question open **BGE 136 III 232**.

- The Zurich Commercial Court held that exhibiting a copy of a work does not fall under the distribution right of lit. b, whereas lending prints for an exhibition does **HG210019**. It did not consider whether exhibition could be caught by para. 1.

The Federal Administrative Court describes the statutory limits as restricting "overall the right of use of the right holders under Art. 10 para. 1" ("beschränkt insgesamt das Verwendungsrecht der Rechteinhaber/innen nach Art. 10 Abs. 1 URG") **b-2346-2009**. On that reading, para. 1 is the umbrella right and the letters of para. 2 are its typical forms. Whether a new form of use can be subjected to the author's control through para. 1 alone is unresolved by the Federal Supreme Court in the retrieved sources.

Legislative history: the 2008 amendment of lit. c and lit. f and later revisions

Lit. c and lit. f received their current wording through the Federal Decree of 5 October 2007, in force since 1 July 2008. The article has not been amended since **Art. 10 CopA**. The adopted text corresponds word for word to the Federal Council's draft **BBI 2006 3447**.

According to the Dispatch, the on-demand right was inserted expressly into lit. c for two reasons. It was meant to emphasise the right's importance in the digital environment, and to make clear, for legal certainty, that Swiss law grants an exclusive right congruent with Art. 8 WCT. The Dispatch adds that this so-called on-demand right "can also be derived from Art. 10 para. 2 lit. c CopA" ("kann auch aus Artikel 10 Absatz 2 Buchstabe c URG abgeleitet werden") **BBI 2006 3389**. The amendment was therefore clarifying rather than constitutive. Online making available before 1 July 2008 is not outside the author's control merely because the express wording was then missing.

Lit. f was extended so that making perceptible a work made available on demand is also reserved to the author as a secondary exploitation, alongside broadcasts and retransmissions **BBI 2006 3389**. The criminal provisions were aligned at the same time (Art. 67(1)(gbis) and (i)) **Art. 67 CopA**.

The 2019 revision did not touch Art. 10. It did add rules that shape how Art. 10 rights are exercised:

- the remuneration right for making audiovisual works available (Art. 13a);
- collective management of rights in orphan works (Art. 22b);
- extended collective licences;
- the stay-down duty of hosting providers (Art. 39d) **BBI 2019 6585**.

The Dispatch states that, for orphan works, the exercise of the rights of use under Art. 10 is subjected to collective management **BBI 2018 591**. The pending draft on a neighbouring right for media companies does not amend Art. 10. It expressly reserves copyright in the works contained in journalistic publications (draft Art. 37a(5)) **BBI 2025 2219**.

The 1989 Dispatch on the original wording of Art. 10 was not retrieved. The origin of the "whether, when and how" formula and of

para. 3 therefore cannot be documented from the materials.

Reproduction (lit. a)

The reproduction right covers every production of copies, whether analogue or digital. In BGE 120 IV 208, making four or five copies of an anonymously received, unpublished thesis infringed the exclusive reproduction right **BGE 120 IV 208**. In BGE 140 III 616 the Court held that it makes no difference whether a reproduction is analogue or digital, and treated scanning as reproduction **BGE 140 III 616**.

Most disputes concern the boundary with private use rather than the concept of reproduction itself:

