

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2007 SPECIAL 301 REPORT

### SPECIAL MENTION

# SWITZERLAND

**Special 301 Recommendation:** IIPA specially mentions Switzerland in this year's Special 301 filing, but does not make a recommendation for listing at this time. However, IIPA does recommend that an out-of-cycle-review be conducted this year to evaluate the efforts of the Swiss Government to amend its copyright law, and specifically: the removal of proposed sweeping exemptions and compulsory licenses for broadcasting organizations for online use of content; the removal of right to circumvent technological protection measures for use of exceptions; and the introduction of legal source requirement.

## **EXECUTIVE SUMMARY**

Over the past year, IIPA and its members have expressed concern about the pending legislation to amend the Swiss Copyright Act and, if unchanged, its possible deleterious effect on the legitimate industries in the digital marketplace. We request that Swiss government officials and members of parliament take actions to amend the proposed amendments to the Swiss Copyright Act to address the concerns expressed in the copyright industries. The current proposals are incompatible with international copyright and related rights' conventions and obligations. We urge that the issues of copyright reform and the importance of effective copyright enforcement in both the offline and online environment continue to be addressed in the work program of the new Swiss-U.S. Trade and Investment Cooperation Forum.

## **COPYRIGHT LAW REFORM AND RELATED ISSUES**

**Copyright Law Reform:** The copyright industries remain quite concerned that the Swiss effort to implement the WIPO Treaties (WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty) would create a difficult legal environment regarding the protection of 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>

The legislative reform process has been underway for almost three years. In October 2004, the Swiss Federal Department of Justice and Police and the Swiss Federal Institute for

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<sup>1</sup> The EC Copyright Directive, which is being implemented by EEA Member States as well as a number of other European countries provides a standard level of copyright protection across Europe. While Switzerland is by no means obliged to implement every aspect 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.

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. 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. The bill was subsequently amended, approved by the Federal Council on March 10, 2006 and introduced to parliament. While the revised proposals come as an improvement in some respects, it is overall very problematic.

IIPA members report that the proposals thus far have been discussed in the Council of States (“Ständerat”) both in the Legal Affairs Committee and the Plenary. Apart from an improvement of the draft with regard to preparatory acts concerning circumvention tools, the Ständerat has considerably worsened the proposals by introducing broadly phrased exceptions which are solely in the interest of broadcasters and are in violation of international agreements, including TRIPS standards and the WIPO Treaties that the Bill is meant to implement. Furthermore, the Draft still allows circumvention of technical measures for use of very broad exceptions, and the official Memorandum to the Draft now explicitly allows private copies made from an illegal source. The Draft as amended by the Ständerat will next be discussed in the “Nationalrat” (Federal Assembly) both in the Legal Affairs Committee and in Plenary. It is then likely that the legislation will go through reconciliation between the two Chambers. Hence it may be anticipated that the legislative procedure will continue through the Fall 2007. The Parliament so far does not understand that certain provisions of the draft will violate international treaties. Therefore, a special out of cycle review may help to get this important message across.

This bill was, at that time of its introduction, and remains problematic for copyright right holders and inconsistent with European and international norms in three key respects. IIPA members summarize the key problems, below:

**Technological protection measures (TPMs):** 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 Swiss bill would allow circumvention of technological measures “for the purposes of a use permitted by law” (Article 39(a)(4)); this provision would effectively eviscerate the legal protection of technological measures and would diminish 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 circumvention permissible even while the tools to circumvent would be illegal. While the industries understand that there are 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. Apparently, some of the circumvention activities that would be legal under civil law are penalized under Swiss Criminal Law. Hence for those cases, activities allowed under copyright law would be prohibited under criminal law. In view of the fact that the provisions in the Copyright Law are *lex specialis* to those in the Criminal Law and would be a *lex posterior* since they would have been adopted after the relevant provisions in the Criminal Code, it is more than questionable whether the criminal offences would even prevail.

**The Interface between TPMs and Exceptions:** A fair balancing of protection of technological measures with copyright exceptions is missing, even though some progress has

been made by replacing the obligations formerly imposed on right owners in Article 39b of the Draft with the establishment of a supervisory body which is to observe the impact of technological measures on exceptions. While this is a step in the right direction, it still does not ensure the development of new business models, such as on-demand and interactive services.

**Private Copy Exception:** The private copying 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 exception not only covers private copying, but all other uses made for private or personal ends as well. The scope of this private use exception clearly does not pass the three-step test which is the international standard to which all exceptions must conform (TRIPS Article 13). Article 19 of the Swiss law as currently drafted seems to permit transmission of copies to third parties and the official memorandum to the Draft now explicitly permits 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. The unfortunate fact is that the Explanatory Memorandum in the “Botschaft” to the draft dated March 10, 2006 issued by the Swiss Government states that there should be no distinction between unlawful and lawful sources in the private circle. Consequently, it could be argued on the basis of the Explanatory Memorandum that the making of copies from unlawful sources would be allowed. That position encourages copyright infringement on a massive scale, is inconsistent with international norms, and threatens the vitality of Switzerland’s digital environment.

