

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2006 SPECIAL 301

### SPECIAL MENTION

## SWITZERLAND

The copyright industries are very concerned that Swiss-proposed legislation to implement the WIPO Treaties (WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty) would create a severely problematic legal environment for copyrighted materials. The vast majority of European countries have amended their laws to meet their international obligations and to implement the EC Copyright Directive adopted in 2001. Switzerland also committed to implement these Treaties on June 21, 2001, when it signed an agreement, which extends the coverage of the EFTA Convention to the protection of intellectual property (Chapter VII, Article 19 and Annex J to the Convention).<sup>1</sup>

To review, in October 2004, the Swiss Federal Department of Justice and Police and the Swiss Federal Institute for Intellectual Property published preliminary draft amendments to the Swiss Copyright Act and started a consultation process, which included receiving input from the copyright industries and interested right holders. For a long time, right holder groups have been pressing the Swiss Government, which played an active role in the adoption of the 1996 WIPO Treaties, to implement them as part of its adaptation of Swiss law into the digital environment. In May 2005, the Swiss Federal Department of Justice and Police and the Swiss Federal Institute for Intellectual Property issued a press release and published a Report on the 176 submissions it received during the consultation process.

Consistency of approach towards copyright protection in the digital age is vital. The Swiss copyright amendment proposal is problematic for copyright right holders and inconsistent with the international and European in three key respects.

First, **legal protection for technological measures** seems insufficient to satisfy treaty standards and represents a dramatic departure from the standard in the EU Copyright Directive (Articles 6.1 and 6.2) and the U.S. Digital Millennium Copyright Act (Section 1201). The draft would allow circumvention of technological measures “for the purposes of a use permitted by law” (Article 39(a)(4)); this provision weakens the legal protection of technological measures and diminishes right holders’ ability to enforce “effective legal remedies” (as required by WCT Article 11) in the event of such circumvention. This provision renders certain instances of

---

<sup>1</sup> The EC Copyright Directive (now implemented in 23 of 25 Member States, of course also being implemented by EEA Member States as well as a number of other European countries, notably those seeking to accede to the EU) provides a standard level of copyright protection across Europe. While Switzerland is by no means obliged to implement every facet of the Copyright Directive, it is important that the Swiss WIPO Treaties’ implementation achieve adequate copyright protection which helps to create a level playing field and ensures consistency of the rules across Europe. This is vital in a networked environment. Article 19(4) of the EFTA Convention states that Member States should avoid or remedy trade distortions caused by actual levels of protection of intellectual property rights. The EFTA Convention (Article 2) also promotes the enactment and respect of equivalent rules as well as the need to provide appropriate protection of intellectual property rights, in accordance with the highest international standards.

circumvention permissible even while the tools to circumvent would be illegal. While the industries understand that there concerns relating to copyright exceptions and privacy, this proposed approach is unworkable. Adequate standards for protection of technological measures are set out in both the EU Copyright Directive and the DMCA, neither of which goes so far as to permit or sanction circumvention. It should be noted that beyond the public rhetoric against Digital Rights Management (DRM), both the Copyright Directive and the DMCA have gone a long way to promote new modes of delivery of copyright works for consumers.

Second, **a fair balancing of protection of technological measures with copyright exceptions is lacking**, with the Swiss draft skewed too heavily in favour of such exceptions. The weakness of protection for technological measures is further apparent in the draft's favoring of exceptions to exclusive rights at the expense of such measures, and in the undue burdens placed on copyright owners who apply such measures to protect their works. For example, Articles 39(a) and (b) as well as Article 62(3) would cumulatively result in a process skewed heavily in favor of users at the expense of copyright owners, who will likely find themselves before courts enmeshed in litigation because the law would give users a judicially enforceable claim to obtain access to works protected by technological measures. As evidenced in both the EU Copyright Directive and the U.S. DMCA, there are other mechanisms that can be used to address possible failures to accommodate exceptions. A fairer approach is required to ensure the development of new business models, such as on-demand and interactive services.

Lastly, **the private copy exception in current Swiss copyright law is so broad as to open a wide door to piracy**, particularly in the digital realm, and therefore needs to be modified to meet international and European norms. The scope of the private copy exception is so broad that it calls into question whether Swiss law currently meets TRIPS standards (TRIPS Article 13). Article 19 of the Swiss law seems to permit transmission of copies to third parties and to permit copying from illegal or unauthorized sources. Moreover, the concept of what is a "private" copy is overly broad, in that the law refers to the "private circle" rather than to copies made "by the individual for his or her own private use and for no direct or indirect economic or commercial gain" (see Article 5.2b of the EU Copyright Directive). This is not meant to exclude users within the same household but is intended to circumscribe the exception to a narrow group of users.

In sum, these provisions are highly dubious in view of the dangers of Internet-based piracy, where users exchange unauthorized copies by peer-to-peer networks. This danger is clear based on certain comments included in the May 2005 Report of the Swiss Federal Department of Justice and Police and the Swiss Federal Institute for Intellectual Property; that Report states that "downloading for private purposes is assimilated to private copying and is therefore authorized." Such a position encourages copyright infringement on a massive scale and is inconsistent with international norms.

We therefore urge the Swiss government to reconsider and revise the proposed amendments to the Swiss Copyright act to address the concerns expressed in this letter and would welcome the opportunity to discuss our views further as appropriate. Finally, we ask that this copyright legislation and the importance of effective copyright enforcement in both the offline and online environment be included in the work program of the new Swiss-U.S. Trade and Investment Cooperation Forum.