- Copying by third parties. A person entitled to private use may have the necessary copies made by third parties, including libraries (Art. 19(2)). Sending a lawfully made copy to that person by post or e-mail is permitted **BGE 140 III 616**.
- Complete copies. Outside the private circle of Art. 19(1)(a), complete or substantial copying of commercially available copies is barred (Art. 19(3)(a)) **Art. 19 CopA**. The relevant "copy" is the published unit actually used as the copying source, such as the journal issue or the anthology. It is not the individual article, even where that article is also sold separately online **BGE 140 III 616**. The Zurich Commercial Court had treated the individual article as the relevant copy and found direct competition with the publishers' online sales. The Federal Supreme Court reversed that decision **HG110271**.
- Three-step test. BGE 140 III 616 tested its interpretation against the three-step test and found that it neither impairs the normal exploitation of the work nor unreasonably prejudices the authors' legitimate interests **BGE 140 III 616**.
- Remunerated recording by a third party. A replay-TV provider that records broadcasts as a third party carries out a reproduction under lit. a. It owes remuneration under Art. 20(2) CopA instead of needing an exclusive licence **b-687-2024**.
- Internal copying in enterprises. Copying for internal information or documentation (Art. 19(1)(c)) is likewise permitted against remuneration. The Neuchâtel cantonal court held that the duty to pay arises as soon as an enterprise has a copying device or an internal computer network. It nevertheless dismissed the claim, because the applicable tariff required payment only from 15 employees **CCIV.2017.4**. Whether payment is actually owed therefore depends on the tariff, not only on the statute.

Two statutory limits complete the picture:

- Temporary copies. A temporary reproduction is permitted if it is transient or incidental, forms an integral and essential part of a technical process, serves exclusively the transmission in a network between third parties by an intermediary or a lawful use, and has no independent economic significance (Art. 24a) **Art. 24a CopA**. No retrieved decision applies Art. 24a.
- Computer programs. Art. 19 does not apply to computer programs (Art. 19(4)) **Art. 19 CopA**. Their reproduction is therefore governed by the exclusive right without the private-use exception.

Offering, distribution and exhaustion (lit. b and para. 3)

Scope of the distribution right

Lit. b covers every act by which copies are put into circulation. The Federal Supreme Court included every form of handing over, such as loan and gift, and extended the right to lawfully and unlawfully made copies alike **BGE 120 IV 208**. The Zurich Commercial Court applied lit. b to offering photo prints for sale, importing them into Switzerland and lending them for an exhibition, while excluding mere exhibition **HG210019**.

International exhaustion and its limits

Once the author has sold a copy or consented to its sale, that copy may be resold or otherwise distributed (Art. 12(1)) **Art. 12 CopA**. Three propositions are established:

- Exhaustion is international. In BGE 124 III 321 the Court held that a first sale abroad with the right holder's consent exhausts the Swiss distribution right, so parallel imports cannot be blocked by copyright law. Contractual territorial limits on a transferred distribution right bind only the contracting partner and cannot be raised against third parties **BGE 124 III 321**. BGE 133 III 273 confirmed that international exhaustion applies in principle without restriction ("grundsätzlich uneingeschränkt") **BGE 133 III 273**.
- A consented sale is required. Exhaustion presupposes a sale by the author or with consent. Anonymous delivery of a copy is not enough, and neither would a mere loan have been **BGE 120 IV 208**.
- Exhaustion attaches to the concrete copy. The party relying on exhaustion must substantiate a chain of transfers that begins with the first sale of the specific copy. A signature on a print, or the presence of comparable prints on the market, does not establish exhaustion. In the Zurich case, the defendants failed to meet this burden of substantiation **HG210019**.

The film exception in Art. 12(1bis) protects the cascade of exploitation. Copies of audiovisual works may not be resold or rented as long as this impairs the author's performance right under lit. c **Art. 12 CopA**. The Geneva Court of Justice applied the current wording to DVDs rented or sold in Geneva while the films were still being shown in local cinemas. It found that the right holder had been really impeded in exercising its performance right and that the exclusive licensee had standing **ACJC/980/2006**.

BGE 133 III 273 held that the former Art. 12(1bis), which then required a domestic sale, was tailored to cinema films and did not cover video and computer games. Those therefore remained subject to international exhaustion **BGE 133 III 273**. The decision interprets superseded wording. Its reasoning (no cascade exploitation, hence no justification for a special rule) remains a strong argument for reading the current text equally narrowly, but that is an inference rather than a holding.