The legal commission of the Nationalrat is expected to debate the draft sometime between February and April 2007. Thereafter, it will be debated in the Nationalrat. AudioVision Switzerland continues to lobby on behalf of the MPA, the IFPI, and the interactive game companies in order to abolish the right to circumvent TPMs for use of exceptions and to introduce a legal source requirement.

**Mandatory collective administration:** Lastly, it is important to bear in mind the Swiss legislators’ predilection for mandatory collective administration, particularly for the benefit of broadcasters which is also being pursued in the revised draft. Mandatory collective administration is particularly problematic in Switzerland, not only because it takes away from the right owner the decision to administer a right individually or collectively, but also in view of the serious consequences it has with regard to the level of remuneration: Article 60(2) of the Swiss Copyright Law limits the levels of remuneration to 10% for authors and 3% for related rights owners. As a result, particularly in the area of related rights, an appropriate income cannot be guaranteed where collective administration is mandatory. With Article 24b addressing certain acts of reproduction for the purposes of broadcasting, the Draft already seeks to introduce one additional instance of mandatory collective administration into Swiss copyright law. The provision is so broadly worded that it exceeds the scope of Article 11*bis*(3) of the Berne Convention and Article 15(1)(c) of the Rome Convention. In addition, two further broadly worded proposals for mandatory collective administration, primarily in favour of broadcasters, were tabled during the debate in the Council of States after strong lobbying by the public broadcaster SRG. Both concern aspects which have long been high on the agenda of broadcasters: the exploitation of archival productions and the use of so-called orphan works (Articles 22a and 22b of the draft as amended by the Ständerat). Provisions in this respect were already contained in the previous draft, but in view of the harsh criticism expressed, they were not taken on board in the Government Draft of March 10, 2006. The Ständerat thus re-introduced highly controversial provisions that are not only

detrimental for the music and audiovisual industries but are also unnecessary since they are not required for the implementation of the WIPO Treaties.

**Camcording Legislation:** The illicit recording of movies at movie theaters (“camcorder piracy”) is a major source of pirated motion pictures available over the Internet, as well as on street corners and flea markets around the world. Switzerland has been traced as a source for unauthorized camcording. In order to facilitate enforcement and prosecution of such piracy, anti-camcording legislation should be adopted in the Switzerland to require jail sentences, preferably up to a year or longer for the first offense, and a higher penalty for any subsequent offense. One illicit recording of a first-run motion picture spread through the Internet and on street corners can destroy a film’s ability to recoup the investment made in its production. Therefore, the result is exponentially greater economic harm than what is traditionally experienced as a result of a single act of “theft.”

## **COPYRIGHT PIRACY IN SWITZERLAND**

**Internet Piracy:** Peer-to-peer (P2P) file distribution is gaining in popularity as broadband penetration increases (Switzerland is the number two country in Europe for the percentage of households with broadband penetration). Piracy on P2P networks also contributes to optical disc piracy, since the films can then be used as masters for the production of DVD-Rs and CD-Rs. There are several portals sites operated from Switzerland but closely connected to the German piracy market.

**Signal theft piracy:** Switzerland, as it falls within the footprint of most European satellites, suffers from signal theft piracy typically via gray and pirate market smart cards. The country’s central location and linguistic diversity make it a prime market for such piracy. New anti-circumvention legislation covering commercial aspects of signal theft (manufacture, distribution, and sale) needs to be rigorously applied.

<b>SWITZERLAND</b> <b>Estimated Trade Losses Due to Copyright Piracy</b> <b>(in millions of U.S. dollars)</b> <b>and Levels of Piracy: 2006<sup>2</sup></b>		
<b>INDUSTRY</b>	<b>2006</b>	
	<b>Loss</b>	<b>Level</b>
<b>Sound Recordings &amp; Musical Compositions</b>	NA	NA
<b>Business Software</b>	\$165.0	25%
<b>Motion Pictures</b>	NA	NA
<b>Books</b>	NA	NA
<b>Entertainment Software</b>	NA	NA
<b>TOTALS</b>	<b>\$165.0+</b>	

<sup>2</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2007 Special 301 submission at [www.iipa.com/pdf/2007spec301methodology.pdf](http://www.iipa.com/pdf/2007spec301methodology.pdf). BSA’s 2006 estimates are preliminary, and MPAA does not have 2006 data available at the time of this submission; any updated figures will be posted on the IIPA website later in the year. For information on the IIPA’s prior 301 country reports, visit <http://www.iipa.com/countryreports.html>.