Rental: an exclusive right only for computer programs

Rental of copies of literary and artistic works is not an exclusive right. It gives rise to a remuneration claim that only approved collecting societies may assert. There are exceptions for works of architecture, copies of works of applied art and contractually agreed uses (Art. 13(1) to (3)) **Art. 13 CopA**. The Federal Supreme Court characterised this claim as compensation for exhaustion, resting on a statutory licence. Because the renter acts lawfully, the claim is not delictual. It is governed by the general limitation rules and, as a periodic payment under Art. 128 no. 1 CO, becomes time-barred after five years **BGE 124 III 370**.

For computer programs, Art. 13 does not apply and the exclusive right under Art. 10(3) is reserved (Art. 13(4)) **Art. 13 CopA**. Renting out a computer program without authorisation is a criminal offence (Art. 67(1)(l)) **Art. 67 CopA**. Under Art. 12(2), a program sold by the author or with consent may be used and resold. The program-specific exhaustion rule thus extends to "use" but not to rental **Art. 12 CopA**. No retrieved Swiss decision interprets Art. 10(3), or the application of Art. 12(2) to software transferred by download.

Public communication without copies: performance and making perceptible (lit. c first limb, lit. f)

Performance, presentation and the organiser as user

Lit. c covers recitation, performance and presentation of a work "directly or through any kind of medium" **Art. 10 CopA**. Performance therefore includes playing recordings. The Zurich Commercial Court treated music from recordings played for dancing in a club as a public

performance under Art. 10(1) and (2)(c) **HG110143**. In another case, the same court held the organiser of club events liable, and internal arrangements between the organiser and the clubs did not change the organiser's standing as defendant **HG220007**. In the Basel Tattoo case, the Federal Supreme Court treated the event organiser as the user who owes remuneration for the music performed **4A_482/2013**.

The private circle as the boundary of "public" use

Para. 2 does not repeat a requirement of publicity in every letter. In practice, the boundary is drawn by private use. The Federal Administrative Court stated that the counterpart of the public is permitted private use under Art. 19(1)(a) **b-6540-2012**. Private use covers any use in the personal sphere or within a circle of persons closely connected to each other, such as relatives or friends **BGE 143 II 617**. The Federal Administrative Court recognised that such a close connection can exist among boarding-school pupils or care-home residents (a "Schicksalsgemeinschaft"), but not among hotel guests who know each other only superficially **b-6540-2012**.

Two further points follow from the case law:

- Who uses the work matters, not who enjoys it. In hotels, the user is the hotelier, not the guest **BGE 143 II 617**.
- A profit motive excludes private use. A hotelier who generally pursues a profit cannot invoke private use **BGE 143 II 617**.

No retrieved decision deals with a genuinely private party or similar event at the margin of the private circle.

Making broadcasts and on-demand works perceptible (lit. f)

Lit. f covers showing or playing broadcast, retransmitted or on-demand works to an audience by means of a receiver. Public viewing of television broadcasts on large screens falls under lit. f regardless of the event's importance, the size of the audience or the size of the screen. It is not a presentation under lit. c **b-2346-2009**. The Federal Administrative Court gave two reasons. First, public viewing does not take place where the broadcast is recorded, so it does not meet the narrow concept of presentation in lit. c. Second, Art. 22 is a deliberate special rule for making broadcasts perceptible, and it limits the right under para. 1 as a whole **b-2346-2009**.

The Federal Supreme Court has set an important limit. Making broadcasts perceptible presupposes that there is no additional installation between the receiving set and the users ("Le droit de l'auteur de faire voir ou entendre des émissions suppose l'absence d'installation supplémentaire entre le poste récepteur et les utilisateurs") **6B_167/2012**. A server system that decrypted programmes which customers received themselves did not fall under lit. f. The Court held that "the mere fact of rendering a work perceptible is not sufficient" ("le simple fait de rendre perceptible une oeuvre ne suffit pas") **6B_167/2012**. The decision was given in criminal proceedings, but it interprets lit. f directly.

Background music in shops and restaurants is in practice settled through tariffs. The Aargau Commercial Court cited both lit. c and lit. f for music in a hair salon and café and decided the claim under Common Tariff 3a, without deciding which letter was the exclusive basis **HOR.2023.43**. The retrieved sources do not draw a doctrinal line between "making perceptible elsewhere" under lit. c (for example a live performance relayed to another room) and lit. f.

Broadcasting and retransmission (lit. d and e)

Linear versus on-demand transmission

The Federal Administrative Court distinguishes by the nature of the transmission. Where public communication is linear, there is broadcasting (simulcasting, web radio, web TV). Everything that is distributed to the public non-linearly (on-demand services, podcasts, direct access to broadcast archives) is making available ("Erfolgt die öffentliche Wiedergabe linear, liegt ein Senden vor (Simulcasting,

Web-Radio, Web-TV)") **b-1624-2018**. Internet transmission counts as broadcasting only if it follows a predetermined programme sequence that the user cannot influence. Webcasting of individual events is not broadcasting but a performance or presentation under lit. c **b-1624-2018**. The Federal Supreme Court confirmed that simultaneous, unaltered internet distribution of radio programmes is part of the broadcasting purposes covered by the tariff **2C_306/2019**.

Satellite broadcasting

Under the current Act, the broadcasting right for satellite transmission covers only the injection of the signal into the chain of communication (state-of-emission theory) **BGE 136 III 232**. Under the old Act, the Federal Supreme Court had treated a satellite transmission as broadcasting where it was intended for reception by the public **BGE 119 II 51**. The territorial consequences are discussed below under territoriality.

Retransmission: concept and limits

Retransmission occurs where a broadcast programme is relayed simultaneously by a third party other than the original broadcasting organisation **6B_584/2011**. Card-sharing is not retransmission. The operator did not pass on the broadcast signal; customers received the images directly with their own receivers, and the system merely shared decryption codes. The Federal Supreme Court therefore overturned a cantonal conviction for retransmission **6B_584/2011**.

Hotel rooms and similar premises

Where a hotel receives radio or television programmes with its own antenna and passes them on to guest rooms, this is retransmission under lit. e, not making perceptible under lit. f. The reason is that a new act of communication reaches an indeterminate circle of recipients **BGE 143 II 617**. Art. 22(2) permits retransmission through equipment intended to serve a small number of receivers, such as installations in multiple-family dwellings or residential complexes **Art. 22 CopA**. That exemption does not apply to hotel guest rooms, which constitute public communication within Art. 11bis(1) of the Berne Convention **BGE 143 II 617**. In a parallel judgment of the same date, the Federal Supreme Court upheld a tariff that also covers patient rooms in hospitals and clinics, prison cells and holiday flats rented out commercially. It allowed the appeals only on retroactivity, setting the start of the tariff at 8 July 2015 **2C_685/2016**.

The case law is not uniform in its classification:

- Federal Administrative Court. In B-6540/2012 and B-3865/2015, the court treated reception in guest rooms as making broadcasts perceptible under lit. f **b-3865-2015**. B-3865/2015 was partially reversed on retroactivity **2C_685/2016**.
- Federal Supreme Court. The Court applies lit. e where the hotel distributes the signal from its own antenna **BGE 143 II 617**.
- Old law. Under the former Act, the Federal Supreme Court had treated a hotel's in-house network as mere reception **BGE 119 II 51**. That approach has been displaced by lit. e read with the narrow wording of Art. 22(2).

The practical outcome is the same on both lines: the use is subject to remuneration and is not free. The Federal Supreme Court's classification governs. B-3865/2015 also held that the guest-room tariff does not overlap with the cable retransmission tariff, because different uses and different users are involved, nor with the public-law reception fee. Rooms in which radio and TV are completely blocked fall outside the tariff **b-3865-2015**.

A tariff can impose payment only within its own scope. In **2C_580/2012**, the Federal Supreme Court held that Common Tariff 3a, which covers background entertainment, did not reach hotel rooms, hospital rooms and holiday flats, where guests deliberately switch on the device to follow a programme. Fees for those uses could not be collected until a sufficient tariff basis existed **2C_580/2012**.

Making available on demand (lit. c second limb)

Who makes available

The on-demand right covers making the work available so that persons may access it from a place and at a time individually chosen by them **Art. 10 CopA**. In BGE 145 III 72 the Federal Supreme Court located the infringement in the conduct of the portal operators, hosts and uploaders who made films available in Switzerland without consent. The end user's streaming or downloading for personal use was lawful even from an illegal source **BGE 145 III 72**. The Geneva Court of Justice applied lit. c to the publication of protected tourist-guide texts on a website **ACJC/435/2014**.

Licence scope

Online use requires authorisation for that specific use. In the Geneva case, the licensee held only a right to use the texts for itself. It could not pass them on to a third party for publication on that party's website. The third party infringed the author's rights, and the licensee was liable for breach of contract **ACJC/435/2014**.

Linking and P2P

A website collecting and supplying eD2K links to protected files was treated in criminal proceedings as aiding the users' infringing acts. The operator was not treated as making available itself. The Court regarded the website as active assistance, linking providers and downloaders of protected files **6B_757/2010**. No retrieved Swiss decision decides whether setting a hyperlink, framing or embedding is an act of making available in its own right.

Remuneration for audiovisual works and catch-up services

Two statutory regimes overlay the exclusive right:

- Art. 13a. Anyone who lawfully makes an audiovisual work available on demand owes remuneration to the authors. The claim is inalienable and unwaivable and may only be asserted by approved collecting societies. It does not apply where the author personally exploits the exclusive right, nor to certain categories such as company or advertising films, computer games, journalistic commissioned works, archive works and orphan works. Music in audiovisual works is excluded **Art. 13a CopA**. Art. 13a presupposes a lawful act of making available. It leaves the exclusive right in place and adds a remuneration claim.
- Art. 22c. The right to make available non-theatrical music contained in a broadcast can only be asserted through collecting societies, provided three cumulative conditions are met. The broadcast was primarily produced by or for the broadcasting organisation; it was devoted to a non-musical topic that took precedence over the music; and making it available does not impair sales of music by third parties **Art. 22c CopA**. The Federal Supreme Court held that this rule contains no time limit. It reads the phrase "in connection with their broadcast" functionally, covering all cases of simultaneous and later making available of broadcasts online **2C_306/2019**. Compulsory collective management does not affect the content of the right but only prevents its individual exercise **2C_306/2019**.

Compulsory collective management and tariffs

Which Art. 10 rights can only be exercised collectively

For several uses, the exclusive right exists but can be asserted only through approved collecting societies:

- Art. 22(1). Making broadcast works perceptible simultaneously and without alteration (lit. f), and retransmission as part of passing on a broadcast programme (lit. e) **Art. 22 CopA**. The rule does

not apply to subscription television or to programmes that cannot be received in Switzerland (Art. 22(3)) **Art. 22 CopA**.

- Art. 22c. Making available broadcast non-theatrical music, under the conditions set out above **Art. 22c CopA**.
- Art. 40(1). Federal supervision covers the management of exclusive rights to perform and broadcast non-theatrical music, the assertion of the rights under Art. 22 to 22c and 24b, and the listed remuneration claims. The author's or heirs' personal exploitation of the music rights is exempt from supervision **Art. 40 CopA**.

Art. 22(1) replaces the individual exercise of the right to prohibit with collective management. The Act provides no exception for broadcasting organisations. A broadcaster can therefore prevent cable retransmission in Switzerland only by encrypting its programmes **BGE 133 III 568**. Federal supervision under Art. 40 is limited to the listed areas. A tariff surcharge for advertising losses caused by ad-skipping is not a copyright remuneration claim and falls outside federal supervision. Approval of the tariff cannot extend supervision beyond Art. 40 **b-687-2024**.

Tariffs: binding force and limits

Collecting societies must draw up tariffs, negotiate them with user associations and submit them to the Federal Arbitration Commission for approval (Art. 46) **Art. 46 CopA**. Three rules govern their effect:

- Courts are bound. Civil courts may not review again whether an approved tariff is reasonable. They must, however, ensure that no unlawful claims are derived from a tariff in the individual case **4A_482/2013**. The Zurich Commercial Court applies this binding force routinely to tariff claims **HG220135**.
- No claim beyond statute or tariff. Approval of a tariff cannot create remuneration claims that the Act does not provide. Conversely, a claim provided by statute in the field of collective management can only be asserted on the basis of an approved and valid tariff **2C_580/2012**.
- Interpretation of tariff reductions. In the Basel Tattoo case, a tariff reduction for music accompanying other works required simultaneous performance with other protected works in a subordinate or accompanying function. The Court examined the programme item by item and rejected the claim that the whole event was a protected stage work **4A_482/2013**.

Cantonal courts apply tariff mechanisms in collection proceedings:

- Estimation and doubling. Where users fail to report, the collecting society may estimate the relevant data, and the tariffs double the fee for use without authorisation or for non-cooperation. The Zurich Commercial Court applied this to a club **HG110143**, and a Ticino court to a one-off music event **10.2009.16**.
- No mandate for each work. The collecting society need not prove a mandate for each work used **10.2009.16**.
- Limits on fees. An uncontested estimate is deemed accepted, but the administrative fee for the estimation procedure may be charged only once **10.2022.17**.

Remuneration claim versus infringement

Unpaid tariff fees for an authorised use are a remuneration claim, not an infringement. The Fribourg cantonal court held that where an association had a contract with SUISA authorising the concerts, the event was not organised without right. Arts. 62 and 67 CopA, which deal exclusively with unauthorised use, did not apply. Licence remuneration cannot be equated with damages in tort, so the association's president was not personally liable **102 2014 274**. The same distinction underlies the Federal Supreme Court's treatment of the rental remuneration as a non-delictual claim **BGE 124 III 370**. For the user, this means that obtaining authorisation, even without paying, changes the nature of the dispute.

Territorial reach: cross-border broadcasts and online use

Intellectual property rights are governed by the law of the state for which protection is claimed (Art. 110(1) PILA). After the damaging event, the parties may agree to apply the law of the forum to infringement claims (Art. 110(2)) **Art. 110 PILA**. The Zurich Commercial Court applied German law where German copyright was asserted for use on a Zurich website, while basing its jurisdiction on the place of the act under the Lugano Convention **HG180107**.

The case law locates the relevant act differently depending on the right:

- Satellite broadcasting (lit. d). The state-of-emission theory applies. Satellite broadcasting from France was not subject to the Swiss Act, even though the signal contained advertising aimed at Swiss viewers. No exception to the state-of-emission principle was justified **BGE 136 III 232**.
- Making available (lit. c). Making films available in Switzerland without consent can infringe Swiss law even if those acting are abroad. Swiss protection can extend to acts committed abroad that produce effects in Switzerland **4A_433/2018**.
- Civil versus criminal liability. The Zug High Court held that, unlike in the criminal assessment, effects in Switzerland are sufficient for civil liability. The website was accessible in Switzerland and so were the protected works **S 2021 49**.

The difference is explained by the distinct acts: broadcasting is the injection of a signal, making available is offering access. On the open question whether reception in Switzerland could be captured under Art. 10(1), see the discussion of the catch-all above **BGE 136 III 232**.

Infringement consequences and the liability of intermediaries

Civil claims

Anyone whose copyright is infringed or threatened may seek a prohibition of an imminent infringement, removal of an existing one and information on the origin and quantity of infringing items (Art. 62(1)). Claims for damages, satisfaction and handing over of profits under the Code of Obligations remain reserved (Art. 62(2)). An exclusive licensee has its own standing unless the licence expressly excludes it (Art. 62(3)) **Art. 62 CopA**. A declaratory action is available to anyone with a legal interest (Art. 61) **Art. 61 CopA**.

Monetary relief is structured as follows:

- Damages by licence analogy. Damages may be calculated by licence analogy. A flat 20 % infringer surcharge is incompatible with Swiss principles of damage assessment, because it introduces a punitive element. Further heads of damage require the injured party to substantiate that the infringement was capable of causing further damage and that such damage was likely **BGE 122 III 463**.
- Fault and bad faith. Damages under Art. 41 CO require fault. Surrender of profits under Art. 423 CO requires bad faith, meaning the infringer knew or should have known it was interfering without legal basis. A person who follows a wrong but defensible view under difficult circumstances remains in good faith, and a warning letter does not automatically destroy good faith **BGE 151 III 95**.
- Good-faith infringers. A good-faith infringer must return the enrichment under Art. 62 CO, which does not permit profit stripping **BGE 151 III 95**. The Aargau Commercial Court measured that enrichment as an objectively determined hypothetical licence fee, set at 10 % of the net sales price by analogy to Art. 42(2) CO. The infringer could not invoke the defence that the enrichment no longer existed **HOR.2019.16**.

On proof of rights, the Geneva Court of Justice placed the burden of proving the acquisition of the authors' rights on the claimant. It inferred the limited scope of the defendant's licence from the contract and the circumstances **ACJC/435/2014**. For exhaustion, the party relying on it bears the burden of substantiation (see the section on

distribution above) **HG210019**.

Participants and intermediaries

Liability of participants under Art. 50 CO requires a concrete contribution to the direct infringement. An access provider that only supplies general internet access is not a participant in infringements by foreign portal operators. A general "system liability" with blocking duties cannot be derived from civil participant liability and would require legislation **BGE 145 III 72**.

A hosting service stands differently. In the RapidShare case, the Zug High Court distinguished the file-hosting service from the access provider in **BGE 145 III 72**, because it stored the uploaders' files on its own servers. Its business model created a strongly increased risk of infringement. This gave rise to a duty going beyond take-down to prevent re-uploads ("stay-down"), and to heightened duties of care **S 2021 49**.

Since 1 April 2020, Art. 39d codifies a stay-down duty. A hosting provider must prevent a work from being made unlawfully available again through its service if three conditions are met: the work was already made unlawfully available through the same service, the provider was notified, and the service has created a particular risk of such infringements, notably through its technical operation or an economic orientation that favours infringement. The provider must take the measures that are technically and economically reasonable **Art. 39d CopA**. Breach of this duty constitutes a threat to copyright that supports injunctive relief (Art. 62(1bis)) **Art. 62 CopA**. The Zug court noted that Art. 39d does not require proactive screening of all uploads, and that the provision was not yet in force for the facts before it **S 2021 49**.

Criminal liability

Art. 67(1) mirrors the rights in Art. 10. It penalises intentional and unlawful reproduction (lit. e), distribution (lit. f), performance and making perceptible elsewhere (lit. g), making available (lit. gbis), broadcasting and retransmission (lit. h), making perceptible of works made available, broadcast or retransmitted (lit. i) and rental of computer programs (lit. l). Prosecution is on complaint. Acts committed for commercial gain are prosecuted ex officio and carry up to five years' custodial sentence (Art. 67(2)) **Art. 67 CopA**. The criminal courts interpret the letters of Art. 10 strictly. Card-sharing was neither retransmission **6B_584/2011** nor making perceptible **6B_167/2012**. The operator of an eD2K link site, by contrast, was convicted of commercial aiding **6B_757/2010**.

Practical implications

- Classify the act first. Distinguish reproduction, distribution, performance, making perceptible, broadcasting, retransmission and making available. The classification determines whether the use is exclusive, collectively managed, remunerated or free.
- Checklist for users. Identify who counts as the user (organiser, operator or hotelier, not the audience). Check whether a valid tariff covers the specific situation, and report to the collecting society to avoid estimates and doubled fees. Be able to trace a copy back to a consented first sale before relying on exhaustion. Verify that a licence covers onward online use. Each point is analysed in the relevant section above.
- Checklist for right holders. Treat licence-analogy damages as the realistic baseline, because profit surrender requires bad faith. Direct online claims against those who make works available and against high-risk hosting services rather than mere access providers. Give prior notice of the specific infringement before relying on Art. 39d (see the section on intermediaries).